



# The Future and the WTO: Confronting the Challenges

A Collection of Short Essays

Edited by  
Ricardo Meléndez-Ortiz, Christophe Bellmann  
and Miguel Rodríguez Mendoza



International Centre for Trade  
and Sustainable Development



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## ABBREVIATIONS AND ACRONYMS

ACTA	Anti-Counterfeiting Trade Agreement
ACWL	Advisory Centre on WTO Law
ADB	Asian Development Bank
AFT	Aid for Trade
AGOA	African Growth and Opportunity Act
AMS	Aggregated Measurement of Support
AoA	WTO Agreement on Agriculture
APEC	Asia Pacific Economic Cooperation
BCPBS	Basel Core Principles for Banking Supervision
BIAs	Bilateral investment agreements
CBI	Caribbean Basin Initiative
COMESA	Common Market for Eastern and Southern African States
COOL	Country of origin labelling
CRTA	Committee on Regional Trade Arrangements
DAC	OECD's Development Assistance Committee
DDA	Doha Development Agenda
DDR	Doha Development Round
DFQF	Duty free, quota-free
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EAC	East African Community
EEZ	Exclusive environmental zone
EPA	US Environmental Protection Agency
EU	European Union
FAO	Food and Agriculture Organization
FDI	Foreign direct investment
FIPS	Five Interested Parties
FTA	Free-trade agreement
FTAAP	Free Trade Agreement of the Asia-Pacific
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
GHG	Greenhouse gas
GI	Geographical indications
GPA	Government procurement agreement
GSP	Generalized system of preferences
IEA	International Energy Agency
IMF	International Monetary Fund
IP	Intellectual property
IPCC	Intergovernmental Panel on Climate Change
IPR	Intellectual property rights

IUU	Illegal, unreported, or unregulated
ISO	International Organization for Standardization
ITA	Information technology agreement
KPCS	Kimberly Process Certification Scheme
LAP	Legislative Action Plan
MCA	Multilateral competition agreement
LDC	Least Developed Country
MDGs	Millennium Development Goals
MFN	Most-favoured nation
NAMA	Non-agricultural market access
NTB	Non-tariff barrier
NTM	Non-tariff measures
ODA	Official development assistance
OECD	Organisation for Economic Co-operation and Development
PTA	Preferential trade agreements
RECS	Regional economic communities
RTA	Regional trade agreement
S&D	Special and differential
SADC	Southern African Development Community
SCM	Subsidies and countervailing measures
SEGS	Sustainable energy goods and services
SETIs	Sustainable Energy Trade Initiatives
SME	Small- and medium-sized enterprise
SOE	State-owned enterprise
SPS	Sanitary and phyto-sanitary
TBT	Technical barriers to trade
TPP	Trans-Pacific Partnership
TPRM	Trade Policy Review Mechanism
TRIPS	WTO Agreements on Trade-Related Aspects of Intellectual Property Rights
T-TPA	Tripartite-PTAs
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNO	United Nations Organization
USTR	United States Trade Representative
WIPO	World Intellectual Property Organization
WPMs	Working Party Meetings
WTO	World Trade Organization

## INTRODUCTION

The essays included in this book deal with a variety of topics, ranging from the functioning of the World Trade Organization (WTO) and the role of emerging economies to regional agreements and institutional challenges. They were written by a set of distinguished academics, policymakers, and practitioners, which, together, offer a very rich and enlightened perspective on the tasks ahead. The essays were originally commissioned by the International Centre on Trade and Sustainable Development (ICTSD) to provide participants at the Eighth WTO Ministerial Conference in 2011 and the Trade and Development Symposium (TDS) that took place in parallel with it, with up-to-date analysis on the most pressing issues that the multilateral trading system currently faces.

No unified views can be found in this volume. The challenges as well as the opportunities that the multilateral trading system is confronted with are of a diverse nature and can be - indeed are - subject to different interpretations. Uniform and eventually consensus solutions have yet to be found, and the aim of this volume is to help in the search for them by providing brief, but thorough analyses on the most pressing issues in today's global trade environment.

Part I of the book deals with the possible ways forward for the WTO. Although different in focus, the five pieces included in this section underline the difficult and critical juncture in which the multilateral trading system currently operates. The world economy is in turmoil; fiscal and trade imbalances continue unabated; and no end is in sight for the Doha negotiations. New challenges are added to old ones. Tariff and non tariff protection, export restrictions, the proliferation of regional trade pacts, the emergence of new and complex issues, such as climate change, high and volatile food prices, and energy production and consumption are all issues that need to be addressed rather soon.

The key question the authors seek to underline in this section of the book is whether the WTO is well equipped to deal with these challenges or whether there is a need to revisit the basic foundations on which the trading system has developed. Should the current mandate of the WTO now be expanded, or it is advisable to complete the unfinished business of Doha before moving on into other, uncharted areas? What should be done to strengthen the multilateral trading system and ensure its robustness and resilience in the future? Some answers are provided in the essays included in this section, many others remain to be put forward.

Preferential trade arrangements are dealt with in Part II of the book. Regional pacts in different configurations - bilateral deals, plurilateral agreements, regional and interregional ones - have become a permanent and increasingly important feature of the world trading environment. Currently, more than half of world commerce takes place among countries linked by such pacts. Furthermore, these trade agreements have grown not just in number, but also in quality. Many agreements deal with matters that often lie outside the WTO's scope or capacity to address, such as rules pertaining to investment and competition policies, and others. For some WTO members, regional and bilateral pacts have become the preferred way to interact with their trade partners. The deadlock of the Doha negotiations may exacerbate these tendencies.

The relationship between the WTO - and previously the General Agreement on Tariffs and Trade (GATT) - and regional trade agreements has been mainly limited, so far, to evaluate them in light of the obligations of GATT Article XXIV, the General Agreement on Trade in Services (GATS) Article V and the Enabling Clause, as well as the enhanced notification procedures of the more recent *transparency* mechanism. While these obligations have led to an improved understanding of these trade pacts by making more information on them



available, little else has come out of them. Under current circumstances, this may not be enough, as made clear in most of the essays included in this section.

There may be a need to look into the possibility of establishing a more *organic* link between the WTO and regional trade pacts, moving away from the perception that regional pacts are little more than second-best options, and instead start recognizing them as valuable agreements in their own right. Many of today's regional pacts are as complex and sophisticated as the WTO, and there is a body of rules and practices at the regional level from which the multilateral trading system could benefit. In fact, rather than ignoring regional pacts or regarding them with suspicion, the WTO should *embrace* them by providing, at least initially, a dedicated place or forum for regional pacts inside the WTO. There, all matters relating to regional trade pacts, their rules, and practices could be subject to informed discussion among all WTO members, including those that actively participate in regional agreements and negotiations as well as the secretariats and officials, if any, of regional pacts.

Part III of the book addresses the participation of developing countries in the multilateral trading system by looking into one of the most striking features of today's global environment, the rise of emerging countries and the relative decline of traditional economic powers, as well as the persistent poverty and marginalization of the poorest countries, generally grouped under the least-developed countries (LDCs) category.

The rise of emerging economies like China, India, Brazil, Indonesia, or South Africa has been remarkable. In roughly ten years, China is expected to become the world largest economy. By 2050, developing countries might account for nearly 70 percent of gross world product. Sustained and rapid economic growth in those countries has not only contributed to lifting millions of people out of poverty, but also has generated demand for industrial raw materials, energy, and food products, ultimately boosting exports from other developing economies. In the WTO, the preponderant role of Brazil or India, together with more assertive developing country coalitions have changed the dynamics and configuration of the talks. After more than ten years of intense negotiations, most observers concur that the current impasse in the Doha Round is the result of fundamental disagreements over the respective level of commitment expected from emerging and more advanced economies. While several countries have insisted on the need for the larger emerging economies to shoulder new responsibilities commensurate with their rapid economic growth, emerging economies have pointed to the numerous development challenges they are still facing at home, starting with the urgent need to tackle rampant poverty.

At the same time, despite the recent financial crisis and global recession, the LDCs as a group have enjoyed, over the last decade or so, a period of sustained economic growth, macroeconomic stability, and increased trade and investment. In 2008, for the first time in several decades, the LDCs' share of global merchandise trade exceeded 1 percent, largely due to the strong export performances of African LDCs. However, these achievements, as impressive as they look, remain fragile. LDCs are still facing daunting challenges ranging from inadequate access to essential services to rampant poverty and high unemployment rates. Furthermore, most LDCs have not been able to significantly diversify their economies, which remain dependent on a few sectors, mostly primary commodities and on a limited number of export markets. Finally, as they become more integrated in the world economy, LDCs also find themselves more exposed to risks associated with external shocks.

In this context, the current impasse in the Doha negotiations and, more recently, the failure to agree on an LDC package addressing pressing issues, such as cotton subsidies, duty free, quota-free (DFQF) market access, rules of origin, or the services waiver, are of particular concern. Deadlock is particularly frustrating for LDCs, as the Doha Round was intended to address their structural handicaps to growth and stimulate their trade capabilities. Paralysis

in the Doha negotiations might also accelerate the trend toward bilateral and regional agreements and therefore, the risk of further marginalization of LDCs, which tend to be excluded from such trade deals.

Institutional reform of the WTO is the central theme of Part IV of the book. The WTO is not what it used to be a decade or so ago. Many new developing countries have since joined, and shifts in the balance of global economic and political power have transformed the global playing field. Accordingly, new needs and different expectations have emerged, including demands on the decision-making process relating to its fairness, inclusiveness, and transparency. With the Doha Round reaching an impasse, generating uncertainties about the future of the WTO as a forum for negotiations, some critics have argued that the WTO's decision-making rules, principles, and practices, carried over from the GATT are ill-suited to the fast-changing challenges of our times.

There has been considerable debate as to whether institutional reform is needed, and in what form, ever since the WTO was established, and numerous proposals have been put forward. But, as with any intergovernmental institution, change must come - and be agreed to - from the inside. This raises the question of how such a process can be initiated at the WTO. What is more, years of near-exclusive focus on the Doha Round have inhibited institutional evolution and even diminished some of the WTO's permanent, non-negotiating functions, such as the work of the regular committees. In these circumstances, how could a possible reform agenda be initiated at the WTO and what should be its content? Should fundamental principles and practices, such as the notion of a single undertaking be reconsidered? Is there a role for private sector initiatives in the WTO? These are some of the issues on which the essays included in this section mainly focus.

Finally, Part V looks into the future. The current paralysis in the Doha Round is arguably hampering the ability of the multilateral trading system to respond and adapt to emerging global trade and sustainable development challenges, particularly those that cannot be solved through bilateral or regional trade agreements. The effects of the financial crisis and global recession are still hampering faster economic recovery. The number of hungry people is estimated to have reached one billion in 2009, catapulting food security back to the top of the political agenda. As growth in demand continues to rise faster than supply, food prices are expected to remain high in the coming years. Low stocks, rapidly growing demand for biofuels, combined with rising energy prices have also contributed to higher price volatility, further exacerbated by policy responses, such as export restrictions imposed by major food exporters.

As governments are confronted with the urgent need to curb greenhouse-gas emissions and initiate a transition to a greener economy, they are facing a wide range of concerns, ranging from loss of competitiveness, carbon leakage, or the need to promote the widespread diffusion of green technology, with direct implications for intellectual property protection, and tariff and subsidies policies. While these concerns have been omnipresent in the minds of both trade and climate negotiators, they haven't been fully addressed, let alone resolved, in any forum. As a result, plurilateral responses and unilateral action have prevailed in recent years—for better or worse—often raising concerns of policy coherence and WTO compatibility as illustrated by recent disputes on energy subsidies. The multilateral trading system also needs to take better account of the growing importance and impact of non-tariff measures, including behind the border rules and regulations, not to speak of the link between trade and exchange rate policies.

How should the system respond to these emerging challenges? Is the WTO rule book sufficiently equipped to deal with them? Should WTO Members address them in parallel with efforts to revive the Doha Round? And if so, in what way and through which process should

they move? The essays included in this section deal directly or indirectly with many of these issues, most of them emphasizing the need to move urgently to tackle them in a multilateral context, and pointing out the importance of the WTO to get well equipped, both politically and technically, to address them in a coherent manner.

I would like to thank all the authors who responded enthusiastically to our call to produce short essays in a very limited amount of time and to share their views, experience, and proposals on the many challenges the multilateral system now faces. This book is the result of a collective undertaking. In addition to the authors, the eBook was made possible thanks to a generous contribution from the Swiss State Secretariat of Economic Affairs (SECO), which allowed ICTSD not only to get such a distinguished group of specialists involved in this project, but also facilitated the organization of the Trade and Development Symposium (TDS), an open-ended event held in conjunction with the Eighth WTO Ministerial Conference, where the substantive issues dealt with in the book were thoroughly discussed. Many people have been involved in this project beyond the contributors. My thanks go to Christophe Bellmann (Programmes Director) and Miguel Rodriguez Mendoza (Senior Associate) for their support and guidance in the editorial process of this book. I am also particularly grateful to Anne-Katrin Pfister for her patience and efficiency in coordinating the production of the book, and for her tireless dedication and professionalism in organizing the Trade and Development Symposium held in December 2011. Finally, my thanks go to those at ICTSD who have contributed to this project in different capacities including Giacomo Pascolini for managing the layout and formal copy editing of the book; Marie Wilke, Sofia Baliño, and Maximiliano Chab for their valuable comments and efforts in reviewing some of the draft pieces, in the midst of taking care of many other responsibilities; and Cécile de Gardelle and her team for taking care of the logistical arrangements around the Trade and Development Symposium.



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**PART I:  
A WAY FORWARD FOR THE WTO**

# 1. A WAY FORWARD FOR THE WTO

*James Bacchus*<sup>1</sup>

## 1.1 Introduction

The last vote I cast as a member of the Congress of the United States (US) in 1994 was a vote in favour of implementing the Uruguay Round trade agreements that established the World Trade Organization (WTO). Many of us, in the US and elsewhere, assumed at the time that the Uruguay Round would be the last of the vast global rounds of multilateral trade negotiations. Our hope then was that the WTO would become a full-time forum and framework for ongoing negotiations on trade issues of all kinds for an ever-growing number of WTO Members. Our expectation was that more trade agreements of all kinds would be concluded by WTO Members over time as they were needed to hasten the flow of trade and heighten the spread of prosperity in an ever-growing and ever-changing global economy. There would be no more need for the grand global trade “rounds” of the past.

Our hopes and our expectations at that time have yet to be fulfilled. Instead, the Members of the WTO launched the Doha Development Round (DDR) of multilateral trade negotiations in 2001. A decade later, they are still negotiating on the DDR. It is clear to almost everyone who cares about the fate of the WTO that its Members must find a new way of negotiating if they hope to continue to lower barriers to trade worldwide and to sustain and strengthen the WTO-based world trading system. To me, the answer is clear. We should make the WTO what many of us who helped create it have always intended it to be. The way to do so already exists under WTO rules – through the negotiation and conclusion by some, but not all, WTO Members of less than fully global trade agreements as part of the WTO treaty.

## 1.2 Opportunity

A decade since its inception, the DDR remains deadlocked for one fundamental reason that all who long to break that deadlock know all too well. Under the WTO treaty, the DDR cannot be concluded successfully unless and until there is a “consensus” of all 153 WTO Members. Any one member can block the achievement of the needed “consensus.” There are, however, other provisions of the WTO treaty that allow WTO Members to lower barriers to trade in ways other than through protracted multilateral negotiations involving all WTO Members, such as the DDR.

These other provisions offer a better way forward for the WTO. In addition to fully “multilateral” agreements binding all WTO Members, such as those sought in the DDR, the WTO treaty also permits “plurilateral” agreements among some but not all WTO Members. This has been the case since the establishment of the WTO.

Significantly, “plurilateral trade agreements” can be made part of the WTO treaty by adding them to Annex 4 of the overall WTO agreement. Under Article II.3 of the WTO agreement, such plurilateral agreements are part of the overall WTO agreement “for those Members that have accepted them, and are binding on those Members.” However, such plurilateral agreements “do not create obligations or rights for Members that have not accepted them.”

Under Article X.9 of the WTO agreement, “The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide by consensus to add that agreement to Annex 4.” Further, “The Ministerial Conference, upon the request of the Members parties

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<sup>1</sup> James Bacchus is a former member of the US Congress and a former Chairman of the Appellate Body of the WTO. He chairs the global practice of the Greenberg Traurig law firm.

to a Plurilateral Trade Agreement, may decide to delete that agreement from Annex 4.” Under Article X.10 of the WTO agreement, “Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.”

Thus, under existing WTO rules, some but not all WTO Members can agree to go above and beyond their existing WTO obligations by making additional commitments in some area of trade where a consensus to go forward with those additional commitments does not yet exist, or indeed may never exist, among all WTO Members. In this way, the option of plurilateral agreements offers the Members of the WTO the opportunity to lower barriers to trade through what would otherwise be “WTO-plus” commitments within the context of the WTO and of the WTO treaty.

### 1.3 Response

Two such plurilateral trade agreements already exist and have proven effective in lowering barriers to trade. One is the WTO government procurement agreement (GPA). The other is the WTO information technology agreement (ITA). Both the GPA and the ITA could benefit from having more signatories among WTO Members, but, by and large, both have been successful, and seem likely to become more so.

For all manner of commercial, political, and institutional reasons, it is still to be fervently hoped that the Members of the WTO will find some way to reach a consensus, and soon, on the successful conclusion of the DDR. Looking beyond Doha, the Members of the WTO can then move forward on many trade-related fronts without an initial consensus of all WTO Members by negotiating and concluding more plurilateral agreements among “coalitions of the willing” among the overall WTO membership. As my colleagues and I on the Global Agenda Council on Trade of the World Economic Forum have recommended, the WTO can become a “club of clubs,” dealing with a whole host of new trade-related issues within the framework of the existing world trade system.

These plurilateral agreements will bind the WTO Members that choose to be bound by them. They can be open to adherence by all other WTO Members that may choose to sign them later. But they will not in any way bind any WTO Members that do not sign them. Through such partial, premium, “state-of-the-art” agreements among some but not all WTO Members, the WTO as a whole can become a much more effective forum for addressing the varying array of “next generation” issues relating to trade that are not currently covered by WTO rules, not sufficiently covered by WTO rules, and not part of, or not sufficiently part of, the negotiating agenda of the DDR.

These issues include: investment; competition; green energy; digital commerce; global supply chains; currency practices; services; intellectual property; regulatory harmonization; standards and technical regulations; trade facilitation; and product safety. These and other pressing issues of international commercial concern could be suitable topics for additional plurilateral agreements.

Is this a new idea? No, not at all. Indeed, this is an echo of how, over time, we created the WTO. Old hands of the General Agreement on Tariffs and Trade (GATT) will recall that a number of “codes” were negotiated in the Tokyo Round – on standards, subsidies, dumping, and more. These Tokyo Round codes were binding only on those contracting parties to the GATT that agreed to them. Later, a number of Tokyo Round codes emerged from the Uruguay Round as full-blown multilateral agreements, and are now among the covered agreements in the WTO treaty.

Would these plurilateral agreements, like those Tokyo Round codes, eventually become fully

multilateral agreements that would bind all WTO Members? Not necessarily. Some might; but others might not. Certainly, this has not yet happened with either the GPA or the ITA. Again, only those WTO Members that choose to be bound by such plurilateral agreements are in any way bound by them. It may be hoped by their advocates that some plurilateral agreements may become fully multilateral, and the cumulative effect of the operation of the obligations in a plurilateral agreement may create over time a critical commercial mass that may help to encourage other WTO Members to make it fully multilateral. But, there is no way under the WTO rules that some WTO Members can make other WTO Members sign a plurilateral agreement if they do not wish to do so.

Would these plurilateral agreements go beyond what was originally intended in creating the WTO by extending the reach of the WTO too far? No; the preamble of the WTO agreement is far-reaching in suggesting the appropriate range of WTO concerns. It speaks of conducting “relations in the field of trade and economic endeavour...with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with (the) respective needs and concerns (of WTO Members) at different levels of economic development.” All this involves much more than merely customs and tariffs.

Would the consensus required for adding plurilateral trade agreements to Annex 4 of the WTO treaty prove to be a political obstacle? No, it should not be. Why should some WTO Members object if other WTO Members wish to negotiate WTO-plus obligations that will not bind them unless they choose to be bound by them? Should not all WTO Members, who share a common stake in the ongoing success of the WTO-based world trading system prefer that new trade agreements among WTO Members be made part of that overall system? Would that not be one good way to ensure the security and predictability of the system and otherwise to enhance it?

Should disputes arising under these plurilateral agreements be resolved by WTO dispute settlement? Yes; absolutely. Perhaps the greatest advantage of including WTO-plus plurilateral agreements within the WTO is the availability – and especially the enforceability – of the WTO dispute settlement system. The GPA and the ITA are both enforceable on WTO Members that have chosen to sign them in WTO dispute settlement. Other plurilateral agreements could – and should – be as well. New trade-related agreements are worth having only if they can be enforced. To be enforceable, any agreement concluded outside the framework of the WTO will need to establish an entirely new and untried dispute settlement system.

## 1.4 Conclusion

In conclusion, where do we go from here? The negotiation and inclusion of plurilateral trade agreements as part of the WTO treaty does not require any change in WTO rules. The legal authority already exists. So where should we start? Three immediate opportunities are obvious.

One opportunity is the Anti-Counterfeiting Trade Agreement (ACTA) currently under consideration by a number of like-minded Members of the WTO that wish to add WTO-plus protections against infringements of intellectual property rights beyond those provided for all WTO Members in the WTO Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS). Although intellectual property comprises an ever-increasing part of the value of every good and service traded in the world, this issue is not on the Doha agenda. Making the ACTA a plurilateral agreement under the WTO treaty would be a way to

move forward within the WTO without the need for a consensus among all WTO Members.

A second opportunity is a Sustainable Energy Trade Agreement that would eliminate the barriers to trade and investment in the new green technologies that are needed everywhere to spur sustainable growth. Thus far, the Members of the WTO have fallen short of consensus on reducing or eliminating barriers to trade in environmental goods and services in the DDR. That issue and other issues relating to the spread of sustainable energy technologies and practices could be addressed in a plurilateral agreement under the WTO treaty.

A third opportunity is the proposed Trans-Pacific Partnership (TPP). All the countries negotiating the TPP are Members of the WTO. If the gold standard of trade-related commitments sought by those negotiating the TPP would enhance the growth of some WTO Members, why not make that opportunity available to all WTO Members willing to be bound over time by those additional commitments by making it, too, a plurilateral agreement under the WTO treaty?

More than half a century has been spent building a world trade organization that serves billions of people in the world in endless ways. Why reinvent the wheel in trade now? Why not add more spokes to the well-proven wheel of the world trading system by addressing our new, 21st-century trade agenda through new plurilateral trade agreements within the WTO?



## 2. THE FUTURE OF THE MULTILATERAL TRADING SYSTEM AND THE WTO

*Roderick Abbott*<sup>1</sup>

A recent study on the attitudes of the global trade community came to a conclusion that was striking: “it is much more divided than it was ten years ago, influenced by conflicting interests and with no leading group capable of bringing the DDR to a successful end, in fact a community fragmented into multiple different segments.”<sup>2</sup> This paper attempts to address the questions posed by this analysis and suggest some partial solutions.

This note starts by considering the changing pattern of world trade and the shifts in power among the major trading nations and assessing what these trends imply for the multilateral trading system. To use more populist language, I am looking at the impact of global supply chains and the rise of the emerging economies and what this may mean for the WTO as an institution.

### 2.1 The Multilateral System in Context

But, before we address challenges and opportunities for the future of the system, we should review some of the elements of the existing system that are not generally emphasized. I am assuming an audience that knows the basics: the multilateral system is, by convention, the rules put in place in the GATT in 1947 and now incorporated, with some additions, in the WTO.

For some, these rules are based on an essential antithesis between the multilateral approach and other avenues that lead to trade agreements or policy measures, whether bilateral, regional, or unilateral. This might be characterized as a clear division between activity within the WTO framework and in Geneva and other activities that take place elsewhere around the world that contribute to a global system.

For others this is an artificial analysis, the multilateral and the bilateral are two sides of the same coin. How could it be otherwise when there is an “immediate and unconditional” application of the most-favoured nation (MFN) rule to all WTO members, together with a rule, some GATT Articles later, that permits preferential import treatment within free trade areas? Also, a general prohibition on all quantitative restrictions on imports is followed by rules that identify permissible exceptions to this and by rules that define in some detail how restrictions are administered.<sup>3</sup>

The point here is that the trade system contains within itself various elements that might appear to be contradictory and antithetical. Activities that are apparently outside the system can be, and have been, accommodated without tearing it apart. Many think that it is precisely these built-in flexibilities that have enabled the system to survive so long in a marriage of political imperatives with legal requirements. International rules in the financial or developmental fields have not endured so well.

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2 Messerlin, P. and Van Der Marel, E. “Polly Wants a Doha Deal: What Does the Trade Community Think?” *World Trade Review*, October 2011.

3 General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994). I refer to Article XI, together with Articles XX and XXI and Article XIII.

This history becomes particularly relevant when we discuss the future of the system. Therefore, the first question is why there are so many trade policy observers who suggest the system should be reformed. It was always thus: if we go back to the 1960s, when GATT Part IV was added and when the United Nations Conference on Trade and Development (UNCTAD) was established, there were repeated criticisms that the GATT was skewed in favour of the developed countries and that its trade liberalization efforts were unfair to “the third world.” In the 1970s and into the 1980s, when the generalized system of preferences (GSP) was a major issue and when the “enabling clause” was agreed, this was still an underlying theme among critics.

With the arrival of the WTO some changes have been made, including a stronger emphasis on the legal aspects, the contractual nature of the commitments, and the rights and obligations of the Members, as well as a clear recognition that there are indeed several tiers of membership with tangible differences in the import treatment applied to each group.<sup>4</sup> This is an indicator of a pragmatic approach to new circumstances and is, in essence, a proof of flexibility.

However, further reform of the system is now on the agenda. The continuing failure to close the DDR is a part of the picture; when a core part of the institution’s agenda is not working, there is inevitably a response that reform is needed. But, it goes back further, and we could usefully examine why exactly the system has become largely dysfunctional (and thus what needs to be fixed).

- A first indication of trouble was the deadlock in the succession process for a new Director-General in early 1999. This had all the appearance of a traditional North-South divide, with the developing world feeling that it was time (overdue) for them to have a turn.
- Shortly after this, a second disaster struck in Seattle, when a WTO Ministerial was abandoned without an agreed declaration and without launching the new Round, which had been the stated objective.
- In addition to these WTO internal events, the organization was facing two major challenges from outside: the Internet and the spread of electronic data and payments systems, and the impact of globalization on business and trading patterns. Many people attributed the economic changes that occurred to the new organization. The general support that had existed for GATT eroded.
- The success of the Doha conference was a brief-lived respite; but the WTO then faced a further setback in Cancun. While outside factors (the US political situation) had affected the efforts at Seattle, Cancun revealed that the WTO Membership was fundamentally split. Major differences were emerging about the end points that could be negotiated in the three core areas of the agenda – non-agricultural market access (NAMA), agriculture, and services – and what would be contributed by all Members.
- The declarations by US Trade Representative Robert Zoellick after Cancun that the US would pursue regional and bilateral agreements were another indicator that the system was under strain. The fact that these were aimed at WTO-plus agreements, going further than the Doha proposals and including elements that had been excluded from the Doha agenda, confirmed that the division of opinion on how to move forward had become deeply rooted.

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<sup>4</sup> It is remarkable that the WTO does not yet have a clear definition of which Members are developing countries, although the rules allow specific measures (such as GSP) to assist development in such countries.

- Finally, the exponential increase in trade in services that resulted from the developments mentioned above has led to a much broader distribution of trade among countries. China, India, Korea, and Brazil are the WTO Members that have benefitted most.

## 2.2 Possible Challenges

Three broad areas of WTO activity can be identified where reform could be relevant in the current context: institutional issues (including decision-making, small groupings, and promoting leadership); “the negotiating forum” (which clearly needs rethinking); and shifts in world trade patterns and global trading power (and the consequences). This third area, the impact of external events, needs to be emphasized even if the facts about the changing pattern of world trade are well known. China has risen to be the third largest trading nation in goods and services in the decade since it joined the WTO—and second if the European Union (EU) is not treated as a group. India has followed, now joining the top echelon, thanks to its successes in the services sector.<sup>5</sup> Countries, such as Korea, Mexico, and Brazil have also been rising up the ladder.<sup>6</sup>

One economic feature that underlies this shift is the development of the global supply chain business model, also called the industrial value chain. This is definitely due to globalization factors, such as the Internet, leading to a pattern of input supply-final assembly, which has brought many smaller economies into the world trade system. In turn, that puts emphasis on the role of foreign direct investment (FDI) in changing trade patterns. China is universally recognized as having won the lion’s share of the growth in FDI in the last decade; but other Asian countries have also taken their share, and in more sophisticated industries the roles of Korea and Taiwan should not be ignored.

These developments are part of a general shift of trade power away from the West and towards Asia, with China’s gross domestic product (GDP) overtaking that of Japan in the region, and Korea and India also experiencing rates of growth much higher than those of countries in Europe. This phenomenon, with the rise of emerging economies elsewhere in the world, has led to the creation of the G20 to replace the G8 and to calls for reform of institutions, such as the International Monetary Fund (IMF) and the World Bank, where the management and voting power still reflect the situation of the post-World War II period. There is no good reason why the WTO would be isolated from such change.

The challenge is, therefore, how to introduce changes to the system that might help to address these points of deadlock and failure, and that might respond to the shifts occurring in the global economy.

To take the broader issue first, how should we give greater recognition in the WTO to the shifts in trade power among the Members? This is not a straightforward issue. The WTO does not face the same kinds of governance questions as arise in bodies like the IMF and the World Bank. There are no differences in the way countries are represented in WTO. Each Member has an Ambassador and single vote. This clearly distinguishes the WTO’s practices from those of other institutions where the representation of a country in the governing bodies is usually indirect, and voting rights reflect a member’s (historic) weight in the world economy and its

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5 As an importer India is ranked at 13 for goods and at 7 for services in 2010 (at 8 and 5 if intra-EU trade is excluded). It stands a little further back as an exporter, but is still in the top ten.

6 It is true that the US and Japan and five or six EU member states still occupy places in the top 10, but Canada and smaller European states have been displaced, and nations, such as Thailand, Malaysia, and Indonesia have moved ahead of them.

financial contribution to the institution.<sup>7</sup>

Reform in those institutions is seen to be a matter of adjusting current practice, not only to bring it into line with the evolution of the global economy, but also to keep control of key decisions in the hands of the main financial contributors. Within those parameters, a more equitable spread of responsibility for the leadership of the financial and development systems is also desirable. For the WTO, on the other hand, a broader division of leadership responsibility is the first requirement, with a greater role for the emerging economies that have been increasing their shares of world trade rapidly.

We are not starting from zero in this process. As already mentioned, the WTO does explicitly recognize three groups of members, and has allowed members to introduce policies that give advantage to one or other group. Long-standing examples of measures are the GSP schemes and more recently the duty-free, quota-free treatment (DFQF) for least-developed countries (LDCs) applied by several developed Members. In the rules area these actions are covered by the Enabling Clause. During the DDR a major shift has already occurred with the *de facto* recognition of the central role that China, India, and Brazil can play as a developing country presence in the G5 group steering negotiations.

What more could be done? In purely institutional terms, it seems difficult to invent new mechanisms that would in some mysterious fashion create new leaders: presence and participation is one element; leadership in the general systemic interest is another thing. I would, however, support one change, to set up an intermediate body between the members acting individually and the membership acting together in the General Council, with executive functions on similar lines to those that exist in almost every other international organization. This might be represented as a “G20 trade group,” reflecting the broader composition of the G20 summit meetings but giving it a defined role in the WTO hierarchy.

Such a group would permit more open, in-depth discussion of the main policy issues than is possible with about 120 representatives in the room and would lead to greater efficiency in the decision-making process.<sup>8</sup> This may well be needed as the WTO moves forward toward a post-Doha world and begins considering what the elements of its work programme should be. Leaving politics aside, Members should be able to focus on the economic role that FDI could play in supporting trade expansion as well as in realizing wider development objectives.

This would yield institutional benefits, but would not address the problems of how to achieve a wider responsibility for the future of the system. In the area of trade negotiations, the primary job of every national representative is to secure changes in rules (or reduce trade

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7 In the World Bank, five major economies (but not China, Brazil, or India) are permanent members of the Executive Board and the others are elected for a fixed term and organized in groups represented by one member of the group. The members of each group are selected based on regional criteria; but the method to choose the country that represents them is arcane and varies from group to group. Voting rights reflect the weight of each member in the world economy when the Bank was set up (with relatively minor adjustments since), as well as the donations made to the Bank's funding (eg. to the IDA). The five permanent members have more than 37 percent of the voting rights, but to take one example, China, Russia, and Saudi Arabia each have less than 3 percent of the votes while many middle-rank European countries enjoy more voting power than they do. Fourteen leading members command a clear majority in the Bank's decision-making, which is skewed in favour of the 'old' Western nations (who also have contributed more to the funding).

8 This preparatory role is at present performed by an exhaustive round of informal consultations carried out by the Director General in the 'Green Room' and by the Chairmen of various councils and negotiating groups; but there is still from time to time criticism that not everyone can make his voice heard. In earlier years a middle-level group was established, but it was limited to an advisory role and was discontinued after a short period.

barriers) that are in his or her country's interest; but it is also necessary for those at the centre that are crafting the final deal - and the compromises inevitably needed - to agree on and promote systemic objectives. Recalling the quotation at the start of this paper, it is no easy task to agree on these objectives if the trade community is fragmented and split.

As a consequence, there is no single reform approach that will ensure success. The composition of the G5 is reasonably balanced and representative; it could be expanded in various ways, but would that be an improvement? Some of the missing ingredients are the political will in major trading nations to pursue the primary objectives of opening markets, eliminating barriers, and expanding trade; and close behind is the absence of a cooperative spirit as opposed to an adversarial approach. It will take some time to bring the trade community back to such first principles; and it is the Members themselves that need to reshape the institution rather than the other way around.

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## 3. CHALLENGING OPPORTUNITIES FOR THE MULTILATERAL TRADE REGIME

*Kevin P. Gallagher*<sup>1</sup>

### 3.1 Introduction

The seeds of the multilateral trading system were planted in 1944 at the United Nations Monetary and Financial Conference in Bretton Woods, New Hampshire as World War II was dwindling and the Great Depression still loomed large in memory. The Bretton Woods process was very much embedded in what was then referred to as “New Deal” thinking, under which nation states demanded leeway to improve the welfare of their citizens but only to such an extent that it did not unduly impose on the welfare of other nations.<sup>2</sup> Over the past two decades the multilateral trading system has lost sight of that balance and the WTO can now hardly be seen as a New Deal institution. The current crises that plague the world economy are a challenging opportunity for the WTO to regain that balance.

Preserving and enhancing the multilateral trade regime is of utmost importance in order to foster growth and prosperity in the world economy. Over the past decade, rather than refining the global set of rules and norms at the WTO toward that end, negotiations have solely focused on further trade liberalization, although the gains from further liberalization are relatively low and the costs can be significant.

The fact that this approach has produced a standstill at the WTO need not be seen as a failure. Rather, the standstill in negotiations for further liberalization are an opportunity for actors in the world trading system to reflect on some of the new challenges in the world trading system and reform the WTO in such a manner that it can become the premiere institution governing the trading system.

The alternative is not optimal: a splintering system of preferential trade agreements (PTAs) that can distort trade, accentuate discrimination, and allow private actors to “shop” for the forum that best advances their interests. The world needs a WTO that has accepted norms, enforceable rules, and a legitimate forum for the settlement of disputes at the multilateral level. Of all the multilateral institutions, the WTO has the most promise to play this role because of its unique one-country, one-vote consensus structure. Can the WTO turn challenge into opportunity?

This short paper outlines four challenging opportunities facing the WTO. If the WTO is reformed into a more modest, flexible, and equitable organization, it can gain the legitimacy and importance hoped for by those who originally recognized the need for a coordinated multilateral trading system in Bretton Woods almost 80 years ago.

### 3.2 Four Challenges for the Multilateral Trade Regime

At least four challenges to the WTO have stopped negotiations for further liberalization in their tracks: the limits of further liberalization; the rise of emerging market developing

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2 Helleiner, E. “Contemporary Reform of Global Financial Governance: Implications of and Lessons from the Past,” in *Reforming the International Financial System for Development*, ed. Jomo Kwame Sundaram (Oxford University Press, 2011).

countries; the food and climate crises; and the instability of the global monetary system. As depression and war challenged the global financial architecture in the 1940s, these trends challenge the WTO today.

### 3.2.1 Shrinking gains and rising costs of liberalization

Trade liberalization has brought significant benefits to the world economy over the past 40 years, yet with real winners and losers. However, the benefits of further liberalization are shrinking, and the costs of deep integration can be significant.

The World Bank's 2005 projections of gains from a 'likely' Doha deal were met with much surprise because they showed how little is to be gained from further global trade liberalization.<sup>3</sup> The World Bank estimated that the global gains from trade liberalization in the year 2015 would be just USD 96 billion, with only USD 16 billion going to the developing world. In other words, the developing country benefits represent a one-time increase in income of just 0.16 percent of GDP. This is often misconstrued as an increase in the annual growth rate; it is a one-time increase in GDP. In per capita terms, it amounts to USD 3.13 or less than a penny per day per-capita for those in developing countries.

Studies like these only examine the potential benefits of trade liberalization, while downplaying the costs. Total tariff losses for developing countries under proposed NAMA liberalization were estimated to be as high as USD 63.4 billion. Many developing countries rely on tariffs for more than one-quarter of their tax revenue. Most models also predict declines in terms of trade for developing countries. In the long run, declining terms of trade undermine developing country efforts to diversify and develop. They can also accentuate balance of payments problems in developing countries and deepen the impacts of crises.<sup>4</sup>

Moreover, the gains from adopting industrialized country-style intellectual property rules and financial regulations are also questionable from a development perspective. The World Bank estimates that the amount of South-to-North profit transfers due to patent rents under the WTO's intellectual property rules is USD 41 billion annually (World Bank, 2002).<sup>5</sup> The IMF recently estimated that those nations that liberalized foreign investment in the financial services sector were among the most hard-hit during the financial crisis.<sup>6</sup>

As industrialized nations have become frustrated with the lack of integration at the global level, they have pushed PTAs with nations more willing to negotiate. PTAs cause costly trade diversion—perhaps of USD 6.6 to USD 21.5 billion according to the World Bank.<sup>7</sup> What is more, PTAs have non-trade provisions in areas such as intellectual property and financial services that constrain the ability of nations to deploy adequate development policy. Finally, many PTAs tip the balance in favour of powerful interests where disputes can be settled when private firms directly file claims on governments, rather than the state-to-state dispute system that governs the WTO.

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3 Ackerman, F., and Gallagher, K.P. "The Shrinking Gains from Global Trade Liberalization in Computable General Equilibrium Models: A Critical Assessment," *International Journal of Political Economy*, 37:1 (2008): 50-78.

4 Wise, T. and Gallagher, K.P. *Back to the Drawing Board: No Basis for Concluding the Doha Round of Negotiations*, RIS policy brief, No.36 April 2008, Delhi, India.

5 World Bank. *Global Economic Prospects*, Washington, World Bank (2002).

6 Ostry, J. et al. *Capital Inflows: The Role of Inflows*, Washington: International Monetary Fund, February 10, 2011.

7 World Bank. *Global Economic Prospects*, Washington, World Bank (2005).

### 3.2.2 The rise of the rest

Developing countries have been growing faster than their industrialized counterparts since the turn of the century. And in the aftermath of the global financial crisis, the developing world has proven more resilient. This has been due to a hybrid approach to economic development that recognizes the importance of global markets, but also realizes that markets need to be embedded in the proper institutions in order to maximize welfare for national societies. The latter approach has meant that many of the most successful emerging powers - China, Brazil, South Africa, and India - have accentuated the role of the state in economic affairs. This has led to a “clash of globalizations” at the WTO.<sup>8</sup>

We could call this variety ‘developmental globalization’. All of these nations have been slow to open their capital accounts to foreign investment. All engage in industrial and state-led innovation policy to some degree. And, together these nations form the heads of significant coalitions in global trade talks that have pushed back on industrialized country proposals aimed at making developing countries look more like industrialized economies. They have clout, because they are fast growing markets to which firms and investors want greater access. They also have clout, because in purchasing power parity terms they lead an emerging-market world that has a larger share of GDP in the world economy than Western nations.

The theoretical underpinning of the WTO is to aid nations in maximizing their static comparative advantage. Yet many developing countries have sought to globalize in order to achieve a dynamic comparative advantage. In many cases that has meant favouring domestic firms or industries over foreign ones; and, thus, at least in spirit such an approach violates the principle of national treatment. Tariffs in the world economy are relatively low by historical standards. Therefore, this clash is often not seen to occur in discussions over goods tariffs. What has gone unrecognized by some is that trade treaties are no longer about trade in goods, but, rather, about domestic regulations that could be seen as violating the two principles.

As China, India, Brazil, South Africa, and others have continued to grow their economies at a significant pace since the turn of the century, they (and their domestic constituents) have fought hard to maintain at a minimum the level of policy space they have at the WTO. At the WTO, this meant rejecting the proposals by the developed world to deepen international investment rules, intellectual property rules, government procurement, and financial services (the so-called Singapore Issues and others).

Moreover, the developing world turned the tables on the narrative of the talks. While past rounds were pitched as the developing world being riddled with protections that were bad for growth and prosperity, the developing world flipped that on its head and accused the north of the same thing. Almost immediately into the negotiations the developing world made an issue of industrialized country subsidies and tariffs benefiting agricultural producers and intellectual property rules that prevented developing countries from break patents to serve ailing and diseased populations. In effect, this put the developing world on the moral high ground. Rather than the North getting their Singapore issues at the 2003 WTO Cancun meetings, the North had to abandon those issues, but also amend the WTO agreements on intellectual property rules to allow for public health exceptions - a key victory for developing countries. Turning away from a ‘deep integration’ agenda, from 2003 on, the negotiations were mostly about market access in agriculture, manufacturing goods, and some services. In addition, special attention was to go to the poorest nations in the form of relieving cotton subsidies and aid for trade packages.

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8 Gallagher, K. P., (2012), “Developmental Globalization and Equity-Enhancing Multilateralism,” in *Re-Embedding the Market*, ed. Sanjay Pinto (London: Routledge, forthcoming).



### 3.2.3 Food and climate crises

Two other major challenges to the trading system are the food and climate crises. Since 2008 the world has entered a new era of highly volatile food prices and a renewed sense of urgency regarding the need to combat climate change. Both these crises require urgent and sometimes drastic attention. It is not clear that the WTO as currently structured has the flexibility necessary for the world to combat these challenges. A 21<sup>st</sup> century WTO would allow nations to respond to contemporary challenges like these.

Since 2007 global food prices have been increasing and volatile, reaching the highest level ever recorded in 2011. This has adversely affected the livelihoods of many of the world's poorest. This event has triggered a new set of policy responses to ensure food security across the globe. The United Nations Special Rapporteur for the Right to Food (2011) has identified five sets of policies for food security in the 21<sup>st</sup> Century:

(1) reinvestment in agriculture and general support schemes to small-scale farmers; (2) safety-nets and income-insurance for the urban and rural poor; (3) the establishment of food reserves at national or regional levels to allow governments to cushion the impact of price shocks and to limit volatility of prices for agricultural commodities; (4) orderly market management, including marketing boards and supply management schemes, as another measure to combat volatility; and (5) limiting excessive reliance on international trade in the pursuit of food security.<sup>9</sup>

A preliminary "compatibility review" of these measures alongside WTO rules conducted by the Food and Agriculture Organization (FAO) reveals that these policies are seen as derivations from the WTO rather than as the principal objectives of agricultural trade policy.

With respect to the climate crisis, the climate regime is urging the world's nations to deploy and diffuse technological and process innovation in green technology rapidly. A particular emphasis has been on China—which has been told that it needs to deploy such technologies and reduce emissions with little or no financial help from the industrialized world.

China, as an example, has deployed policies to create world-class technologies (such as solar power where they lowered the global price by 40 percent) but through means that are also not "compatible" with current WTO rules. By 2009, China added more wind power than any other country, including the United States. China already has the largest solar thermal capacity in the world and now leads the world in installed renewable energy capacity. Yet, the same industrialized nations that are telling China to deploy clean technology and clean up its act are now taking China to the WTO for violating its rules, particularly with respect to subsidies.

Many seem to have lost sight of the fact that the use of climate-altering fossil fuels distorts trade. Subsidizing alternatives can correct those distortions. Oil and coal prices seldom reflect their environmental costs and are thus overproduced. The World Bank's 2010 world development report estimates that fossil fuel subsidies amount to at least USD 300 billion a year. If prices reflected true costs, much less polluting trade would occur and renewable energy would be on a more even playing field.

Subsidies for renewable energy, such as wind power, can help correct the distortions in the energy market and allow the world to climb the learning curve for renewable forms of energy.

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9 De Schutter, O. *The World Trade Organization and the Post-Global Food Crisis Agenda*, United Nations Food and Agriculture Organization. Activity Report, November 2011.

### 3.2.4 Instability of the global monetary system

From 1944 to the Tokyo Round, the Bretton Woods agreement ensured exchange rate stability and the swift payment of current account transactions. Exchange rate stability, therefore, came to be taken for granted in the multilateral trading system. Without stable exchange rates global trade markets are not sent the right signals, and global trade transactions will not be a function of factor abundance, productivity, and comparative advantage. Since the Tokyo Round the monetary system has become increasingly unstable, and never more so than in the aftermath of the global financial crisis. The multi-lateral trading system will continue to be jeopardized until the monetary system is reformed.

Exchange rate instability may be the key reason the DDR is permanently stalled, given that key nations like India, Brazil, and South Africa have been sacked with exchange rate volatility ever since the crisis began. For example, Brazil was supportive of the last-ditch 2008 deal at the WTO. Brazil's soy and beef industries stood to gain significantly from a WTO deal and many manufacturing firms stood to gain in terms of providing machinery, transport, and other inputs. Finally - and this is important - the Brazilian real was relatively undervalued during the first years of the DDR. A weak currency is implicitly import-substituting and a subsidy to exports. Thus, Brazilian industry was more open to negotiating. All this changed after the global financial crisis, as Brazil and many other emerging markets have seen their currencies appreciate by more than 40 percent. Brazilian industrialists became very averse to a deal because they lacked competitiveness and saw more concessions as being out of the question. At this point Brazil would never agree to the 2008 deal. According to some calculations Brazil's currency appreciation has effectively amounted to a 25 percent reduction in import tariffs for that country.<sup>10</sup>

Not only has the misalignment of the monetary and trading system distorted trade flows, many of financial regulatory measures that nations deploy to manage the exchange rate are not permitted under the WTO if a nation has listed them under its General Agreement on Trade and Services commitments.<sup>11</sup>

### 3.3 Toward a More Responsive Multilateral Trade Regime

The WTO is poised to be one of the most important of the institutions in the global financial architecture. Unlike the G-20, the IMF, and even the United Nations, the WTO operates on a one-country, one-vote consensus basis. In the G-20 and the IMF decisions are made via a system in which votes are weighted according to the size of nations' economies, and decisions taken by the UN General Assembly can be overridden by the Security Council. Therefore, the WTO carries the most legitimacy among these international bodies. Indeed, the WTO has been undersold as a legitimate global economic governance institution.

In general, the WTO should conduct a thorough review of the extent to which its principles and rules are compatible with policies for growth, food security, environmental protection, and financial stability. In particular, it should consider the following:

**Institutional Reform:** Rather than focusing on further liberalization, the WTO should focus on building its institutional capabilities in order to serve as the global governance structure for world trade. As nations do so they will need to think about their interests further into the future. What we have learned in the past ten years is that some nations that were once

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10 Thorstensen, V., Emerson M. and Lucas F. "Impacts of Exchange Rates on International Trade Policy Instruments: The Case of Tariffs", São Paulo School of Economics (EESP), FGV, September 2011.

11 Gallagher, K. P. "Losing Control: Policy Space for Capital Controls in Trade and Investment Agreements," *Development Policy Review* 29:4, July 2011: 387-413.

LDCs are now among the largest economies in the world. In a rapidly changing and uncertain world where nations do not know what their places will be, it is in the interest of actors to adhere to the ‘maximin’ principle of attempting to establish rules that will maximize the position of those who are worst off in the current system. There should also be a moratorium on North-South preferential trade agreements. These deals exploit the asymmetric nature of bargaining power between developed and developing nations, divert trade away from nations with true comparative advantages, and curtail the ability of developing countries to deploy effective policies for development.

**Food:** The WTO should take seriously the proposals by many African nations to tame highly concentrated global commodities markets, dominated by agribusinesses that suck most of the value out of these value chains. Rich nations should also grant poorer countries extensive rights to exempt staples of their local economies, such as corn, rice, and wheat - so-called “special products” - from tariff cuts, and allow them to raise duties when imports surge. Moreover, policies to create food reserves, marketing boards, and supply management schemes should be seen as advancing world trade, not distorting it.

**Climate:** the WTO needs to leave ample room for the transfer of clean technology to developing countries. Otherwise the diffusion of new technologies and mitigation strategies will get bogged down in global rules over intellectual property, investment, and goods trade. There is room for creative thinking whereby specific collaborative efforts between say, the United States and China could be granted immunity for a specific period under the WTO in order to meet certain emissions and technology targets—in a manner analogous to but much broader than the Article 8 exceptions to the subsidies agreement of the WTO.

**Finance:** National and global financial authorities will be the ones to determine what a new global monetary system looks like in the wake of the financial crisis. Meanwhile, the WTO should conduct a thorough review of the extent to which its principles and rules are compatible with various measures that nations can deploy to prevent and mitigate financial crises. In the absence of a stable monetary system nations will have to resort to measures, such as capital account regulations, that at present seem to be incompatible with the WTO.

Upon the reflection outlined here, the WTO will become a more modest global institution, but one with more legitimacy and a stronger mandate. More important, it will allow nations the flexibility to improve and maintain the welfare of their citizens at present and in future generations—and to an extent that the actions of individual nations do not unduly impose on the welfare of other nations—as the founders of the global economic architecture had hoped in 1944.

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## 4. THERE IS NOTHING WRONG WITH THE WTO

*Magda Shahin*<sup>1</sup>

The WTO's current institutional arrangements are essentially sound. The organization remains an effective instrument of international cooperation and a guarantor of the rule of law. Its alleged institutional challenges reside in the inability of member countries to reconcile their diverging interests to conclude the DDR within a defined time frame. These challenges are not entirely those of the WTO as an organization. Accordingly, this note suggests: a) avoiding mixing up the issues and placing the responsibility of the stalling of the DDR where it lies and not with the WTO, which should be allowed to continue performing its functions, and b) developing alternative approaches that maintain the DDR momentum and safeguard the objective of progressive trade liberalization. For the latter, this note offers three suggestions, namely a "Blair House" type of agreement, an approach similar to that of the standards and codes used for harmonization of financial systems policies, and a revisit of the DDR issues within a non binding time frame. These suggestions may be developed within the current WTO's institutional arrangements.

### 4.1 The Institutional Challenges of the DDR Are Not Exclusively the Responsibility of the WTO

The institutional challenges of the DDR, which have led to the current effective impasse, can be attributed not only to lack of political will and absence of leadership, but, also to the growing frustration with the apparent negligence of developed countries in the ongoing negotiations. These states seem to feel that it is after all *only* a development round and hence have little to expect from it for their stakeholders. Today's world financial and economic crisis exacerbates the situation further. Undeniably this structural impasse has impacted the WTO - at least for an outside observer tending to see the DDR and the WTO as one and the same. For insiders, however, the WTO has strongly maintained its ranking. There are positive signs that the WTO continues to foster cooperation on international trade issues and operate effectively. It needs to build on its strength to be able to better promote the trade agenda in world governance.

Countries continue to see the usefulness of the WTO, as reflected in the increase in the number of members and the intentions of others to join. The organization's membership increased from 86 in 1994 at the conclusion of the Uruguay Round to 158 members by 2008. In addition, a number of countries maintain observer status, reflecting a keen interest in the WTO's deliberations and eventual membership. Member countries also see the WTO as the natural forum in which to bring their trade disputes. They also value the Trade Policy Review Mechanism (TPRM), which provides cooperative peer reviewing. Also, and not least, the organization's mobilization of resources to deliver technical assistance to developing countries and LDCs is perceived as essential to establish a more effective base for cooperation.

Moreover, there are recent important achievements. Most prominent are: the working party's sealed deal on Russia's membership in October 2011, continued TPRM regular reviews as well as the annual trade report, and the Dispute Settlement Mechanism (DSM) that has recently issued its panel report in favour of Canada and Mexico in their complaint against the US regarding country of origin labelling (COOL). In addition, the WTO is the symbol of cooperation and the rule of law against a recurrence of beggar-thy-neighbour policies and

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an ambiguous trading system. Moreover, the organization is a safeguard against members backtracking on their commitments. However, the pace for the way forward remains the prerogative of the members. “To be or not to be” is not the issue at stake here; as the WTO is here to stay for good reasons, most notably the well-functioning, predictability, and security of the international trading system.

Having said that, the position of the WTO as neither a UN body nor a Bretton Woods associate gives it strength and weakness. The WTO’s idiosyncratic position allows it to follow independent policies that do not emerge from UN economic policies. It is also not bound to follow policies set in the Bretton Woods institutions for which the WTO should be the reference point on trade matters. The WTO has not sufficiently made use of this implicit strength. It needs to capitalize on it and more definitely establish its rightful independent place vis-à-vis the UN system and the Bretton Woods institutions. The WTO needs to be clearly seen as the authority on all issues related to international trade, including agenda setting, and it should be deferred to accordingly. However, the WTO needs to be mindful that this very position offers an opportunity to be seized to build up its international role. The WTO should be cognizant of its intrinsic potential. While the Bretton Woods, financial and development institutions have an established and recognized role, the WTO has strength most notably as a legal organization with its Dispute Settlement Understanding.

The WTO needs to build on its strength to play its due role in global economic governance and help the international community recognize the essential role of international trade in development and stability. Members need to deliberately promote the WTO’s role and avoid seeing it marginalized as occurred in the wake of the global financial and economic crisis. Though the organization did establish agreements with the IMF and the World Bank as envisaged under the Uruguay Round, these have not been effective in providing the WTO with the adequate channels to include trade concerns in the relevant agendas. The WTO membership, in particular developing countries, was skeptical about establishing close linkages, lest the contamination of cross-conditionality would reach the WTO. At the same time, the IMF and the World Bank may not have been keen on encouraging a close relationship with a quasi-novel organization as they were not sure yet of its direction and operational power.

## 4.2 Alternative Approaches to the DDR

The stalling of progress in the DDR reflects the challenge of organizing global governance and reaching deals. It should be noted that the difficulties encountered in the DDR negotiations are not unusual compared with other high-stakes international negotiations. The following offers three suggestions. While the first suggested approach is yet another attempt to reach a successful conclusion of the DDR, the two other approaches tend to suggest shelving the DDR for few years. This is proposed in the hope that at a later stage the environment will become more propitious for a “single undertaking,” which continues to present the sole option for ensuring progressive liberalization in an overall acceptable trading system. The two latter approaches also have the advantage of allowing the WTO to distance itself from the DDR log jam and to allow the organization to function in a more focused way so as to reconstitute itself as the ‘trade anchor in the world economy’ as indicated by Pascal Lamy, the incumbent Director-General.

The first suggestion maintains the substantive objectives of the DDR and suggests the phased decision-making process that proved effective in the context of the Uruguay Round. The second suggestion consists of recalibrating the objectives of the DDR by establishing benchmarks of best-practice policies. Countries would voluntarily seek to comply with these best practices in a transparent manner. This approach would be similar to the one followed in the area of financial sector policies. The third suggestion consists of engaging in more

relaxed negotiations within existing institutional arrangements. This third way will give ample time for negotiators to work closer together in a more lenient and congenial manner to better identify the stakes for participant countries and overcome the deeply entrenched mistrust and suspicion that has characterized some of the negotiations. The same current institutional setup would be used to pursue the debates in the expectation that the absence of deadline pressures may lead to a deal when the time is ripe.

#### 4.2.1 Blair House Agreement

The Uruguay Round would not have been concluded had not the US and the EU sat together and reached an agreement. What came to be known as the “Blair House Agreement” was basically a bilateral agreement between the two ‘elephants’ that was then multilateralized. Both had to make concessions to one another irrespective of the Cairns group or any other country. The direct discussions between the US and EU responded to their own needs and policies. Given their weight and stakes in global trade their deal was critical to overcome obstacles to the Round’s conclusion.

The weight and corresponding assertiveness of countries, like Brazil, China, and India in the trade negotiations make them critical partners for reaching a deal. Inasmuch as the US has been reluctant throughout the DDR negotiations to show leadership, which has been - without any doubt - the most negative impact on the Round, there is a growing conviction among participants that it is Brazil, China, and India that represent today’s elephants in the trade negotiations. With this in mind not only is there room to repeat the Uruguay Round scenario; but also such a scenario may be workable due to the immense mutual interests between the elephants of today and the US. First, there is the reciprocity in granting mutual market access between those countries. A deal on the issue could be worked out through focused discussions and exchanges of concessions. Deals reached at the level of those heavy weights could then be submitted to the larger community of members. A global agreement could then be reached through a carrot-and-stick approach, dealing with specific concerns and providing technical and financial support on a case-by-case basis. If China is in the deal, it will be able to draw the African countries into the round. A weakened EU with enormous international problems as well as internal discord between its member states cannot afford to block the round singlehandedly as it cannot continue to drag out the round with its well-known delaying tactics.

The foregoing approach entails the recognition that the stakes are not the same for all participants, a reality that cannot be swept under the carpet. It means that governance in terms of structures and processes to reach decisions for international trade negotiations need to be sufficiently flexible across issues to factor in the diverse level of stakes between participants.

#### 4.2.2 Setting standards of best practice

Another approach can maintain the momentum of progressive trade liberalization without imposing deadlines for concluding the DDR. It consists of defining standards of best policy practice in the different trade areas. Countries commit themselves to work toward implementing these practices and agree on regular reviews of the progress they make and their publication. In the finance area there are a number of standards and codes of this type, including the Basel Core Principles for Banking Supervision (BCPBS) and others covering notably securities exchange, insurance, payment systems, money laundering, and countering terrorism financing. Such standards are regularly reviewed and updated by standard setters. Countries’ progress toward compliance with the standards is regularly reviewed by assessors, which can be organizations, such as the World Bank, IMF, or private financial advisors.

It is conceivable that such an approach - all too novel to the trading system - is applicable to peer review countries independently and observe their progressive 'autonomous' liberalization and adaptation of their domestic laws and regulations. Such an approach, however, does not entail any exchange of concessions, which is so characteristic of the trading system and, by no means is this approach thought of as a replacement for the traditional best practices of horse trading through requests and offers, which have served the trading system well for more than 60 years.

The approach's advantages are to offer a guidepost for best practice and regular reviews, including by peers and disclosure. Progress is voluntary, but the disclosure of the regular reviews provides implicit pressure on the laggards to seek progress. Another advantage of the approach is the common recognition of best practice and an institutionalization of the process to assess members' progress toward the goals. Over time, as significant progress materializes, binding agreements can be entered into when it is timely.

The WTO could see its TPRM expanded to include standards and codes compliance assessments and their publication. It could also see an expansion of its technical assistance role, as members wishing to improve on their compliance seek its assistance. Finally, it could give a better handle to the international community to assess global progress toward the desired goals without putting any single member in a straight jacket that is not of its choice.

### 4.2.3 More relaxed negotiations

As for the third approach, as said earlier, it is based on congeniality, which should replace mistrust and suspicion. Easing the pressures of deadlines and the frustration and fear of failure should allow a better negotiating environment. Hence, the third suggested approach, irrespective of the number of years it may take (for certain less than the expired ten years of negotiations) will build on more positive attitudes toward one another and better engagement to move forward.

On a different note, there is hardly any sense in continuously pushing for what is often referred to as early harvests in the areas where meaningful progress can be achieved, as this only deepens the divide and raises doubts about the underlying intentions. Furthermore, it is well-known that what was meant by early harvest in the framework of the DDR was confined to the LDCs, notably regarding the DFQF market access for their products and not an overall bonus.

This approach will also make use of the WTO institutions to the fullest without any parallel tracks, which so far have undermined the proper functioning of the Uruguay Round-established mechanisms. It is, however, necessary to emphasize that such an approach does not suggest starting anew. On the contrary, it is very strong in not unravelling any potential progress reached over the last ten years of serious negotiations, but is meant to build on it.

## 4.3 Conclusion

It should be noted that all three approaches are based on the consensus rule, which has been a cornerstone of the trading system. Voting is the easy way out. Consensus building, however, necessitates the continuation of negotiations until every member - no matter how big or small - is relatively satisfied with the outcome and can live with it. Voting basically excludes members from being part of the decision-making, and eventually the outcome is forced on them. Furthermore, if voting is considered, the chance of weighted voting in the WTO will be the reasonable option, thus totally excluding small traders from the decision-



making process.<sup>1</sup>

The order of the three approaches put forward in this think piece was not done haphazardly. The two latter approaches are not mutually exclusive; on the contrary, if implemented together, they will strengthen one another. Furthermore, they do not disregard either the progress achieved so far in the negotiations or the DDR. They are allowing for additional space during which the WTO should revitalize itself, and the Member states should work either autonomously or even within regional and bilateral free-trade agreements (FTAs) - if they so wish - for progressive liberalization, which should be constantly monitored and surveyed through the mechanisms available to the WTO.

The first approach, dealing with the Blair House-type agreement, is more complex. It carries in it equally the seeds of success as well as failure. Going along with the Blair House-type agreement as an institutional framework need only be considered by the four said countries. Succeeding, however, in the negotiations on the substantive issues within such a framework is certainly more difficult. Yet, if this first tier between the elephants of today is a success, the chances are then all the more favourable for a conclusion of the DDR. If not, the two other suggestions will be validated with the advantages they offer in the prevailing circumstances.

This think piece contains few messages that should lead us - if there is a political will - to further action. The paper gives more space to the negotiations by offering alternative approaches that help the WTO revitalize itself and at the same time maintain the momentum toward an eventual DDR deal to seal the success of progressive liberalization. It is important to understand that the outcome of the negotiations is usually determined through the process of negotiation itself, rather than being derived analytically from some clearly defined set of initial conditions and axioms.<sup>2</sup> Accordingly, the paper has chosen to change the process of negotiation either by setting standards of best practices that should be attained voluntarily or a more relaxed process to allow a successful conclusion.

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1 It is also perceived that the Blair House approach is a “forced consensus”, where the majors have “forced” others to follow. Thus stretching the argument it may be seen as covert weighted voting.

2 Hopmann, P.T. *The Negotiation Process and the Resolution of International Conflicts*. University of South Carolina Press, 1998.

## 5. TOWARD “PLURILATERAL PLUS” AGREEMENTS

*Miguel Rodriguez Mendoza*<sup>1</sup>

### 5.1 Introduction

WTO members have been struggling to complete the Doha negotiations for more than ten years now. A final deal, however, will continue to be elusive if a way is not found to do away with the so-called “single undertaking”, under which nothing could be agreed, much less implemented, if agreement is still lacking in some areas of the negotiations. This idea has wrongly been placed in the category of a legally binding “principle” that must inform all negotiations. Rather, the “single undertaking” is becoming an ideal formula for failure in an environment of more than 150 diverse countries struggling to reach consensus on a wide variety of technical and sensitive issues.

While initially introduced during the Uruguay Round to level the playing field, allowing reciprocity and stronger linkages in the negotiations, the “single undertaking” now artificially limits the flexibilities of WTO Members, and is being used as an argument in favour of blockage - much to the detriment of developing countries.

This needs to change and change rapidly. The “single undertaking” is neither a legally binding “principle” of the WTO nor a tool to shape progress in the negotiations. It played a critical, positive role in putting together all the Uruguay Round agreements and, ultimately, establishing the WTO, but it is now being misused and should be set aside as soon as possible.

The way countries undertake trade negotiations may have to be redesigned in the future, moving away from all-encompassing “rounds” of negotiations on an always increasing number of subjects to more “a la carte” negotiations when subjects are more likely to produce significant and quicker results. At present, the task is to find a way out for Doha to succeed, and this may ultimately require dealing with the serious limitations posed by the “single undertaking.” A way to do it is by moving toward “plurilateral plus” agreements, as discussed below.

### 5.2 The “Short” History of the Single Undertaking

No “single understanding” guided the (mainly) tariff negotiations conducted under the aegis of the GATT. There was no need for all countries to agree on all (mostly) bilateral deals concluded in these negotiations, which involved almost exclusively principal suppliers and principal markets. The non-participating countries, however, benefitted from these agreements by virtue of the MFN clause. This changed, however, with the Tokyo Round (1973-1979), as in addition to a set of tariff reductions it ended with the adoption by most industrialized countries of a number of “codes” to deal with some non-tariff barriers. The codes were not applied on a MFN basis, and this created a duality of rights and obligations among the GATT Members that fractured the multilateral trading system. This unfortunate construct came hand in hand, a few years later, with a push, mainly from the US, to further expand the coverage of the GATT to include issues, such as trade in services, investment, and intellectual property (later called the “new” issues).

It is against this background that the emergence of the “single understanding” needs to be understood. As countries set to prepare and launch new trade negotiations - the so called

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Uruguay Round - they tried to avoid the experience of the Tokyo Round by ensuring that the issues of interest to all participants, developed and developing countries, would be given a similar treatment, i.e. would be negotiated and eventually agreed to in the form of a “single” agreement. To put it in the words of those days, they tried to ensure that no progress would be made on the “new issues,” which interested mainly developed countries, while neglecting the most traditional issues, which were mainly of concern to developing countries.<sup>2</sup>

Toward the end of the Uruguay Round there emerged the need to create a new institutional framework to deal with all future agreements. Members thus agreed that the GATT was to be replaced by a new organization that would include rules on intellectual property and trade-related investment measures, as well as an agreement on services. Eventually, all the Uruguay Round agreements (including most of the “revised” Tokyo Round codes) as well as a framework agreement establishing the WTO were presented as a “take-it-or-leave-it” package, that is, as a single undertaking. This move transformed it from a negotiating tool into a procedural device to get together all the agreements negotiated during the Uruguay Round.

Thus, in retrospect it can be argued that the single undertaking played a rather positive role during the Uruguay Round. First, it helped to move away from the fragmented system that emerged from the Tokyo Round. Second, it contributed to a more balanced multilateral trading system, as developing countries undertook more obligations and were entitled to more rights, making the trading system more a partnership and less the rich man’s club in place until then. Finally, the single undertaking facilitated the establishment of the WTO, and the setting up of the universal multilateral trading system as we know it today.

That positive role is not there anymore. History does not repeat itself. The single undertaking has been transformed during the Doha negotiations into a straight jacket that holds hostage any negotiating outcome. It is not that WTO Members have been unable to agree on anything, as it is often said. It is rather that they have been prevented from concluding Doha by the generalized perception that they cannot reach agreement if they do not, at the same time, agree on all the issues under negotiation.

The ability of WTO Members to reach agreements has been demonstrated once and again, before and during the Doha negotiations, and when the opportunity has presented itself they have not hesitated to undertake new commitments. For instance, shortly after the entry into force of the WTO, a significant number of countries agreed to craft new agreements on telecommunications and financial services. Many agreed, during the Singapore Ministerial in 1996 to put in place an ambitious agreement to open up trade in high technology goods - the ITA. Later, during the preparatory process of the Doha negotiations an understanding on the TRIPS agreement and public health was reached. More recently, a mechanism to channel financial resources to help the poorer countries to increase their participation in international trade - the aid-for-trade (AFT) mechanism - was also put in place.

Interestingly, some of the agreements mentioned above were not, *strictu sensu*, multilateral agreements, as they were not adopted by all WTO Members. This was the case in particular of the agreements on telecommunications, financial services, and information technology where only a “critical mass” of countries joined in the negotiations and accepted the final agreements. They were, however, applied multilaterally as the benefits of the agreements were extended to all WTO Members by virtue of the MFN clause, much as the GATT tariff negotiations operated, and in so doing they strengthened rather than debilitated the multilateral trading system.

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2 These included topics, such as safeguards, tropical products, agriculture, textiles, and tariff escalation.

No such “a la carte” approach has been allowed during the current Doha negotiations. The single undertaking has been repeatedly presented as an immutable principle under which nothing could be agreed if all is not agreed at the same time. This has prevented negotiating countries from putting in place potential “interim” agreements on matters where the linkages with the core of the negotiations, where bargaining and mutuality of concessions put their imprint, are weak or nonexistent. Issues of critical importance to the poorer developing countries, such as the “cotton dispute” and the agreement on DFQF exports from the LDCs are, in the name of the single undertaking, left in limbo until the end of the negotiations.

It is naturally not the single undertaking alone that can be blamed for the failures of the Doha negotiations. Other issues play a more significant role. The large number of participants, the wide differences in size and level of development, and the great variety of economic interests among them as well as the complexities of crafting agreements on the large number of issues under negotiation account for a larger share of the current deadlocks. However, the single undertaking exacerbates this situation by providing countries not with a negotiating tool, but with a blocking tool holding the negotiations captive of those least willing to enter into new commitments.

### 5.3 Toward “Plurilateral Plus” Agreements

To move out of the current and future deadlocks, a different approach to the WTO negotiations should be put in place. This approach should be predicated on the need for the WTO to move to a more cooperative understanding, where negotiations launched by the entire WTO membership could be undertaken by groups of interested countries if and when certain conditions are met, and, importantly, provided that the multilateral nature of the agreements reached is preserved. This overall approach should have an important exception: negotiations involving only a limited number of countries would not be appropriate when they include existing disciplines and commitments. Thus, there is a need to differentiate between negotiations that involve existing rules or agreements and those on new subjects or sectors.

When existing disciplines are at stake, the entire WTO membership should be involved from the beginning to the end. This is of fundamental importance. The WTO is a legal and institutional framework that obliges its Members to conduct their trade and trade policies in a clearly defined manner. The rules of the system cannot be modified without the acquiescence of the whole membership. Also, new agreements cannot be incorporated into the existing multilateral rules and disciplines without the acceptance of all WTO Members. A case in point was the amendment introduced to the TRIPS Agreement in 2001. The agreement on TRIPS and Public Health, was debated by the TRIPS Council, negotiated by all WTO Members and implemented by a decision adopted during the Doha Ministerial Conference. The TRIPS agreement could only be modified by a collective decision of WTO Members and the same applies *mutatis mutandis* to all existing WTO agreements. Thus, when existing rights and disciplines are to be reviewed no group or sector negotiations should be allowed.

In almost all other instances negotiations among groups of interested countries could take place, and their results could be incorporated within the WTO framework. This is in fact the rationale behind the idea of having plurilateral agreements in the WTO. These agreements are normally entered into by groups of “like minded” or interested countries that decide to establish among themselves a common set of rights and obligations to deal with a particular subject matter or sector. Plurilateral deals are part of the Marrakech Agreement<sup>3</sup> and have

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3 They are included in Annex 4 of the Marrakech Agreement. There are currently only two “plurilateral” agreements included in this Annex: the Agreement on Civil Aircraft and the Agreement on Government Procurement. Two other plurilaterals, on bovine meat and dairy products were ended in 1997.

among its defining characteristics the fact that they create rights and obligations only among the participating WTO members, so they are not multilateral agreements, hence their name.<sup>4</sup>

That is why there is a need to move beyond plurilateral agreements as defined by the Marrakech Agreement; if they are allowed to expand, the WTO may end up in a situation similar that of the GATT after the Tokyo Round, divided and fragmented. An alternative would be to move toward a “plurilateral plus” environment, where the benefits of the agreements would be extended to all WTO members, while their obligations would bound only the initial members of the agreements and others as they join it. The model that comes to mind is the ITA. This agreement was negotiated in 1996, in Singapore, during the first WTO Ministerial Conference, by a group of 29 countries (including the then 15 EC members) and entered into force shortly thereafter (in 1997) when others joined, making it an agreement that would cover more than 90 percent of trade in the sector. Market size was an important consideration for the agreement to come alive, and there are at present more than 70 ITA members. More important, though, from the beginning, participating countries decided that the benefits of the agreement would be extended to all WTO Members no matter whether or not they participated in the ITA. Thus, one can say that the ITA is a plurilateral plus agreement.

Inspired perhaps by the ITA, some authors have proposed that negotiations among groups of WTO members should be allowed to proceed if the countries participating in those negotiations represent a significant percentage of the trade in the chosen sector, i.e. the “critical mass” approach to negotiations in its simplest form. In fact, critical mass requirements are not completely alien to the WTO/GATT negotiations: tariff negotiation and the negotiations of the Tokyo Round codes were arguably conducted on such a basis, and during the Uruguay Round the (unsuccessful) zero-to-zero negotiations on a number of sectors were founded on the critical mass approach.<sup>5</sup>

The critical mass approach may indeed offer some possible ways out of the increasing complexities of the WTO negotiations, but it cannot be applied in all cases. For instance, it would be difficult and probably impossible to define a critical mass when negotiations deal with new rules and disciplines outside a particular sector; how would one define a critical mass, for instance, in negotiations on future rules on trade and climate change? Negotiations based on a critical mass approach could be relevant only in the case of market access negotiations, where the importance of producers and markets could easily be quantified.

Groups of WTO Members should have the possibility of undertaking negotiations among themselves on matters of their interests. Not to allow them to do so would result ultimately in those negotiations moving out of the WTO; thus the importance of a common understanding on how to move in that direction. There have to be rules to create new rules. A decision to allow group negotiations should be taken by a consensus decision of all WTO Members, independently of which Members subsequently join in the negotiations. In other words, all countries should participate in the process of determining the requirements for WTO

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4 Article II.3 of the Marrakech Agreement reads: “The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as “Plurilateral Trade Agreements”) are also part of this 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.”

5 Some authors even assert that “successful negotiating outcomes in the GATT/WTO system have been based not on a single undertaking approach, but rather on what has come to be called the critical mass approach.” See Gallagher, P. and Stoler, A. “Critical Mass As An Alternative Framework For Multilateral Trade Negotiations.” *Global Governance*, 15:3 (2009): 383.

negotiations among subsets of WTO Members, and this should include at least three key considerations: first, to provide for an “opt in” and “opt out” approach, as all WTO Members would be entitled to participate in the negotiations, but could also withdraw from them if they so decided during or at the end of the negotiations; second, the results of negotiations should be applied unconditionally to all WTO Members; and, third, the agreements reached should be incorporated into the multilateral set of rules and regulations as plurilateral plus agreements, with appropriate accession clauses.

Such an approach would have several advantages and help overcome numerous procedural difficulties. First, all countries would be entitled to participate in the negotiations if they so chose, thus preserving their multilateral nature; second, Members could decide to withdraw from the negotiations or not to join the concluded agreements if they considered to be better off by doing so; and third, the multilateral dimension would be further strengthened by the application of the agreements on a MFN basis, thus avoiding the fragmentation of the system that happened with the Tokyo Round codes.<sup>1</sup> It is true that the decision to initiate this sort of negotiations may be a difficult one - as difficult as any decision that requires a consensus of all WTO Members. This may be overcome by asking the WTO secretariat to present a detailed report on the merits of the proposed negotiations with appropriate recommendations, which would then be accepted or rejected by WTO Members with a (qualified) majority vote, consistent with the Marrakech Agreement.<sup>2</sup>

To sum up, an alternative approach to trade negotiations not based on the single undertaking needs to be founded in a cooperative approach among WTO Members, setting aside the confrontational nature of the current negotiations. This alternative approach would require, first, the abandonment of the idea that WTO negotiations can be conducted only in all encompassing “rounds” of negotiations. Second, a recognition that all WTO Members are bound by the existing rules and regulations, the “acquis multilateral,” and these can only be modified and implemented by all WTO Members; and finally, the development of some specific procedures to tackle new issues and leading to plurilateral plus agreements using the critical mass approach or *a la carte* negotiations.

After 60 years of periodic and mostly successful rounds of trade negotiations the time has come to adopt a new approach. The increase in the number and diversity of WTO Members, the wide variety of their trade concerns, and the differences in their levels of development make extremely difficult the reaching of agreement, simultaneously - as prescribed by the single undertaking - on the often complex set of issues included in a round of negotiations.

The approach suggested here would help preserve the integrity of the multilateral trading system. It is difficult to see how a continuation of the current deadlocks in the Doha or a repetition in the future of the same approach to trade negotiations would be in the interest of WTO Members, particularly developing countries. The successes of the past cannot serve as an excuse to continue with an approach that is currently showing its limitations. Although it would be difficult to apply this new approach to the Doha negotiations, it is not impossible to do so. This matter should be given serious consideration and the sooner the better.

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1 An issue to be considered carefully is that of “free riding,” i.e. the fact that countries will benefit from the agreements without undertaking any obligations whatsoever. This issue can be tackled only on a case-by-case basis and not under general principles. If the plurilateral deals are well thought out and designed, countries will have an incentive to join them at some point.

2 Articles IX (Decision-Making) and X (Amendments) of the Marrakech Agreement provide under certain circumstances for decisions by a qualified majority of WTO Members.

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## 6. IS THERE A FUTURE FOR MULTILATERAL TRADE OPENING?

*Arancha González<sup>1</sup>*

At a conference I attended recently I was asked to address the question of whether there is a future for multilateral trade opening. It would be difficult for me to take no for an answer. And yet, this is not the first time in the history of the GATT-WTO that this question has been posed. This same question was on the table at the end of the 70's. Then, as now, we saw serious trade tensions, a crisis of global dimensions and different expectations as to what the global trading system should deliver. In a way, a sense of “common purpose” had been lost.

In a speech delivered in London in 1981, GATT Director-General Arthur Dunkel said: *“The system cannot cope with the pressures generated by rapid economic change, debt difficulties of developing countries and other factors, unless it can rely on a secure and reliable basis through a concerted effort to establish momentum in the right direction.”* A reflective period followed, opening the way for the launch of the Uruguay Round.

In fact, the history of the multilateral trading system has been one of ups and downs, of crisis and breakdowns in cooperation, but also of pragmatic solutions to strengthen international co-operation. We are in one of these phases and the way forward today, as in the past, is through cooperation.

### 6.1 How we got here: shaping factors of the global trading system today

The first half of the twentieth century stands as a monument to deficient global governance with political and economic mismanagement, including two major world wars, the great crash and the failed League of Nations. There were no serious functioning international institutions. In the 1940s, the United Nations and the Bretton Woods institutions, including the multilateral trading system, changed it all. But those institutions face very real challenges today in a rapidly moving world.

Trade has exploded since the 1950s. In 2010 the volume of world exports was 33 times larger than in 1950. By comparison, global GDP only increased 9-fold over same period. The expansion of trade was mostly due to increased shipments of manufactured goods, which rose to around 70 times their 1950 level in 2010. Meanwhile, shipments of agricultural products, fuels and mining products “only” increased by around 10 times each. All of the above figures refer to real increases in trade volume. In dollar terms, the value of world trade jumped from \$62 billion in 1950 to \$15 trillion in 2010.

There have been great strides in trade policy too. It is difficult to say precisely how restrictive trade policy was globally before the creation of the multilateral trading system in 1947. Estimates of around 40% are widely cited, but the 2007 WTO World Trade Report concluded that the true figure was somewhere between 20% and 30% among leading economies. In any case, tariffs were high enough to significantly restrict trade. Since then, the average MFN tariffs have fallen to around 9% for all WTO members and 4% for developed economies in terms of simple averages (trade weighted averages would be lower). Non-tariff measures have also come down, even if they remain a significant policy challenge.

Membership of the global trading system has grown exponentially. When the GATT became

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the WTO, membership went from 23 to 155, and it is still growing, with some 30 countries waiting in the wings to accede. It is not just about numbers, though, it is about diversity and deepening too. The membership of the WTO is far more diverse than ever before. More than two third of the members are developing countries. This focuses much more attention on how trade can support and foster development. The agenda is deeper because globalization has joined up countries to create increased policy inter-dependency across a much wider policy set. We don't just worry about tariffs and other border measures any more. Behind-the-border measures and all manners of regulatory interventions have become more central to effective international cooperation.

Something else very important has changed in the last couple of decades. The rapid growth of emerging economies has shifted the centre of gravity of economic power. In 1980, output of developed economies represented 75% of world GDP while that of the rest of the world made up just 25%. However, by 2010 the developed share had fallen to 63%, and the developing share had risen to 37%. The increase in the share of developing economies in world trade is even more impressive. From 33% in 1980, the share of developing economies fell to a low of 27% in 1990 before rising to 46% in 2010. The share of developing economies is even greater if we exclude intra-EU trade from world trade. In this case, the share of developing countries rose from 38% in 1980 to 49% in 2010. In this landscape China stands out given the margin and pace of its growth, but it is by far not alone. There is Mexico, Brazil, Indonesia, India, South Africa, and Thailand, among many others.

Decisions on the shape and content of international economic cooperation can no longer be taken by two or three economic power houses sitting in a room. Now you need at least five to even begin to fashion a deal. With the contrast in economic growth rates between emerging and industrial economies that is likely to persist for some time, we can expect the share of developing economies in world output to continue to rise, reaching 45% by 2016. The share of developing economies in world trade depends to a great extent on primary commodity prices, which are unpredictable. However, barring a collapse in commodity prices, we should expect to see developing economies' share in world trade exceed 50% in the near future.

Falling trade barriers, new business models and remarkable advances in information and transportation technology have also led to an explosion of supply chains. If we take world trade in intermediate goods as a proxy for the spread of vertically integrated production activities across countries, this trade has roughly doubled in value between 2000 and 2010, rising from \$1.38 trillion to \$2.73 trillion. These figures including trade between EU member states, but if we exclude these flows, we see that world trade in intermediate goods has more than doubled, from \$1.08 trillion in 2000 to \$2.22 trillion in 2010. This phenomenon redefines the nature of inter-dependency and sharpens the challenges of international cooperation on trade.

It is a matter for conjecture whether the economic collapse in 2008/9 has made cooperation more difficult. The Great Recession may not have made it any easier to cooperate and some countries are still potentially feeling the pinch because of the effects of the financial crisis on the availability of trade finance. Moreover, while trade policy stood up rather well overall in the crisis, now when things are still precarious, where growth is sluggish or negative in some quarters and where unemployment has become a scourge, protectionist pressures are mounting. Will we be so successful this time around?

From the WTO's perspective, the stalemate in the Doha Round has been building while preferential trade agreements have been multiplying. Each WTO member now belongs on average to 13 PTAs. This can hardly represent the most efficient way of conducting international trade relations -- it risks friction-inducing discrimination, exclusion, regulatory

divergence, and higher business costs. Yet PTAs have done much to foster economic links among nations while the multilateral trading system has been slow in delivering policy change. The issue is not so much one of conflict between multilateralism and regionalism. Rather, it is about how to render them coherent, while at the same time reducing the costs of fragmentation inherent in preferentialism and raising the game of the multilateral trading system in terms of delivery.

In sum, in the last six decades trade and deeper integration have become a far more prominent feature in the lives of nations. This is because of the mutually reinforcing effects of barrier-reducing trade cooperation, backed by institutional stability via the GATT/WTO, and powerful technological advances that have underwritten the globalization of economic activity. All this has occurred against a background of a growing number of diverse players in the trading system, a dramatically broadened trade agenda, and shifting power relationships that raise global leadership challenges. Protectionist risks are on the rise as many large economies splutter, income and trade growth slow, and unemployment stays stubbornly high. Regionalism has exploded while the WTO has struggled to foster further trade cooperation, leaving us with a less than fully coherent system of trade cooperation. What does all this portend for the future of the multilateral trading system?

## **6.2 Whither the multilateral trading system?**

For many of the reasons cited above, this is not a good time for international cooperation. This is not just a problem for the WTO. We see it too in climate change discussions, in negotiations over reform of the financial architecture, in macroeconomic matters and in non-economic spheres as well. Again, shifting power relations have quite a bit to do with this. We have something of a leadership vacuum and governments have plenty of other preoccupations now. Trade politics are not propitious. A fundamental difference is clear over what the fine balance of rights and obligations should be in the trading system among the industrial and emerging economies. This, I am confident, will be worked out because it is in everyone's interest to reach accommodation. It will just take some time.

In the meanwhile, everyone says they believe in, want, and value the multilateral trading system. We have to be sure that there is no confusion between "saying multilateralism" and "doing minimalism." Any edifice like the WTO will not stand long on its own if it's not nurtured and its relevance reasserted through positive action.

In the industrial countries this is not easy, as opinion polls show a less than enthusiastic embrace of globalization and of the advantages of international specialization. This is not surprising. Governments have perhaps not done enough to get behind these policies and to address the inevitable fallout in terms of those who lose from changing economic structures.

Globalization is much more popular in the emerging economies. They will increasingly see it as in their interests to support and underwrite multilateral cooperation, just as other powers have done before them.

## **6.3 Some ideas on incremental progress: a policy of small steps ... forward**

In short, if governments mean what they say about the multilateral framework for managing trade relations and advancing agendas for cooperation, and I believe they do, then we need to face up to the reality that this will take some time and effort. It needs to be done incrementally and in good faith, gradually building confidence through a process of identifying mutually beneficial trade-offs.

A number of elements will need to feature in the global trading system moving forward.

First, sustaining the process of economic integration will only be possible by also acting “domestically” on the anxieties created by globalisation; countries will need to strengthen domestic policies on education, training, safety nets, infrastructure or capacity building. Support for trade will crumble under the weight of absent or inadequate domestic policies. We can no longer afford “trade is good, please move on.” Conversely, neither should we allow the public perception that trade is the mother of all ills - “please blame it all on trade.”

Second, we need to work on a new narrative on trade. We need to explain the fundamentals of today’s trade which takes the form of value addition through the functioning of supply chains. We need to start by getting the right numbers. These numbers will give us a better sense of the link between trade, job content, growth, development and ultimately poverty alleviation.

Third, we must rethink multilateral trade regulation and cooperation. I believe that the attention that we paid to addressing tariffs in the past, with tariff peaks remaining the most serious tariff issue, now needs to shift to non-tariff measures. We should also recognise the value of “binding” trade policies and practices in WTO, especially given huge autonomous trade opening which has already taken place in the last decade. We must also seriously rethink agriculture policies: we must address the import side but also the export side. We must address subsidies, tariffs and non-tariffs barriers, knowing that today volatility is a key consideration. We must also rethink the link between goods and services whose borders have become very porous. There would be merit in treating these in a more integrated manner. Finally, we must adapt our trade policy tools to the new realities of global value chains.

In sum, the WTO - which is about levelling the playing field - must adjust this levelling to the new realities of trade today. And in doing so, it must be able to reach a fine balance in the rights and obligations of developed and emerging economies, while continuing positive actions in favour of the poorest. We can and must get there, through small steps, which is the only way forward in these troubled times.

**PART II:  
REGIONAL TRADE AGREEMENTS**

# 1. COMPETING WITH REGIONALISM BY REVITALIZING THE WTO

*Robert Z Lawrence<sup>1</sup>*

The global trading system currently presents some strikingly contrasting pictures. Judged by the state of the DDR, the system seems to be in serious trouble. Despite the repeated lip service paid by the G20 leaders instructing their negotiators to achieve “a balanced and ambitious agreement” the round is clearly at an impasse. It has missed every deadline that has been set, and the prospects for resolution are bleak.

Yet, in many other respects the system is vibrant and thriving: the dispute system at the WTO is working well. With only a few exceptions countries have shown great forbearance by not raising trade barriers in the face of the global financial crisis – in the case of most developing countries, this has meant maintaining applied tariff rates at levels far lower than required by WTO rules. In addition, new bilateral preferential agreements are being concluded with great vigour.

Clearly there are strong forces driving countries toward increased global integration. Reductions in transportation and communications costs have allowed firms to operate global supply chains that take advantage of differences in national comparative advantage both through intra-firm trade and through networks that link teams of producers. Increasingly, countries specialize in tasks rather than products, and this puts a premium on establishing governance mechanisms that reduce the transaction costs and risks that such operations entail. The firms that engage in this trade are concerned about far more than tariffs. They seek rules and administrative and logistic facilities that enhance these operations.

A cumulative process has been set in motion as countries compete to become export platforms. As some offer foreign and domestic investors favourable domestic production environments combined with preferential access to foreign markets, others feel pressures to do the same. This has led to agreements in which countries agree to rules (e.g. for investment, competition policies, intellectual property protection) and market opening (in goods and services) that go considerably further than they have undertaken at the WTO.

A second key driver of these agreements has been the shift in global growth away from the developed countries towards the emerging markets. South-South trade has flourished and in response, developing countries have been signing agreements between themselves to regularize and promote their interactions. These South-South agreements have varied in depth and scope, with some that are quite comprehensive and detailed and likely to stimulate trade while others are hortatory and vague and more symbolic and diplomatic in character.

If the DDR ends in failure, the contrasting states of the multilateral and regional parts of the system could become even greater, with regional initiatives flourishing while the multilateral system becomes increasingly less relevant. To be sure the existing agreements will remain binding on all members, but there are dangers that there could be backsliding. One reason countries comply with existing agreements is their interest in negotiating new agreements. Absent such prospects, their compliance incentives could be reduced. Moreover, thus far there are as yet no deep preferential arrangements between the largest trading nations, namely the US, the EU, China, India, and Brazil. And since the WTO is the principal forum

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for their interaction, its weakening could damage their relationships with detrimental consequences for the system. In addition over time these large players are likely to conclude agreements, further weakening the system.

## 1.1 Regionalism is Here to Stay

Some would like to see regional agreements eliminated. But this will not happen. Countries have already proceeded too far with their commitments. Moreover, they should not be eliminated. Some functions are in principle, better carried out at a sub-global level. Viewed simply as tariff-reducing exercises, preferential arrangements are said to be “second best” because they can divert trade. But the WTO also does not eliminate all barriers and its partial multilateral trade liberalization, the realistic alternative to preferential arrangements, is also “second best” in the same way. So the real choice is between two second-best approaches and it is an empirical matter as to which is superior. Indeed both can promote trade.

Only considering tariffs is too limited. Many of the regional agreements cover far more than tariffs, and they also implement rules and regulatory frameworks that not all countries are willing to sign. The optimal area for trade might be the world, but global federal government is not widely seen as the optimal area for governance. Thus viewed as joint governance arrangements, a mixture of multilateral and regional arrangements may actually be first best. Plurilateral and bilateral arrangements can thus be valuable in their own right and not only because they may be a stepping stone toward a more comprehensive system.

The drift towards a world in which all deeper integration takes place through regional arrangements while the WTO maintains a single undertaking that enforces the lowest common denominator, needs to be resisted. Instead, we need a global trading order in which multilateral and preferential arrangements operate in a complementary fashion. This requires a two-pronged approach that on the one hand, revitalizes the WTO and on the other improves the disciplines on preferential arrangements in order to reduce their discriminatory aspects.

## 1.2 Revitalizing the WTO

The multilateral dimension involves successfully concluding the DDR and then launching a new series of plurilateral arrangements governed by a new protocol of understanding. The DDR has worthy objectives, but it also has serious problems. Its many delays have been costly because the world has changed. The prioritization of agriculture was questionable from the start and has become increasingly problematic. This is not an area in which most firms that undertake trade and investment have interests – the payoffs from reducing industrial tariffs and liberalizing services and investment are much larger. In 2001, global food prices were low and the major issues were import barriers and subsidies to production in developed countries. These problems remain, but in 2012, global food prices are high and volatile, and the key farm trade issue not covered by the talks is the export restraints imposed by many developing countries. In 2001, China was a newly acceding member that needed time to adjust, and many developing countries in Africa and Latin America had experienced two decades of slow growth. But, as of 2012, China is the world’s largest exporting nation, and many developing countries have enjoyed a decade of unprecedented growth.

Moreover, framing the negotiations as the development round has been a mixed blessing, especially as developed countries have stagnated. The EU’s priorities to cover the Singapore Issues such as investment, competition policy, and transparency in government procurement failed to achieve the necessary consensus at Cancun. The developed country priority in the round, obtaining meaningful market-opening concessions from the large emerging economies

has been hard to achieve since developing countries have acted as a block to limit their concessions. From the developed country vantage point, the bargain currently on the table looks small and uncertain, while regional arrangements seem to offer better prospects.

Increasingly there are calls for the members to terminate the negotiations by admitting failure or by harvesting the concessions that have already been made. Some argue, for example, for a “Doha-lite,” in which the concessions already agreed for the LDCs are granted and the agreements on trade facilitation adopted. But others resist making even these concessions, claiming they were made under the assumption that more would put more on the table.

However, failure would damage the system, and deprive developing countries of an agreement that could provide them with important new benefits. A final effort should be made. It should start with the largest members stepping forward and exercising the leadership needed to reach a meaningful agreement. For example, China could agree to join the GPA, binding both its central and provincial governments in return for developed countries granting it market economy status.

### 1.3 New Approaches

Part of the final deal could involve a trade in which concessions to developing countries are made in return for them agreeing to a new protocol that would set the rules for negotiating new plurilateral agreements that would counter the attraction of deeper preferential arrangements.

WTO Members are diverse and one size does not fit all. Some members legitimately reject new rules and obligations that would constrain their policy space. But, for others this is costly in terms of opportunities foregone. There are strong reasons to believe that additional rules could aid in the integration required for fully exploiting the potential of the global economy. Ample evidence indicates that, even when tariffs are removed, border effects continue to impede the free flow of goods and services. Indeed, this evidence can be seen in more extensive agendas that are covered by many regional trade arrangements.

The desire for deeper integration and the concerns for policy space for some developing countries should both be respected. Instead of a system in which all members, both developed and developing, are required to adhere to all rules, a more attractive approach would entail a variable geometry with mandatory core commitments supplemented by plurilateral agreements to which only some members belong. These agreements could take a variety of forms. They could involve new rules, the full liberalization of sectors, and agreements on trade facilitation. Some agreements could extend MFN treatment to all members; other agreements would grant privileges only to those who sign up. Some could become binding on members only when a critical mass sign up.

These agreements would end the simplistic distinctions between developed and developing countries and allow members from both groups to adopt rules that meet their interests. Examples might include foreign investment, rules for state-owned enterprises, restrictions on export barriers, restrictions on energy subsidies, competition (anti-trust) policies, regulatory practices, customs procedures, liberalization of key services sectors, and additional intellectual property protection.

The prospects of agreements in these areas would help attract participants that have lost interest in the current system while it would give all some say in developing the rules. Important benefits could result from conducting the negotiations under the WTO aegis: namely, the legitimacy conferred by the stamp of approval of the organization, access to

WTO resources and dispute settlement facilities, the ability for other members in the future to join an arrangement with rules that they had previously endorsed, and the ability to group negotiations on several agreements at once to allow for cross-issue trades.

## 1.4 Tougher Disciplines for FTAs

A second prong of the approach to regionalism would be to tighten the disciplines permitting FTAs. The best solution to the trade diversion caused by regionalism is of course to go to full free trade. The problem is we might never get there if we create vested interests in the current arrangements. But the next best approach is to focus on the diversion and additional costs that are created by complex and restrictive rules of origin. The idea would not be to prevent members from signing FTAs but to reduce their discriminatory effects and enhance the ability to link them into more encompassing arrangements.

For the most part, it is not the WTO rules relating to preferential arrangements that are flawed but the failure to enforce them. The GATT Article XXIV, which deals with preferential trade agreements, stipulates that they should cover “substantially all trade” and not raise barriers on outsiders. But exactly what this means has never been clarified and it should be. A great service would be provided if one brave country was willing to step forward and bring a case that required this be done. Even better of course, would be a more precise definition adopted by all members for future agreements, perhaps grandfathering existing agreements.

In addition, however, there is one area in which the rules should be tightened. Conspicuous by their absence have been additional requirements on rules of origin in the case of FTAs. This has led to protectionist violations of WTO principles when rules such as “yarn forward” for apparel are used in FTAs. These rules prevent garments with any value added from third parties from qualifying for duty-free access under the FTA. They are clearly discriminatory and present obstacles to cumulating value added. GATT Article XXIV should be amended to allow only one rule of origin for all sectors covered by any agreement, and members given five years to come into compliance.

## 1.5 Conclusion

The WTO has a key role to play in helping nations reap the full benefits of deeper integration but as its mission and means have expanded it has become more controversial. The organization’s legitimacy has been attacked from many quarters and efforts to add new issues to the rules have foundered, as many members have refused to accept new obligations on a variety of grounds that include problems in implementation, fears of future trade retaliation, and apprehension that domestic policy space will be lost. However, the net result of this resistance has been to create an organization that is losing its relevance for the issues that are of direct concern to those actually involved in building supply chains that stretch across several countries. This requires dealing not simply with tariffs, but rules that relate to regulations, competition, investment, intellectual property, and services.

Supplementing the core WTO obligations with plurilateral agreements could help to promote deeper global integration while at the same time alleviating the WTO’s institutional tensions. These arrangements offer a compromise in which diversity can co-exist with more extensive commitments among willing members and would help reduce the trends toward regionalism, not by preventing these arrangements but by creating a more attractive alternative. In addition though, disciplines on regional arrangements should be tightened.



## 2. ADDRESSING 21ST CENTURY “WTO-PLUS” ISSUES IN THE MULTILATERAL TRADING SYSTEM

Andrew L. Stoler<sup>1</sup>

### 2.1 Introduction

At their mid-November meeting in Hawaii, the leaders of the sub-APEC Trans Pacific Partnership (TPP) trade negotiations outlined the progress made in the talks and provided considerable detail on how they expected to address the mostly “behind the border” regulatory barriers that are the focus of these talks. On the agenda for this agreement are investment and competition rules, regulatory coherence, creating opportunities for small- and medium-sized enterprises, business facilitation, and market access initiatives for green technologies.

In African regional economic cooperation agreements, it has been common practice to include competition policy obligations, including through the creation of competition authorities with region-wide enforcement responsibilities. Regional trade agreements (RTAs) in place or under negotiation in East Asia include many so-called “WTO-Plus”<sup>2</sup> provisions. At the same time, discussion of these questions in the WTO is *verboden*.

It is no wonder business interest in the DDR is almost non-existent. Global business in 2011 is for the most part not preoccupied with traditional border measures, but with the kinds of things the TPP Leaders are discussing. Unless a way is found to open a constructive dialogue on these questions in the multilateral trading system, the WTO will be doomed to become a 20<sup>th</sup> century organization that is increasingly irrelevant for today’s policymakers and business leaders.

This short paper suggests ways those responsible for WTO policymaking can avoid creeping irrelevance and initiate a constructive discussion of 21<sup>st</sup> century “WTO-Plus” issues in Geneva.

### 2.2 The Problem for the WTO

Most of today’s Members of the WTO are involved in regional trade negotiations and agreements that go beyond the scope of WTO agreements in terms of their coverage. Although the TPP is a more ambitious undertaking than many other RTAs, it is common to find chapters on investment, competition policy, trade facilitation, and electronic commerce in these agreements whether the parties are developed or developing countries. Meanwhile, since mid-2004, WTO Members have decided that these topics are off the agenda for the organization - as though these issues have no relationship to trade in the globalized world of 2011.

Over the past several decades, progress in multilateral and unilateral trade liberalization has meant that, with some obvious exceptions, tariffs have been eliminated or reduced to levels that are often functionally insignificant (e.g., exchange rate movements can have a much more significant effect on competitiveness). Globally oriented businesses have organized their supply chains around production in countries where transaction costs at the

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2 In this paper, “WTO Plus” refers both to trade-related issues now outside the scope of the WTO - such as foreign direct investment issues - and questions within the scope of WTO - such as trade in services - but where trade agreements outside of the WTO have adopted an approach superior to that used in the WTO (for example, the NAFTA-type negative list approach to services trade liberalization).

border are low. Reflecting this new reality, economists studying utilization rates (for goods trade) in RTAs often conclude that the costs of complying with rules of origin documentary requirements often outweigh the preferential tariff benefits. But it would be incorrect to conclude that for this reason, the RTA is useless.

While economists do not have the quantitative tools to accurately measure the effects, it is the elimination of behind the border barriers to trade that drives business interest in most modern regional trade agreements. Much more important than border tariffs are actions to suppress anticompetitive behaviour in the market, the elimination of discrimination in services trade, stable investment environments, and rule of law-promoting actions. Behind the border barriers are often insurmountable problems for small and medium-sized enterprises (SMEs) looking toward export markets.

For all of the progress achieved through the Uruguay Round's expansion of the WTO agenda to cover intellectual property and services, the scope of the WTO's multilateral rule-making and liberalization still falls very far short of what has been happening in regional trade agreements in recent years. WTO Members need to recognize this and the danger it presents to the organization and the system it oversees. Either the WTO catches up with the times or it will become increasingly irrelevant to players in the real world of global trade and investment.

## 2.3 Potential Responses to the Problem

There are several questions that should be addressed at the start of any effort to discuss WTO-Plus trade agreement provisions in the WTO. These are: (1) what should be the institutional framework(s) for the exercise?; (2) what should be the shared objective of the effort?; (3) what definition should be given to the scope of the discussion?; and, (4) should there be any limitations placed on participation in the exercise?

### 2.3.1 Possible institutional frameworks

Plan A: One possibility would be to agree to create a new forum in the WTO that could be the focal point for discussion of these questions. We might imagine something like a "Working Party on Coherent Approaches to 21<sup>st</sup> Century Issues." Participation in the working party should be open to all WTO Members on a voluntary basis and, for the purpose of this exercise participation should be open to both global and regional organizations and groupings with experience in dealing with WTO-Plus issues. The discussion would be enriched by the participation of the OECD, regional development banks, regional UN economic commissions, and the secretariats of APEC, ASEAN and regional economic cooperation agreements in Africa and Latin America. Recognizing that the business community is the natural constituency for action on these behind the border measures, some form of participation by relevant international business groupings should also be facilitated. The creation of the working party would be without prejudice to discussion of these topics, as appropriate, in existing WTO bodies, including the GATS and TRIPS Councils, the Committee on Trade and Development, and the Committee on Regional Trade Arrangements (CRTA). In fact, these specialized committees and councils should be encouraged to develop inputs to the discussion in the Working Party.

Plan B: A fall-back option to the focussed working party arrangement could be to agree that the agreed work plan of the CRTA would be modified to include detailed discussion of WTO-Plus provisions - including those addressed to issues currently outside the scope of the WTO - on a horizontal basis. The modification of the agreed work plan should be accompanied by an understanding that, notwithstanding the view some delegations take of the Enabling Clause, all trade agreement provisions falling within the scope of the exercise,

including those in South-South agreements, would be open for discussion in the CRTA. This would be desirable to maintain a certain unified quality to the discussion. Like the working party approach, a CRTA-based discussion should invite contributions from appropriate WTO councils and committees.

Plan C: In the event WTO Members failed to reach consensus on one of the approaches suggested above, many - but not all - of the WTO-Plus trade provisions found in modern RTAs could be discussed in existing WTO committees and councils. The problem is that such a “Plan C” would not provide a home for consideration of very important provisions relating to investment, competition policy, government procurement, and certain other questions (labour standards, e-commerce, etc.). Another downside is that the discussion would be forced inside what are normally very rigid agendas and rules that guide the work of the committees and councils and this would add to the risk that the work could be counterproductive.

Plan D: Should it prove impossible to launch a productive discussion of WTO-Plus questions under any of the previously discussed institutional formats, WTO Members interested in pursuing a review in the context of the multilateral trading system could take the discussion “off-campus” in a plurilateral grouping organized outside of the formal institutional structure of the WTO itself. This could be the G-20 (the post-GFC G-20, not the Brazilian-led agriculture-oriented G-20) with participation open to other interested parties. Alternatively, it could be based on the external CG-18-type format that a number of key WTO Members pursued in the mid-1990s “Invisibles Group.”<sup>3</sup> Of course, taking the discussion “off-campus” would be very unpopular in some quarters, but we must recognize that a failure by Members to initiate a constructive discussion on the basis of a forward-looking agenda inside WTO would make such an outcome more likely.

Establishing a dialogue on WTO-Plus issues in Geneva on the basis of Plans A and B would add to the credibility of the organization by demonstrating that WTO Members are supportive of a multilateral discussion designed to enhance coherence between trade agreements negotiated regionally and bilaterally and that Members are capable of responding to the challenges of today. Plans C and D would get the discussion going but would reflect badly on the WTO as an institution where its broader membership would be seen as not being supportive of bringing the institutional discussion into the 21<sup>st</sup> century.

### 2.3.2 Shared objectives of the exercise

Broadly speaking, the objective of the proposed exercise in the WTO should be to try to ensure some coherence and complementarity in the WTO-Plus trade agreement provisions being developed and implemented in RTAs, as well as working to see these provisions support the multilateral system. To the extent that WTO Members could develop a shared appreciation of what these provisions should look like (perhaps through an APEC-like best practices exercise), we would make a contribution toward avoiding the trade aggravation caused by differing and overlapping rules, like Professor Bhagwati’s rules of origin “spaghetti bowl.” Even better, if a multilateral discussion led to harmonized approaches, the exercise would facilitate the eventual multilateralization of key parts of RTAs.

If we could reach agreement that these would be the objectives of the exercise, why should any WTO Member raise an objection?

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3 The “Invisibles Group” was an informal grouping of developed and developing countries that met periodically to discuss WTO trade issues and global trade developments between 1995 and 1998. Representation was at capitals-based senior official level. The Group was especially active in the lead up to the 1996 Singapore Ministerial Conference.

### 2.3.3 Scope of the discussion

It should be agreed at the start that the scope of the discussion should be open-ended, with any WTO-plus provision found in any existing trade agreement or RTA under negotiation being fair game for examination. For starters, this means the issues up for discussion would include: investment, competition policy, government procurement, top-down/negative list services liberalization, trade and environment, trade and labour standards, e-commerce, post-TRIPs intellectual property protection, mutual recognition agreements in goods and services trade, and dispute settlement approaches different from those found in the WTO's own Dispute Settlement Understanding (DSU).

How would the discussion in this exercise be organized? Ideally, this would be through a horizontal examination of particular issues and trade agreements provisions where the point of the exercise would not be to criticize what any particular Member has done in an agreement, but rather to try to identify best practices and formulations that might eventually best lend them to adoption at the multilateral level. How the discussion might be organized is illustrated below (in simplified form) for the case of a hypothetical RTA chapter on investment.

#### Selected Issues Relative to Investment

Aspect of Issue	Examples of Points to Compare / Contrast / Evaluate
Definition of "Investment" for purposes of the RTA	<ul style="list-style-type: none"> <li>• Is it desirable to have a broad or narrow definition of what is meant by "investment"?</li> <li>• Do we need to ensure that there is some circumscription to investors' rights (e.g., excluding the "right" to pollute)?</li> <li>• Should all kinds of "investment" be given the same treatment in an agreement?</li> </ul>
Applicability of National Treatment	<ul style="list-style-type: none"> <li>• Should national treatment apply at the pre-establishment phase as well as post-establishment?</li> <li>• Is national treatment generalised or only applied to specified sectors/activities?</li> </ul>
Fair and Equitable Treatment	<ul style="list-style-type: none"> <li>• Is this principle generalized or have the parties to an agreement circumscribed it to ensure it does not result in regulatory chill?</li> </ul>
Dispute Resolution	<ul style="list-style-type: none"> <li>• Does the agreement provide for investor-state dispute settlement? If so, does it specify ICSID or some other body / approach?</li> <li>• If the RTA has an MFN clause, is it qualified in some way in relation to its applicability to ISDS?</li> </ul>

### 2.3.4 Participation

Assuming that it would be possible for WTO Members to agree to launch the proposed exercise on coherence of WTO-plus measures, who should participate in the discussion? On the understanding that this is neither a negotiating exercise nor one that even has the potential to lead to eventual negotiations, participation in the proposed WTO "Working Party on Coherent Approaches to 21<sup>st</sup> Century Issues" should be open to (*inter alia*):

- WTO Members
- Countries in the process of negotiating accession to the WTO
- Other WTO observers
- Relevant International Organizations including:
- Regional development banks;
  - Regional UN Economic Commissions; and,
  - Secretariats of regional groupings like APEC, ASEAN, NAFTA, etc.
- Representatives of Civil Society, such as:
  - International Chamber of Commerce;
  - International Bar Association;
  - APEC Business Advisory Council; and,
  - OECD BIAC and TUAC.

## 2.4 Conclusion

If it is to remain an institution that business and governments find relevant for the 21<sup>st</sup> century, the WTO cannot ignore what is going on today in WTO-plus negotiations conducted outside of the multilateral trading system. Developed and developing countries - including in purely South-South agreements - have gone far beyond the scope of the current coverage and approach of WTO agreements in the bilateral and regional trade agreements they have or are negotiating. As the central forum for global trade issues and rule making, the WTO cannot ignore these developments outside its scope any longer.

This is not about negotiations or forcing WTO Members to agree to WTO-plus provisions either in Geneva or in their bilateral agreements. Rather, it should be about building a shared understanding of what the issues are; how the business community and civil society feel about these issues; and, what would be the best practice and most coherent way of dealing with these questions on a global scale in the future. The global financial crisis has illustrated the need to explore policy coherence on international economic issues and initiatives to keep markets open in an increasingly integrated environment.

If we cannot agree to a multilateral discussion of the issues with an objective of bridging differences and developing best practices, we run the risk of a trade agreements “spaghetti bowl” far more complicated than Professor Bhagwati’s rules of origin problem. We know that some WTO Members are more prepared than others to include provisions in their trade agreements on investment, competition, and other 21<sup>st</sup> century questions and we know that others will require continuing technical assistance in complex areas like these. This is not about negotiations and it is not about negotiating new WTO provisions in these areas.

But we cannot afford to let the pre-eminent multilateral system flounder over a lack of attention to these questions and how they impact trade. WTO Members owe it to themselves and the decades of investment they have put into the GATT and WTO to ensure that the past efforts are not wasted. The way forward is to acknowledge that these new trade issues and agreements provisions are real and that we cannot afford to ignore them in the drive to improve and strengthen the multilateral trading system.

## 3. THE TRANS-PACIFIC PARTNERSHIP

*Gary Hufbauer and Julia Muir<sup>1</sup>*

### 3.1 Introduction

President Barack Obama is not known as a champion of globalization. For years, the Colombia, Panama, and Peru FTAs were unwelcome guests in the Obama White House, while the DDR was locked in a closet. Yet, as he nears the end of his first (and perhaps only) term in office, the TPP has become Obama's signature initiative in Asia. Why? The answer mixes high diplomacy and mundane economics.

The TPP talks were launched without fanfare by former President George W. Bush in March 2008, but it was President Obama who, in November 2009, committed the US to work with the so-called P4 countries to create "a regional agreement that will have broad-based membership and the high standards worthy of a 21st century trade agreement."<sup>2</sup> The following year President Obama put forth an ambitious goal: finishing negotiations by November 2011, in time for the Honolulu summit of the Asia Pacific Economic Cooperation Forum (APEC).

So why did President Obama put so much effort into an agreement when the then-nine members represented a meager 5 percent of total US merchandise trade? Three answers: China, China, and China. China's rapid growth has fostered an assertive geostrategic behavior marked by claims in the South and East China seas, continued support of North Korea, and modest steps toward a blue water navy. On the economic side, China's burst as the world's assembly plant has challenged US and other manufacturing producers around the world. Meanwhile, Asia generally, and China especially, promise to be the world's growth pole for the next 20 years. The US does not want to be disadvantaged in this booming market.

Against this backdrop, the TPP became Obama's chosen vehicle to strengthen the US political-economic footprint in Asia. Foremost, the high standards of liberalization envisaged in the TPP template - if adopted across Asia, including China - will entrench market practices and precepts in the world's most dynamic region. Moreover, if the TPP agreement is successfully concluded and extended to a good chunk of Asia, it will stimulate trade and investment to the advantage of all parties. However the cluster of eight TPP countries surrounding the US in mid-2011 was too small to deliver much bang. To make a significant impact, politically and economically, the TPP had to expand its founding membership to include large regional players, notably Japan and Korea in Asia, and Canada and Mexico in North America.

### 3.2 State of Play

Today, the US has trade agreements with only three Asian-Pacific economies - Australia, Singapore, and Korea. China, by contrast, has trade agreements with Hong Kong, Macao, ASEAN, New Zealand, and Singapore, and is preparing to engage in talks with India, Japan, and Korea. The scorecard says it all: the US is far behind in commercial diplomacy. The best path forward is an expanded TPP.

The current TPP roster includes Australia, Brunei, Chile, Malaysia, New Zealand, Peru,

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<sup>2</sup> The P4 countries are Brunei, Chile, New Zealand and Singapore. President Obama's speech was delivered at Suntory Hall, Tokyo, Japan on November 14, 2009

Singapore, the US, and Vietnam. These countries have a combined GDP of USD 17 trillion, about a quarter of world GDP; but excluding the US, aggregate GDP totals USD 2 trillion, only 3 percent of world output. A similar story can be seen in trade. Trade in goods and services (exports plus imports) of the TPP participants total USD 7 trillion; excluding the US cuts the figure by two-thirds. The agreement needs big players like Japan and Korea to make TPP a credible Asian force, and it needs Canada and Mexico to live up to the name of TPP. At the Honolulu APEC Summit held in November 2011, the groundwork was laid for adding these four countries, which will boost the combined GDP of the enlarged TPP roster to USD 26 trillion, and the combined trade in goods and services (exports plus imports) to USD 11 trillion.

Adding Japan and Korea to the agreement will pose a watershed moment in Asian regional architecture. The choice would be clear: the Asia-only integration model now growing around China versus the more inclusive Asia-Pacific model contemplated by TPP. In fact, the TPP envisages an eventual Free Trade Agreement of the Asia-Pacific (FTAAP), including China and all of ASEAN. The FTAAP, created this way, would forge trans-Pacific commercial links on terms agreeable to the U S and its Asian allies who worry about China's state-centered and mercantalistic economic model. China's trade surplus was not significant in the 1990s, amounting to just USD 25 billion in 2003, but may be close to USD 200 billion in 2011. Continued growth along this path will cause serious macroeconomic problems in a number of countries, not only the US.

Economic concerns are augmented by security fears. Territorial disputes over the South China Sea frighten claimants that lack the military muscle to stand up to China - Brunei, Malaysia, Philippines, Taiwan and Vietnam. China's continued support of North Korea, partly to forestall unification, irritates South Korea. China's naval expansion toward blue water capability is another worry. The Beijing leadership declared that China "will stick unswervingly to the path of peaceful development, and will never seek hegemony now or in the future."<sup>3</sup> But China's construction of an aircraft carrier and its partnership with Pakistan to access ports in the Indian Ocean may create capabilities that could support bolder intentions.

Of course the TPP cannot, by itself, put to rest the range of political and economic challenges that inevitably accompany China's rise as a world power. But at this juncture, the TPP looks like a critical component of a broader US strategy.

### 3.3 Elements of the TPP Package

Three main elements constitute the TPP package: first, the substantive chapters that launch the agreement and establish a template for new adherents; second, the timeline for translating talk into a trade pact; and third, the path toward broader regional integration.

#### 3.3.1 Substantive chapters

Nearly all the substantive chapters will be the object of intense negotiation. Here we single out just a few contentious areas.

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3 Buckley, C. and Blanchard, B. "China Shows Off Its Expanding Navy." Remarks by Hu Jintao, President of the People's Republic of China, Reuters, 2009. Available at <http://af.reuters.com/article/idAFTRE53M33H20090423>.

### 3.3.2 Services and investment

Key areas for service and investment liberalization are finance, telecommunications, and electronic commerce (E-commerce). The US will push for GATS-plus market access for financial firms, including the right to establish a commercial presence, 100 percent ownership, and cross-border delivery without a commercial presence. On telecommunications, a GATS-plus agreement will ensure free access by joint ventures and 100 percent ownership. For E-commerce, the focus will be on equal treatment for electronically delivered goods and services compared with similar products delivered physically. This will include the elimination of non-tariff barriers NTBs on digital media such as software and videos.

The Korea-US FTA will be advocated by the US as a template for TPP negotiations, since it contains very high standards. Another model will be the New-Zealand-Malaysia pact, which includes GATS-plus market access commitments in education, environment, maritime, tourism, management consulting, and veterinary services. It also guarantees MFN treatment in engineering and computer services. New Zealand and Malaysia agreed to review their services commitments “with a view to further services liberalization, within two years of the Agreement’s entry into force.”<sup>4</sup> This sort of “evergreen” provision will be attractive to TPP negotiators.

### 3.3.3 State-owned enterprises (SOEs)

State-owned enterprises (SOEs) are important in Vietnam (for example, all telecommunications are state-run) and in Japan (Japan Post ranks among the world’s largest banks and insurers), and SOEs often receive preferential treatment via low-cost government capital, exemptions from normal regulation and taxation, and favourable procurement contracts. These features concern US, Australian, and New Zealand negotiators: they recognize that SOEs are a fact of life, but they seek a level playing field for private companies. The potential membership of China in a TPP pact makes the SOE chapter absolutely vital. The chapter will likely call for competitive neutrality between SOEs and private enterprises and a high degree of transparency in SOE operations, including their financial structure.

### 3.3.4 Intellectual property rights

Developing countries sometimes argue that excessive protection of IP rights puts them at a disadvantage. By contrast, the US and other advanced countries argue that strong IPR standards are crucial for promoting innovation and combating patent piracy and copyright infringement. The TPP talks will follow the US playbook, but how far they go remains to be seen. The US proposal would give copyright holders the exclusive right to control the importation of legitimate copyrighted goods. This would effectively stop the practice of “parallel trade” where a copyrighted good is traded between countries - without the consent of the copyright holder - to take advantage of price arbitrage. While the US has domestic laws that prevent parallel trade of copyrighted goods, such language has not been included in its FTAs. Getting the language in the TPP will establish a benchmark for Asian countries that have a particularly poor record on IP enforcement.

For the pharmaceutical industry, the main points of contention relate to patent linkages, term extensions, and data exclusivity. The US position on patent linkages advocates a mandatory “link” between marketing approval for generic drugs and the expiration of the pioneer drug patent – meaning no party may approve the marketing of a generic drug while the original

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4 New Zealand Ministry of Foreign Affairs and Trade (MFAT). *New Zealand-Malaysia Free Trade Agreement*, Key Outcomes. Wellington, 2011. Available at <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Malaysia/Key-Outcomes.php>.



patent is still in force. The US position on term extensions would require TPP countries to compensate for delays in patent or marketing approval with longer patent terms. And the US position on exclusivity would require TPP countries to ensure *exclusive* rights to the patent holder of test data for five years, effectively prohibiting another company from using the same data to obtain marketing approval for a generic drug with identical properties.

### 3.3.5 Agriculture

Market access for sensitive products like dairy, beef, and rice are particularly contentious. Dairy positions are divided between US negotiators, who prefer to focus on technical barriers to trade (TBT) and sanitary and phyto-sanitary (SPS) issues rather than liberalizing tariffs and quotas; and others like New Zealand who are pushing for full tariff and quota liberalization. Adding Japan and Canada to the mix will complicate matters as both countries have a combination of high protection and supply management systems that are deeply entrenched in domestic politics.

Beef and rice issues will erupt as the TPP expands to include Japan, Korea, ASEAN members, and eventually China. Past disputes on beef imports between the US, Korea, and Japan will resurface, but the Korea-US deal on beef set a precedent that Japan and others may have to follow. This includes a commitment to phase out restrictive tariffs. On rice, Malaysia, Japan, and Korea will likely push to maintain existing tariffs to blunt competition from lower cost producers like the US, Australia, and Vietnam.

### 3.3.6 Dispute settlement

It remains to be seen how far the parties will go in creating a regional dispute settlement system patterned after the WTO system. One issue has already sparked differences: the investor-state arbitration chapter. Many countries argue that an investor-state arbitration system impedes governments from regulating dangers in the environment, public health, and safety. In fact Australia is strongly opposed, arguing that it does “not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses.”<sup>5</sup> The US on the other hand argues that foreign investors are sometimes subject to discriminatory expropriation and regulatory takings and will press for an investor-state chapter in the TPP.

## Timeline

President Obama’s ambitious goal of concluding initial negotiations before the APEC Summit in November 2011 was clearly not achieved. The goal post was then pushed back to the end of 2012, but that deadline is also in question. With progressive enlargement, the nature of the TPP has changed: it is no longer a small group of “like minded” countries negotiating a “gold standard” pact. Instead, the TPP club, even at 9 members and certainly with 13, embraces diverse countries both in economic and political character. The chapters mentioned above are just a sample of the provisions that will have to be negotiated, including “frontier subjects” that have not been covered in previous trade pacts.

Finally, the US president has no negotiating mandate from Congress. In turn, this means that TPP partners may be reluctant to put their best offers on the table, fearing that the US Congress will ask for more before ratifying a pact. The painful haggling prior to Congressional ratification of the Korean and Colombian FTAs is well known in Asia. In practice, this means

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5 Australian Department of Foreign Affairs and Trade (DFAT). *Gillard Government Trade Policy Statement: Trading Our Way To More Jobs And Prosperity*. Canberra, 2011. Available at <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state>

that President Obama (or his successor) will need something like Trade Promotion Authority from Congress before the talks get down to hard points. Trade Promotion Authority (also known as “fast track”) allows the President to negotiate a trade deal that Congress can vote up or down, but cannot amend or filibuster. In the absence of this authority, the timeline for completing a deal will inevitably be extended, with 2013 looking like the earliest possible date.

### 3.4 Broader Regional Integration

The long-term vision for regional integration entails a contest between the Asia-centric track and the TPP track. The Asia-centric model proposes intra-Asian integration through ASEAN + 1, ASEAN + 3 (Japan, Korea, and China) and ASEAN + 6 (East Asian FTA plus Australia, New Zealand, and India). Separately, China, Japan, and Korea have embarked on talks that point to a Northeast Asia trade area (CJK). Only at a much later date, when the Asian template is firmly established around its Chinese core, would this path include all the economies of APEC, including those in the Western Hemisphere.

The TPP model on the other hand initially proposed a first tranche of the core nine countries that has now been expanded to include Japan, Korea, Canada, and Mexico. Participation of the additional four countries is critical to the long-term strategy of promoting economic integration in the Asia-Pacific region, bringing China and all of ASEAN into the TPP.

Apart from the sequence of country coverage, the overriding difference is the contest of templates. The TPP envisages deep, policy-led integration, ensured by hard treaty obligations. Members will need to take serious, and sometimes painful, steps to ensure market access to their TPP partners, protect intellectual property, and ensure fair play by SOEs. By contrast, the Asia-centric model codifies liberalization mainly to the extent already practiced by member countries. In this critical respect, the Asia-centric model follows the ASEAN path of thin liberalization and numerous exceptions.

Looking ahead 20 years, either path could lead to a pact labeled the Free Trade Area of the Asia-Pacific - but the scope would differ greatly between the TPP model and the Asia-centric model. Alternatively, the competing paths could lead to a sharp divide between a US-led bloc and a China-led bloc, with security as well as economic overtones. As always, the future is up for grabs.

### 3.5 Conclusion

Reaching a trade agreement among the initial core nine members did not promise to be easy. Expanding the talks to make a truly Asia-Pacific agreement with an additional four members will be even more challenging, but is absolutely necessary for the US to maintain its economic standing in Asia. China is leaps ahead of the US in terms of regional agreements, and US firms could be seriously disadvantaged if the Asia-centric model becomes the dominant form of integration. The US has one strong factor working in its favour. For a mixture of political and economic reasons, its Asian allies are showing more interest in the TPP model than the Asia-centric model. Stay tuned.

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Buckley, C. and Blanchard, B. "China Shows Off Its Expanding Navy." Remarks by Hu Jintao, President of the People's Republic of China, Reuters, 2009. Available at <http://af.reuters.com/article/idAFTRE53M33H20090423>.

New Zealand Ministry of Foreign Affairs and Trade (MFAT). New Zealand-Malaysia Free Trade Agreement, Key Outcomes. Wellington, 2011. Available at [www.mfat.govt.nz](http://www.mfat.govt.nz)

## 4. AFRICA'S TRIPARTITE PREFERENTIAL TRADE AGREEMENT AND THE PTA-WTO COHERENCE DEBATE: YIN AND YANG

*Peter Draper*<sup>1</sup>

Only a healthy multilateral trade regime can solve some key future trade issues, notably reduction and elimination of subsidies for agriculture, fisheries, and fossil-fuel energy. These are particularly harmful to sustainable development in an era of increased water scarcity, depleted fish species, and climate change. On the other hand, the success of the multilateral trade regime raises new challenges that require adapted rules, and some of these new rules may initially be provided by PTAs. This dilemma underscores the “coherence debate”<sup>2</sup> concerning how PTAs relate to the WTO, and particularly how the former can be made more compatible with the latter.

The proposed PTA among three African regional economic communities (RECs), namely the Southern African Development Community (SADC), the Common Market for Eastern and Southern African States (COMESA), and the East African Community (EAC),<sup>3</sup> provides one angle on the coherence debate. The problems with African PTAs are well known.<sup>4</sup> Perhaps less well-known is the widely shared desire to create an African Economic Community by 2025. A substantial<sup>5</sup> obstacle in that path is the continent's fragmentation into 14RECs. Therefore, one of the Tripartite-PTA's (T-PTA) primary stated objectives is to ameliorate the problem of overlapping memberships among the three constituent RECs.<sup>6</sup> Much preparatory work has been done, and negotiations are set to commence in 2012. If successful, the T-PTA would result in a PTA covering 26 countries, or nearly half the continent in terms of nation states. That would be a significant achievement for the continent. It could also be a significant contribution to the global challenge of building greater coherence between PTAs and the WTO.

### 4.1 Opportunity Statement and State of Play

The relationships between PTAs and the WTO have been the subject of much discussion. Recently the debate has received renewed attention, most notably in the WTO's Annual Trade Report.<sup>7</sup> The report notes that the ground has shifted in many ways since the original

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2 PTAs represent a departure from the WTO's most favoured nation (MFN) principle of non-discrimination in trade. However, the agreements are allowed conditionally, either under Art XXIV GATT, or, for developing countries, the Enabling Clause. Article V of the GATS outlines provisions for trade pacts in services.

3 Respectively the Southern African Development Community, Common Market for Eastern and Southern Africa, and East African Community.

4 Draper, P. “Rethinking the (European) Foundations of African Economic Integration: A Political Economy Essay,” *OECD Development Centre Working Paper 293*, 2010.

5 The primary obstacle in this author's view is that the ambition is too grand to be realistic. The continent is hugely diverse and underdeveloped, conditions not propitious to grand integrative schemes. See Draper (2010).

6 Others are to enlarge the markets for goods and services, enhance customs cooperation and promote broader trade facilitation.

7 World Trade Organization. *Annual Report - The WTO And Preferential Trade Agreements: From Co-Existence To Coherence*. WTO, Geneva, 2011.

debates began after the inception of the GATT. Notable among these shifts is the declining relevance of import tariffs as barriers to international commerce and the rise of regulatory “behind the border” measures. Underlying these shifts is the growth of global value chains or “production unbundling,” which requires minimization of transactions costs across borders. Consequently PTAs have increasingly shifted into regulatory issues, spanning market access and harmonization, constituting “deep integration” or convergence in “behind the border” regulations and institutions. This means the impact of PTAs on non-parties, and by extension their relationships with WTO disciplines, are more difficult to measure than the standard trade creation/trade diversion toolkit allows for.<sup>8</sup>

Therefore, as the WTO report notes improving coherence between PTAs and the WTO is challenging. They identify four arenas in which this agenda could be explored:

1. Lowering MFN tariffs;
2. Filling gaps in the WTO’s legal framework;
3. Adopting a “soft law” approach with a view to establishing “hard law” disciplines; and
4. Multilateralizing regionalism.

The report notes that the impasse in the DDR has effectively stymied (1) and (2). Logically, MFN tariff liberalization is now the preserve of unilateral trade policies. With respect to (3) members agreed to the establishment of a transparency review mechanism, which could lead over time to the development of a code of good practices, and then negotiations aimed at improving hard law mechanisms. However, the members’ inability to clarify existing rules under the current Doha mandate does not lead to much optimism regarding this path. Regarding (4) the report notes that the WTO could play a role as a forum for coordination, standardization, and harmonization of preferential rules of origin; or identifying “best practices” in PTAs. They also note the possibility of members agreeing to “critical mass” decision-making or plurilateral approaches to negotiations.

The T-PTA potentially fits into the “multilateralizing regionalism” component of the WTO’s coherence agenda. Its core philosophy, as outlined by the secretariats of the three RECs, is to remove barriers to trade within the combined geographic space of its constituent states; beginning with tariffs then proceeding to regulatory barriers, including harmonization. This vision fits with the broad thrust of PTA evolution in terms of the substance of PTA negotiations, but goes where relatively few have gone in terms of the “widening” ambition relating to parties to the agreement.

Unfortunately other attempts along these lines elsewhere in the world have not registered great success, notably the Free Trade Area of the Americas and the trade liberalization component of APEC. The latter may now be changing as the Trans-Pacific PTA gathers momentum, but its ultimate success remains to be seen. Involving many disparate states and groupings in a grand negotiation process generates formidable political economy obstacles.

Clearly the political economy of the T-PTA will determine whether the vision is likely to be achieved or not, and therefore what significance it holds for the coherence debate. Currently political economy forces within the T-PTA partners seem to be converging on a more limited interpretation of the PTA mandate. While the three REC secretariats evinced a bold vision of tariff and regulatory liberalization, and regulatory harmonization, the member states

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<sup>8</sup> Trade creation refers to new trade originating owing to the new PTA; trade diversion refers to non-parties’ exports losing out in the parties’ markets owing to the establishment of trade preferences among the latter. Economists can in principle measure both since trade volumes and values are known, as are the tariff concessions. It is much more difficult to measure the impacts of changed regulations.

have postponed negotiations over regulatory liberalization and harmonization to a second, indeterminate phase to be commenced once the tariff negotiations are concluded. One area of consensus is the need to coordinate infrastructure investment plans. This entails an agenda that will take many years to unfold. Since the tariff negotiations are likely to take considerable time to conclude - if indeed they do reach a successful conclusion - the prospects for deeper integration currently appear quite slim. Obviously, this would sharply limit the relevance of the T-PTA to the coherence debate and processes.

## 4.2 Responses

If the T-PTA is to serve as some kind of model in the coherence debate, the benefits of pursuing the “multilateralizing regionalism” approach need to become self-evident to the negotiating parties. Since those benefits are intrinsically linked to global value chains and production networks, a phenomenon that until now has almost entirely bypassed sub-Saharan Africa, this is a tough sell.

Nonetheless, there may just be opportunities opening up in the world economy that could support this approach.<sup>9</sup> In the medium term (say five to ten years) the underlying cost structures driving value chain location could change dramatically, specifically:

- I. Energy and associated transportation costs are likely to continue rising, as the cost of fossil fuels increases and policy measures targeted at carbon emissions intensify.
- II. Similarly, as new players from emerging markets secure access to various resources for inputs into production processes, competition will increase and the prices of those resources are likely to rise. Export restrictions, if not properly regulated, are also likely to intensify, placing further upward pressure on prices.
- III. China is at the centre of global value chains in manufacturing, particularly in labour-intensive sectors. As China continues to shift its growth model away from reliance on exports toward domestic consumption, wage costs are likely to rise sharply and the currency should continue its appreciation. Hence, the ‘China cost’ is likely to continue rising, assuming the 12th Five Year Plan is diligently implemented. However, Chinese productivity growth continues to amaze, and the western provinces have hundreds of millions of workers eager to join the ‘new China,’ so bold predictions of massive relocations should be tempered.
- IV. Information technology costs are likely to be driven lower through intense technological competition. This probably has positive implications for those countries specializing in emerging ‘services value chains’ but also opens up opportunities for other countries wishing to grab a slice of the action.

Consequently the geography of value chain location is likely to shift, potentially fundamentally. Hence the rules governing value chain operation need to be revisited with a view to updating them so that the new emerging context can evolve optimally.

Sub Saharan Africa, or more accurately certain countries or sub-regions, could be one of the main beneficiaries of such global value chain shifts, provided policy reforms aimed at creating appropriate investment environments are rapidly undertaken. In this light T-PTA member states have a relatively narrow window of opportunity to position their broad region in this emerging opportunity context.

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<sup>9</sup> The following is adapted from a report prepared by the author in his capacity as chairman of the World Economic Forum’s Global Agenda Council on trade.

This means focusing negotiations on issues where transactions costs are highest, since these are of major concern to the multinational companies that drive global value chains. Elsewhere I have argued<sup>10</sup> that the ensuing schemes should eschew institution-intensive forms of integration as far as possible, and rather focus on trade facilitation in its broadest sense. Linking this to the “multilateralizing regionalism” agenda suggests that T-PTA members should prioritize the following issues:<sup>11</sup>

- Reducing the most blatant costs imposed by constituent PTAs, in particular inconsistent and discriminatory PTA rules of origin, by harmonizing such rules within liberal parameters. This will undoubtedly prove challenging;
- Prioritize the design and implementation of ‘mutual recognition’, for instance when handling one of the thorniest issues in international trade—namely, TBTs;
- experiment with ‘mutual evaluation’ of respective regulations, a key issue in services;
- improve the overall design of the T-PTA by defining WTO-compatible best-practices;
- Include accession provisions for candidate countries with the same commitments as those adhered to by the founding PTA members.
- This seemingly limited agenda will prove very challenging to implement, but if pursued in tandem with successful infrastructure and tariff liberalization, thrusts could position the region and its member states favourably in the unfolding race to attract global value-chain investments.

### 4.3 Conclusion

The agenda outlined above, even if implemented, is likely to have only marginal implications for the coherence debate. That is because African states are rule-takers in the global trading system, not rule-shapers.<sup>12</sup> Hence, the primary objective behind the strategy should be to position the T-PTA region in the global value-chain space. Fortunately, the two objectives are congruent, in other words pursuing a “multilateralizing regionalism” agenda would serve the region’s interests at the same time as contributing, albeit marginally, to the coherence agenda. It is to be hoped it will be pursued.

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10 Draper, op.cit.

11 These are taken from World Economic Forum. *Global Agenda Council Reports 2010*. Retrieved from website: [www.weforum.org/pdf/globalagenda2010.pdf](http://www.weforum.org/pdf/globalagenda2010.pdf)

12 Draper, P., and Qobo, M. “Multilateralizing Regionalism: Case Study Of African Regionalism.” in *Multilateralizing Regionalism: Challenges for the Global Trading System*, ed. R. Baldwin and P. Low (Cambridge: Cambridge University Press, 2009).

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## 5. INTELLECTUAL PROPERTY, PREFERENTIAL TRADE AGREEMENTS AND THE MULTILATERAL SYSTEM

*Pedro Roffe*<sup>1</sup>

### 5.1 Introduction

The Trade Related Intellectual Property Rights Agreement (TRIPS) has been one of the most pervasive and at the same time most contentious instrument adopted as part of the Final Act of the Marrakesh Agreement establishing the WTO. Its influence and relevance particularly from a developing country perspective has been profound. No other international treaty in the evolution of the international intellectual property architecture has been so influential with lasting implications in terms of accelerating major domestic reforms inspired in the TRIPS minimum standards of protection and enforcement.

Four major features of the agreement have had major implications: first, the combined effects of the national treatment and most favoured nation principles; second, the mere concept of minimum standard that translates also into the possibility that countries- not being obliged to do so- may implement in their domestic regimes more extensive protection than that required by TRIPS “provided that such protection does not contravene the provision of this Agreement.” (Article 1.1); third, contrary to the prevailing state practice at the time, patent protection should be available in all fields of technology; and fourth, subjecting intellectual property relations, in cases of non-compliance, to the WTO dispute settlement mechanism that includes the potential for commercial retaliatory and cross retaliatory measures.

### 5.2 The Issue

The final adoption of TRIPS predicted -particularly for the developing world- a period of adjustment to the new standards in areas such as new obligations to upgrade and strengthen different intellectual property disciplines (e.g., extend patent protection to all fields of technology such as products and processes for medicines) and stringent measures on the enforcement of intellectual property rights (IPRs). The major achievements of TRIPS, with inclusive cross-references to the classical intellectual property treaties administered by the World Intellectual Property Organization (WIPO), reaffirmed the virtues of the multilateral process and the possible end to unilateral trade measures that prevailed in the period leading to the establishment of the WTO. It also signalled the determination to continue working within the multilateral system toward reducing “distortions and impediments to international trade ... taking into account the need to promote effective and adequate protection of IPRs, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”<sup>2</sup>

While the TRIPS minimum standards principle anticipated the possibility that countries could accept more extensive obligations, it did not predict their possible implications for the multilateral system. In this sense, the proliferation of PTAs has been one of the means of expanding the TRIPS obligations and the emergence of what has been popularized as the TRIPS-plus world. PTAs incorporating TRIPS-plus intellectual property provisions, however, is

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1 Mr. Roffe is Senior Associate at ICTSD.

2 Preamble TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

not yet a generalized phenomenon but a significant one in terms of a trend toward upward harmonization of norms and of potential impacts on the evolving international intellectual property architecture at the margin of the multilateral system. In other words, while TRIPS meant the reaffirmation of the prominence of the multilateral system, PTAs in the particular sphere of IPRs have been a vehicle to bypass the multilateral system and alter the balance of rights and obligations established by the agreement, notwithstanding the clear affirmation by the parties of “their rights and obligations with respect to each other under the TRIPS Agreement.”

The policy framework and the political economy of concluding PTAs with TRIPS-plus provisions differ and respond to the different circumstances that prevail between trading partners. While cognizant of these differences, the partnerships sought in PTAs in the area of IPRs when they involve low-, middle-, or high-income developing countries pursue similar goals and the general observations made here apply to all cases.<sup>3</sup>

### 5.3 The Challenges

PTAs, through the combined effect of national treatment and MFN principles, constitute an important trend toward moving beyond the TRIPS minimum standards by reducing options and ambiguities and generally by consolidating gains in the direction of upward and strengthened protection and enforcement of IPRs. The phenomenon is, however, not universal but it already includes - with differences in intensity and comprehensiveness - according to our count, more than 50 middle- and high-income economies namely in Latin America and the Caribbean, the Mediterranean, and the Middle East, Africa, and Europe. This trend does not include, yet, LDCs or major emerging developing economies (e.g., India, Indonesia, Mercosur countries, and Thailand). There is a need to bear in mind, however, that ongoing processes are under way with some of these countries, as it is the case of Mercosur and India actually negotiating PTAs with the EU that according to the ambitious objectives of the latter trading bloc might include comprehensive intellectual property (IP) chapters.

The incorporation of IP provisions is one of the main incentives to major trading partners to engage in PTA negotiations due to, *inter alia*, the active and influential role played by some industrial sectors that see the bilateral or regional track as a more productive and issue-oriented process to go beyond TRIPS. In this respect, one obvious motivation for major trading partners in this front is precisely to achieve a level of protection and enforcement that is not possible to obtain at the multilateral level due to resistance and solidarity among like-minded developing countries. As a result, the PTAs' negotiating agenda is crowded with demands conventionally raised by those same industrial sectors and few of the concerns traditionally raised by developing countries in multilateral forums are successfully reflected in the PTAs.

One major challenge for developing countries relates to the implementation of the PTA commitments adding new layers of complexities to those of TRIPS that in a number of cases are still works in progress. As in the case of TRIPS, implementation of these new standards is not a straightforward exercise; it demands important resources and institutional capabilities not common in many cases.

At the same time, the implementation of these TRIPS-plus commitments is subject to closely monitoring processes that often challenge the “freedom of implementation” principle of TRIPS in terms of determining “the appropriate method of implementing the provisions of

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3 We refer to PTAs as the generic term encompassing all trade agreements of a bilateral or regional character whose general purpose is to liberalize trade among the partners, including chapters that cover, generally, in a comprehensive manner IP provisions.

the Agreement within their own legal system and practice.” (Article 1.1). Implementation is further subject to strict follow-up processes and by regular annual reviews of country compliance with IP obligations, by special committees established in the PTAs to follow up their implementation or through close scrutiny by business associations.

In many respects, IP chapters translate in asymmetric processes resulting in the transposition of legal systems or regimes prevailing in the major trading partners. For example, the US model epitomizes the legislative mandate received by the United States Trade Representative (USTR) illustrated by the expired Trade Promotion authority Act of 2002 that, among others, aims at “ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the USA reflect a standard of protection similar to that found in US law.”

In the case of the EU, the central model has drastically evolved. The earlier versions sought to consolidate the implementation of TRIPS and commit new partners to “the highest international standards of protection,” expanding the international architecture—via adhesion to existing IP treaties. Recent PTAs tend to parallel the level of ambition of the US: they are more comprehensive in scope; go beyond the earlier TRIPS consolidation model; include extended protection for pharmaceutical products; extend the protection of geographical indications (GIs) for “agricultural and foodstuffs products, wines, spirit drinks ,and aromatized wines,” and deal extensively with enforcement issues. The degree of ambition, as in the case of the US, is replicated in a EU official 2011 document: “[i]n negotiating FTAs, the intellectual property rights clauses should as far as possible offer identical levels of intellectual property protection to that existing in the EU while taking into account the level of development of the countries concerned.”

This importation of regimes, however, does not fully take into account difference of situations: lack of appropriate safeguards to strike adequate balances between private and public interests and broader considerations prevailing in weaker economies, such as, inadequacy of institutions, experienced and well-trained adjudicatory bodies, a professional and critical IP bar, and IP scholars still in a formation phase. In many respects, the TRIPS original “grand bargain” - transitional adjustment periods, policy space in implementation, the underlying public policy objectives of national systems, including developmental and technological objectives -- achieved at the end of the Uruguay Round has been altered in a significant manner

## 5.4 A Way Forward?

PTAs are a legitimate offspring of the multilateral system but the profound implications in the case of IPRs appear to have outgrown the ancestor. Is this what TRIPS anticipated? As argued in another context, PTAs are here to stay, and this includes the case of agreements of a TRIPS-plus nature. The major difference with agreements reached in multilateral processes in the IP context is that the latter are fully transparent and exposed to public scrutiny. For better or the worse, multilateral processes contribute also to the formation of like-minded alliances that are conducive in many respects to the achievement of common interests and balanced negotiating objectives. These features are not present in PTAs particularly those of a bilateral nature.

There is a case for re-establishing the authority of the WTO and particularly for the Council for TRIPS in its monitoring function of the “operation of this Agreement” and “in particular, Members’ compliance with their obligations.” At the same time, it would be a legitimate undertaking to consider how new agreements are fully consistent with TRIPS in line with the prescriptions of Article 1.1. In this respect, it might be appropriate for all parties concerned to understand the boundaries of the “more extensive protection” allowed by TRIPS in Article

1 and under what circumstances that extensive protection might eventually conflict with the provisions of the agreement.

In other words, the Council should be authorized to consider the nature of the TRIPS-plus provisions and their pertinence in achieving the objectives and principles of the agreement; matters that, in case of differences between the parties, should be left to the dispute settlement mechanisms provided in the PTAs that in general do include the WTO DSU mechanism. The role of the Council for TRIPS should be limited to what is provided in the agreement that, among others, allows for members to have the opportunity of consulting on matters related to the trade-related aspects of IPRs. This should be in line with the basic objectives of PTAs that as a matter of principle, as noted, do reiterate the rights and obligations of TRIPS.<sup>4</sup> This function should be performed in coordination with relevant WTO bodies (e.g., the Committee on Regional Trade Agreements).

It is pertinent to recall that among the transparency provisions of TRIPS -Article 63- Member states shall be prepared to give access or supply information “in sufficient detail” in cases where a Member has reason to believe that a bilateral agreement in the area of IPRs affects its rights under TRIPS. This reinforces the authority of the Council to have a say on PTAs. This could be done for example by an agreed decision of the Council establishing a checklist of issues to be taken into account in the negotiations of PTAs.<sup>5</sup>

There has been important work carried out since the TRIPS Agreement came into force to provide guidance to future work of the Council on PTAs. Among others, the work of the WTO dispute settlement mechanism in the different IP cases has provided useful general principles of interpretation of the agreement laying the scope and edges of some of its provisions. Scholarly work has also provided food for thought regarding the possible limits and binding boundaries of the principle of minimum standards by suggesting possible ceilings, such as in cases of competition, dissemination of technology, access to information, public health, and human rights.<sup>6</sup>

The overseeing by the Council should re-establish its authority on trade related IP matters. It should further achieve its goal of reducing “distortions and impediments to international trade ... taking into account the need to promote effective and adequate protection of IPRs, and to ensure that measures and procedures to enforce IPRs do not themselves become barriers to legitimate trade.” The impression given by PTAs, including TRIPS-plus provisions resembles the origins of the negotiations at the time of the Uruguay Round when a group of discontents with the way business was being carried out in the WIPO brought the consideration of IPRs into the GATT. Again, in order to re-establish the pre-eminence of TRIPS, IPRs related trade agreements negotiated under its umbrella - but at its margins -

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4 See, e.g., ARTICLE 229 EU-Central America association agreement: NATURE AND SCOPE OF OBLIGATIONS: “1. The Parties shall ensure an adequate and effective implementation of the international treaties dealing with intellectual property to which they are parties, including the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the “TRIPS Agreement”). The provisions of this Title shall complement and further specify the rights and obligations between the Parties under the TRIPS Agreement and other international treaties in the field of intellectual property.”

5 This was done by the Council in the case of enforcement issues. See Council for Trade-Related Aspects of Intellectual Property Rights. World Trade Organization, *Checklist Of Issues On Enforcement (IP/C/5) 1995*. Retrieved from website: [http://www.wto.org/english/tratop\\_e/trips\\_e/ipc5\\_e.pdf](http://www.wto.org/english/tratop_e/trips_e/ipc5_e.pdf).

6 See Ruse-Khan, H. G. and Kur, A., *Enough is Enough - The Notion of Binding Ceilings in International Intellectual Property Protection*. Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-01, 8 December 2008. Available at SSRN: <http://ssrn.com/abstract=1326429> or <http://dx.doi.org/10.2139/ssrn.1326429>.

should be brought back and allow the Council to have a say on it. That was the fundamental justification to incorporate IPRs into the system: their trade relatedness. Tackling this issue and not ignoring it would decrease tensions and make PTAs more palatable as an integral part of the system and a genuine spinoff of TRIPS. Finally, it would give confidence to the multilateral system and provide further assurance that the TRIPS “grand bargain” continues to reign.

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## 6. HOW TO ENCOURAGE NETWORK TRADE RULES INTERCONNECTIONS? AN APPLICATION TO THE CASE OF NON-TARIFF BARRIERS<sup>1</sup>

*Marcel Vaillant*<sup>2</sup>

### 6.1 Introduction

The current international trade agenda is usually dominated by market-access issues. How much access in my own market should be provided in order to get better access conditions in neighbors' markets? The fragmentation of international economic activity has strengthened the link between protection of one's own market and foreign market access conditions. Baldwin and Nicoud (2008) have pointed out that this is good news from the perspective of expected results, which are related to the endogenous mechanisms of trade liberalization<sup>3</sup>. Unilateral domestic trade policies will increasingly become more open if countries perceive that by reducing their own barriers, this will also reduce their neighbors' barriers. This mechanism seems to have started acting gradually in the conditions of trade in goods and particularly in certain manufacturing sectors that tend to converge to a trade of zero for zero. However, there are still areas where a negotiating effort is required as to get improvements in markets of deeper distortion (certain sectors of agriculture and manufacturing). The trade liberalization topics included in the last package of the Doha Round negotiations contained these topics, while proposing a possible path to reach important results in this direction, but the world is still awaiting improvements in this field.

The focus of this paper is different and is also a by-product of the globalization process. As the range of economic activities in the international economy expands, the themes that require necessary consideration in trade agreements also grow. The extension of the set of economic activities in the international economy provokes an extension of the themes that require necessary consideration in trade agreements. The adaptation speed in the multilateral field is structurally slow. Countries are less willing to establish rules on the basis of MFN than within PTAs. Hence the demands to expand and deepen in new topics have been channelled through the proliferation of preferential trade agreements. The content of commitments and themes in the agenda of international trade negotiations between national jurisdictions has widened: from the trade of goods to the trade of services, as well as to the mobility of some production factors. At the same time, the field where commitments are achieved has increased exponentially: bilateral agreements, plurilateral agreements, agreements between groups of countries, and the extension of agreements. For a diagnosis of what is happening, it is necessary to build a complex and large matrix of information that crosses the fields of commitment (columns of the matrix) with its issues or contents ("lines").

The biggest threat that looms over the international trade system is the consistency,

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1 ICTSD Trade & Development Symposium 2011. I acknowledge the comments by Professor Marcelo Olarreaga, which I received from a previous version of this brief note.

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3 This mechanism works better in East Asia than in Latin America or sub-Saharan Africa where network trade is more rare. Works better where there is a comparative advantage in the production of a complex good. This comparative advantage may be endogenous too. Where there is too much regional protection, the production of complex goods in networks becomes more difficult.

applicability, and use of the established set of rules. What is committed in a certain “line” of the referred matrix is different and often difficult to translate into what is committed in another, and in some cases rules can be openly inconsistent. It is necessary to find issues that enable a systematic approach to this problem to apply a methodology that is plausible of being applied and then replicated to other themes. It is also necessary to obtain a result based on a new working methodology. Pointing in this direction, this paper chooses, within the wider subject related to goods, the topic of non-tariff barriers, which will be more thoroughly developed in the third section.

## 6.2 Problem/Opportunity Statement and State of Play

By shifting the focus of attention from liberalization seeking to improved market access, to the consistency, applicability, and use of established rules in agreements, it becomes meaningless to continue with the procedure of basing the agreement on a single undertaking principle, by which all sectors and issues are agreed upon simultaneously. In this proposal, a phased approach, in which issues are selected in accordance with an increasing degree of difficulty, seems to make more sense. What is being proposed is not an attempt to establish an alternative strategy from the prevailing *status quo*, but a complimentary path in which results could be achieved faster than in conventional multilateral negotiations. The aim is to improve the system through the improvement of its consistency, allocating the scarce political resources of negotiation as efficiently as possible. The required systemic order needs to establish some degree of association between “lines” (agenda issues) and columns (fields of negotiation). This establishes an order of prevalence that defines the most suitable fields to use in each case and to expand from that particular place to the rest of the space. In fact, that association exists. Think of a simplified matrix including agenda issues and negotiation fields (see Table 1).

Given the virtual state of paralysis of multilateral trade negotiations this is an excellent time to deal with this subject. It has been repeatedly pointed out that the threats of excessive fragmentation of the system of international trade rules would be exacerbated in a world where multilateralism is undergoing a period of weakness. The current proposal seeks to achieve the opposite result: strengthen multilateralism by imposing a higher degree of specialization in the agenda and allocating the political resources available for the negotiations on goals or results that are likely to be reached fast.

The world of economic relations works as a network that has interconnection mechanisms that can be differentiated by the subset of countries included in the sample. This lack of harmonization for movements from the jurisdiction of one agreement to another can be expressed as an additional transaction cost and can potentially become an irreversible obstacle leading to the fragmentation of the international trade system as a whole.

To understand the current situation we can think of different types of interconnected systems that require mechanisms that enable them, at a minimum cost, to work efficiently in their interlinkages. A simple example is the one of electric grids: despite the fact of being basic, mature, and associated with a homogenous service, it is possible to find many differences between systems belonging to different national jurisdictions that entail a restriction on mutual interconnectivity. If one adopts the perspective of a travelling user of electronic devices you can see the type of problems we are facing. Different connection-chips are used all over the world. These differences in connection modes can be counted by tens. Being a relatively simple and old problem, universal chips have been invented to overcome this difficulty. Trouble emerges when those chips do not exist. This chips situation is comparable to the current state of the international trade system in many of its agenda topics. It could also be exemplified with physical transportation networks and the capacity to develop interlinkages between different types of transportation and national systems. In this case,

we can observe a transition from isolated national systems with different means of transport that retain a certain autonomy to an integral development of different types of transport that seek to articulate themselves in an international system that links them together. From their very origin information technologies exemplify interconnected systems that were created on a global and universal scale, in contraposition with electric systems that were created on national bases and norms. Even so, it is still possible to present examples of fragmentation in the design of more basic operative systems that can become an obstacle to its proper functioning. Again we see that the system's capacity to properly function depends on its ability to establish interlinkages. The international trade system requires an operative system that works behind all the other existing networks of trade agreements and that provides support and robust functioning. This is precisely the role that the WTO should play, which widely transcends any specific negotiation round in which market access is exchanged on a reciprocal basis.<sup>4</sup>

With respect to the international trading system, multilateralism established exceptions to the MFN principle (discrimination) that enabled the development of multiple preferential commercial agreements, but later multilateralism worked as if these agreements did not exist. The international community built systems that overlap and that work in isolation with very weak interconnections. Only recently, in the Doha Round, a more defined movement can be perceived that tries to consider this other part of the system through the basic and fundamental objective of promoting transparency through an adequate information system.<sup>5</sup>

### 6.3 Responses

This section outlines a concrete proposal and presents a specific example to implement the above proposal. The proposal involves establishing a list of issues that have systemic effects that generate a different negotiation dynamic and set forward a new method. This proposal would involve dealing with issues that are ranked according to their relevance inside the system. Dealing with them on an individual basis decoupled from the conventional agenda that will follow its own known track. This list should be short and essential. Long agendas that include issues of different relevance and with no hierarchy are the starting point of a new failure in trade negotiations. Besides, the proposal involves a new method that combines both the preferential and multilateral spaces. It is also necessary to build or adapt new rules of approval for the consolidation of obtained results. The process should have a defined institutional leadership and the necessary attributes to exercise it.

#### 6.3.1 Non trade barriers (NTBs)

I chose the issue of NTBs applied in the trade of goods, because it is a mature and well-known subject, and there is consensus about the need to advance toward its eradication inside the international trade system.<sup>6</sup> It is a well-known fact that the NTBs erode efforts undertaken in any trade agreement that seeks to reduce barriers in reciprocal trade. As the trade liberalization processes advance, lower tariffs tend to be partially replaced by NTBs

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4 This necessity to concentrate on the systematic aspects and consistency of the international trade system has been pointed out with different intensity over the past years. A central reference in this regard is in Baldwin, R. E. and Low, P. *Multilateralizing Regionalism, Challenges for the Global Trading System*,. Patrick LowWorld Trade Organization, Geneva: Cambridge University Press. 2009.

5 Important steps have been taken in this direction with the creation of the database on RTAs, available online on the ITO web page. There is still a long way to go, as, for example, there is still no consistent and universal database for international trade that contains information on all preferential trade relations and its degree of usage.

6 The WTO's 2012 trade report is on non-tariff barriers.



(both at the extensive margin of new barriers, as well as the intensive margin in the use of pre-existing ones).<sup>7</sup>

The current period of financial and economic crisis has been especially critical in this sense as the use of these measures has proliferated.<sup>8</sup> Several studies illustrate this point. Even when many NTBs have a conjuncture root and are likely to gradually disappear governments' inertia in the application of such measures may prolong the effects. Trade relations are currently affected by what is known as murky protectionism, the proliferation and intensification of the use of unconventional measures with a protectionist objective.<sup>9</sup>

The proliferation of NTBs attacks one of the basic principles that should guide the international trading system as a whole: the transparency of trade rules. Transparency is a cornerstone for the construction of a consistent international system. Saez and Vaillant argue that transparency is a general goal regardless of the level of specific restrictions applied in each of the negotiated rules.<sup>10</sup> It has the advantage that it can be achieved with each country's unilateral effort. Transparency is a prerequisite for any trade negotiation. It is necessary to reclaim it to the partner and it is essential to have the ability to provide it unilaterally. It is a topic where every possible area of rule building is combined.

The distortion effect of a NTB exceeds the concrete size that it may have in terms of an equivalent tariff that generates the same short-term effects. NTBs have prolonged effects through the expectations they generate about the uncertainty related to the rules of future trade and have permanent consequences in the allocation of production, consumption, and trade.

The primacy of the multilateral framework in the BNA issue should be unquestioned. It is unreasonable to justify the existence of NTBs applied on a discriminatory basis.<sup>11</sup> Trade agreements should be designed in a way that exceptions to the principle to the MFN are possible only when the applied trade barriers are known. This might imply a modification of Article XXIV so there are no doubts about its interpretation. It might also require adjustments in the content of many preferential trade agreements. The issue calls for action not only at a multilateral level, but also by implementing a global dynamic of trade agreement adjustments.

### 6.3.2 Case Study

The key is to generate procedures that ensure a friendly link between multilateralism and regionalism that is applied to the detection and elimination of NTBs on the basis of the MFN principle. Regional agreements provoke a dynamic of information exchange between

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7 See Kee, H, Nicita, A. and Olarreaga, M. "Estimating Trade Restrictiveness Indices". *Economic Journal*, 119: 534 (January 2009) 172-199. They show that there is substitution between tariffs and NTBs and that NTBs are the market access problem today (SPS and TBTs more generally).

8 See the ten reports of Global Trade Alert (<http://www.globaltradealert.org>), particularly Evenett, S. "Trade Tensions Mount: The 10th GTA Report". Global Trade Alert, CEPR, London-Geneva, 2011.

9 Baldwin R. and Evenett S. *The Collapse Of Global Trade, Murky Protectionism, And The Crisis*, Institut Universitaire de Hautes Etudes Internationales, Geneva, 2009.

10 Saez, S. and Vaillant, M. "The Negotiation and Management of Regulations in the Trade in Services, 2010", in *The Negotiation and Management of Regulations in the Trade in Services*, World Bank, Washington, D. C., 2010.

11 Note that even NTBs that are applied non-discriminatorily may have a discriminatory effect. See Crozet, M., Milet E., and Mirza, D. "The discriminatory effect of domestic regulations on international services trade: evidence from firm level data" (Unpublished conference paper presented in 2011).

members that is deeper and more detailed than what is possible in a multilateral space. Besides, given the greater relative proximity, higher reciprocal knowledge among members allows a better detection of these barriers. Moreover, possibilities of retaliation are higher and appear quicker and more convenient. All of these elements are oriented in the direction that the scope of the preferential agreements may be used as a stage for a strategy with this objective.

Trade disputes in the context of regional agreements that result in the removal of NTBs must become extensive in the multilateral trading system and their application mandatory on a non discriminatory basis. The system requires the construction of a strong interlinkage between the preferential trade system and the multilateral system, reinforcing compliance paths between them. This creation of fluid and almost automatic interlinkages should gradually extend to other matters.

By reporting the facts of one case we can illustrate the central point of this paper. The case relates to the recent barriers to the imports of refurbished tires into Brazil. This case began as a regional trade dispute (Paraguay and Uruguay against Brazil) and then led to a case in Geneva with the EU in the context of the dispute settlement understanding of the WTO.<sup>12</sup> Since the early 1990s Brazil prohibited imports of used tires.<sup>13</sup> In the past decade, this prohibition was extended to include refurbished tires. In the 2000s, while culminating the process of creation of a free-trade zone within MERCOSUR that liberalized inter-regional trade for these products, a possible trade flow from the region to Brazil was anticipated. Neighbour countries would import used tires from the rest of the world, refurbish them in the region and export them to Brazil. To avoid this trade flow, Brazil extended the ban on imports of used tires to refurbished ones. This measure led to a dispute within MERCOSUR that resulted in a ruling that mandated Brazil to lift the measures for Paraguay and Uruguay. Brazil complied with the ruling but only lifted the measure for its regional partners. This generated a response from the EU, which filed a case before the WTO, arguing that the discriminatory treatment from Brazil was unjustified. The process involved the creation of a special group that primarily ruled in favour of Brazil. The EU appealed before the appellate body of the WTO's dispute settlement understanding, which ruled in its favour. In order to comply with the WTO ruling, Brazil re-established its ban at a regional level, thus violating the ruling of MERCOSUR's Permanent Revision Tribunal.

Synergies did not develop in the expected direction to create a virtuous circle, and the story unfolded in a vicious circle. According to this paper's perspective part of the problem was the inexistence of operative interconnections between the set of rules of preferential agreements and the WTO's multilateral agreement, which would have created consistency between both decisions toward of the elimination of the discriminatory NTBs. It is necessary to design linkage mechanisms that create consistency and enable the extension of the capacities that agreements have of obliging Members to comply with the content of the agreements to which they subscribe. A considerable amount of NTBs are protectionist detour mechanisms that use undercover instruments that were designed with other objectives. For this reason, its control requires an efficient and timely use of information.<sup>14</sup>

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12 Lavopa F. and Vaillant M. "Options for a friendly relation between multilateralism and preferential trade agreements: the case of tire imports in Brazil". Regional Course on WTO Trade Policy, Sergio Arboleda University. (Colombia, forthcoming).

13 Brazil justifies this measure to preserve the environment through preventing an increase in stock of used tires. According to the objectives of public health, it is said that used tires stock is positively related to the mosquito population that transmits Dengue

14 This would also avoid the problem of "forum shopping" as Pawlyn et al (2009) called it.

## 6.4 Where to Start?

As in the majority of trade policy affairs, the first battle is for transparency. It is necessary to have precise definitions and an updated taxonomy of the non-tariff measures (NTM) that enable their precise identification. Overall, any NTM can become a barrier if it is applied in a way that discriminates against suppliers by origin. However, some NTMs have a greater potential for being used with that aim. The international community is not at a starting point in this matter. Several multilateral agencies related to the international trade system have begun a work process that has, among other results, established an updated classification of the NTMs.<sup>1</sup> Besides, there is the objective of updating and extending coverage of the global database, including measures implemented by country and product. The working process indicates that to some extent the proposed methodology is reasonable. Work was carried out with national cases, with regional integration organizations, and coordination between multilateral agencies. The efforts toward the identification of the problem are clear and the progress made, as well as the proposals, are feasible to consider given the degree of autonomy that the technical structures of the involved international agencies can exercise. If the proposed program is respected there would be a major step toward transparency.

However, a deeper political involvement is required from countries through the legitimization of a program of elimination of NTBs that should be led by the WTO and not restricted to developing economies.<sup>2</sup> For the purpose of reaching an operative mechanism of interconnection between the multilateral trade system and preferential agreements, it is necessary to create a space that directly involves them. In other words, it is essential to consolidate the commitment of countries, their preferential agreements, and the multilateral framework into a single programme. This programme should be capable of identifying measures and establishing proper incentives to generate a dynamic of gradual elimination, as well as making harder the emergence of new measures. Inside this scheme it may be necessary to establish temporary tariff safeguard mechanisms that are easy to implement and discourage the use of diffuse NTMs.<sup>3</sup>

The proliferation of NTBs reveals that there are incentives for their implementation. The key element that protects them is the opacity they may have and the capacity of generating protection without being detected or without giving the affected country the possibility of establishing an effective retaliation mechanism. It is clear that it also reveals a weakness in the dispute settlement mechanisms that have been established in the different trade agreements. The following are some important issues to consider that serve as an indicative guide of what is left to do:

- I. Create a program for eliminating and controlling NTBs that combines participation of countries within the preferential agreements they integrate with the trade multilateral framework.
- II. Make the conventional trade negotiation programs independent, generate a different

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1 Following a UNCTAD initiative, in the year 2006 the Group of Eminent People on NTBs gathered and worked alongside a technical team called Multiagency Support Team (MAST) (UNCTAD, World Bank, WTO, ITC, IMF, OECD, European Commission, USDA, USITC). See UNCTAD. *Non Tariff Measures: Evidence From Selected Developing Countries And Future Agenda, Developing Countries In International Trade Studies*, Geneva: United Nations, 2009.

2 The restrictiveness of NTBs in developed countries is often very high and therefore of an important concern. See Kee, H, Nicita, A. and Olarreaga, M. "Estimating Trade Restrictiveness Indices". *Economic Journal*, 119: 534 (January 2009) 172-199.

3 Temporary is the crucial concept in this framework. The safeguards need to have a maximum limit, otherwise we introduce the uncertainty that we were talking earlier.

mechanism for these systemic aspects that have the objective of improving the functioning of international trade systems through more fluid interconnections between the multilateral and regional level.

- III. Strengthen the role of preferential agreements since they entail fewer actors who know each other closely and are more effective than the multilateral system in detecting the trade-restricting NTMs. Particularly, in a first stage it is relevant to include plurilateral agreements that have a greater capacity of acting as a technical secretariat to enable them to develop an ambitious and complex agenda.
- IV. Perfect the exception to the MFN principle in the WTO - the accepted discrimination should be restricted to include only tariff discrimination (modification of Article XXIV).
- V. Establish a coordination mechanism between regional and multilateral dispute settlement mechanisms that tends toward the harmonization of criteria and procedural aspects, as well as establishes criteria of predominance among them. For example, if a regional tribunal detects a NTB it could trigger the removal on the basis of the MFN. Consequently, more and better regional market access should imply more and better access on the bases of the MFN.

## 6.5 Conclusion

The failure of the multilateral system in bringing together the required political support for concluding the trade negotiation round is freezing many new ideas and proposed routes toward the development of the trade system. In 2008, a possible format for the completion of the Doha Round was reached but, unfortunately, it never came through. The task that is left is not very different from the one presented three years ago, and there is still no prospect of it being reached.

The only noticeable activities from which it is possible to establish results are the different preferential trade agreements that are still being subscribed. It is audacious to make a general judgment on the potential contribution of the new trade agreements to the construction of a more consistent international trade system. On the contrary, it is well known that the proliferation of preferential trade agreements in a weakened multilateral context is not a desirable scenario as it can provoke fragmentation in rules and an increase of inconsistency and related conflicts.

The diagnosis made on the network of trade rules is that it poorly interconnects different areas. These shortcomings are related to the fact that the multilateral framework - which should act as a global link articulator (a sort of background operating system of the international trade system) - in fact has evolved ignoring the implications of the preferential trade agreements it helped create. The interconnections between the different types of agreements must be strengthened, and this process should be used as a weapon to strengthen the multilateral agreement. A short and substantive list of issues that can be decoupled from the logic of round negotiations should be created. This list would allow a dynamic of permanent evolution and generate faster results than the trade rounds that have been taken forward until now. It's all about innovating the work methodology.

The case of NTBs is one of the relevant areas in which it is feasible to apply the proposed methodology. Non-tariff barriers erode the results obtained in all kind of agreements. It is an element that reduces clarity in the system, has both static and dynamic negative effects and obstructs the development of trade. Despite being a well-known and mature matter it poses a threat to the consistency of a system that remains totally valid. The recent evolution, during the current crisis period, illustrates this point.

The referred ongoing efforts and work dynamics should be reinforced and complemented with a defined political involvement from countries through all the preferential agreements to which they are parties. The key is to build a self-sufficient mechanism - as Baldwin and Nicoud identified in the case of tariffs - to be applied to NTBs.<sup>4</sup> Today, facts reveal the opposite: as the current system structure provides incentives for a gradual increase in the use of NTBs. Besides, interaction between fields in many cases does not generate virtuous circles. In fact, as exemplified in the case of tire imports to Brazil, the opposite happens.

Strategies toward the elimination and control of NTBs should be harmonized and unified, and multilateral and preferential trade spaces must be interconnected in a more fluent and efficient way. This paper schematically developed some concrete ideas on how to develop this interconnection. Some of the challenges related to NTBs include increasing transparency and strengthening the linkages between areas in order to create a set of trading rules that generate adequate incentives. This approach could later be extended to other aspects that have a systemic impact.

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4 Baldwin, R. E. and Robert-Nicoud, F. *A Simple Model of The Juggernaut Effect of Trade Liberalization*, Centre for Economic Performance, London School of Economics and Political Science, 2008.

**Table 1. Information Matrix: Issues by Type of Agreement****(Degree of relevance)**

ISSUES/TYPE OF TRADE AGREEMENT		MULTILATERAL	PREFERENTIAL
Goods	Market Access barriers	XX	XXX
	Rules	XXX	X
Services	Market Access barriers	XX	XXX
	Rules	XX	XX
Complementary matters		X	XXX

XXX - High relevance; XX - Medium relevance; X - Low relevance

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**PART III:  
DEVELOPING COUNTRIES AND THE  
MULTILATERAL TRADING SYSTEM**



# 1. THE SHIFTING STARS: THE RISE OF CHINA, EMERGING ECONOMIES AND THE FUTURE OF WORLD TRADE GOVERNANCE

*Henry Gao*<sup>1</sup>

## 1.1 Introduction

Since its inception, the GATT has been largely a transatlantic scheme, where the most important initiatives and decisions were first brokered between the US and the EU and then presented to the rest of the membership for acceptance. Later, this arrangement was expanded to include two more countries, Canada and Japan. Known as “the Quad” among GATT observers, these four members controlled the GATT during most of its history.

In the 1980s, things started to change. In the Uruguay Round, for example, the developing countries went beyond the loose S&D treatment provisions and started to push for more substantive change in the multilateral trading system. A good example of this is the successful campaign for the inclusion of major reform in agricultural trade by the Cairns Group, which is composed of mainly developing countries. After the conclusion of the Uruguay Round and the establishment of the WTO, the developing countries became even more assertive. Led by India and Brazil, the developing countries fought hard against the launch of a new round as they believed that they received a bad bargain in the Uruguay Round. The round was launched in 2001 only after the developed countries agreed to make important concessions to developing countries. These include, among others, the official recognition of the “utmost importance”<sup>2</sup> of implementation issues - the central demand of developing countries - in the Doha Declarations, and the adoption of a separate Ministerial Declaration explicitly providing developing countries the right to grant compulsory licenses to deal with public health crises.

As the negotiations got under way, the power gradually shifted from the Quad to the new G-4, i.e., the US, the EU, Brazil and India, and then “Five Interested Parties” (FIPS), i.e., the G-4 plus Australia. This was later expanded into the G-6 with Japan back in the picture. However, China, the biggest developing country member, has been conspicuously absent in the inner circle for the better part of the history of the Doha Round.

## 1.2 China’s Ascent in Global Trade Governance

In the first few years after the launch of the Doha Development Agenda (DDA), China took a rather cautious approach. While it submitted its first negotiating proposal as early as six months after its accession, most of its earlier years in the WTO were spent observing the negotiations rather than making active interventions.

There are several reasons for such an approach: First, China lacked experience in WTO negotiations and needed time to learn the negotiating skills. Second, as a recently acceded member, China argued that it had already made extensive concessions, which greatly exceeded those of other WTO Members and thus should not be required to undertake

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1 Mr. Gao is Associate Professor, School of Law, Singapore Management University; Dongfang Scholar Chair Professor, Shanghai Institute of Foreign Trade. I am most grateful for the kind comments by Miguel Rodriguez Mendoza. All errors remain my own.

2 Para. 12, World Trade Organization, Ministerial Declaration [Doha Declaration], WT/MIN(01)/DEC/1; 41 I.L.M. 746(2002)

additional commitments in the DDA.

As the transition period for China's accession commitments came to an end in 2006, however, the US and the EU started to push China to shoulder more responsibilities in the Doha Round. At about the same time, China also began to realize that its interests were not always aligned with those of other developing countries and it should not continue to hide behind developing country leaders, such as Brazil and India. After reassessing its priorities, China started to adopt a practical approach to the negotiations. On the one hand, as the largest exporter, China shares many interests with developed countries. One example is trade facilitation: while many developing countries are against the inclusion of the issue, given its position as one of the top exporters in the world, it is actually in China's interest to push for the inclusion of trade facilitation in the WTO framework to make the customs process more efficient and cheaper. On the other hand, as a country with a large low-income population, China also sympathizes with the concerns of many developing country members. This is why China supports the demand by India that developing countries should be entitled to a list of special products that will be exempted from tariff cuts, as well as a special safeguard mechanism that can deal with surge on particular agricultural imports.

As a country that straddles the North-South spectrum, China is well positioned to be an "honest broker" among developed and developing countries. In the words of Zhang Xiangchen, China's Deputy Permanent Representative to WTO, China should play "a balancing, bridging, and constructive role" between developed and developing countries. One example of China's bridging role is its proposal at the 2005 Hong Kong Ministerial that the Members try to achieve some early harvest of the negotiating results before the conclusion of a comprehensive agreement. This proposal helped to maintain the momentum of negotiations and pushed the negotiation forward. Sometimes, China is willing to sacrifice some of its own interests to generate momentum for the round. For example, in 2005, China voluntarily offered to provide duty-free market access to imports from LDC<sup>3</sup> even though developing countries are not required to do so.

In recognition of China's important role, it was finally offered the coveted membership in the core decision-making group of the WTO at the July 2008 Mini-Ministerial in Geneva, when the G6 was expanded to the G7. Of course, with power comes responsibility: part of the reason for the inclusion of China was that the DDA had finally moved from agriculture to NAMA issues, and any negotiations on industrial tariffs cannot move without the participation of the largest exporter of manufactured products.

While it recognizes that it has special responsibilities as a large developing country, China is resentful of any attempt to single it out in the negotiations. Therefore, China has been consistently opposing efforts by developed countries and some developing countries to differentiate among developing country members. Similarly, when the July 2008 meeting ran into an impasse due to the refusal of India to give in on special products and the special safeguard mechanism, China turned down the US request for China to provide additional concessions on special products in agriculture and sectoral negotiations on industrial goods. Part of the reason was domestic political difficulties, but an equally-important reason is that China does not wish to be treated differently than India, which has held steadfast against US demands on these issues.

From the submission of its first negotiating proposal in June 2002 to the fateful July 2008 meeting, China has made more than 100 submissions in the DDA. Judging from the number of proposals submitted, China is one of the most active members of the round. However, numbers alone tell only part of the story. Compared with the submissions by other major

3 As of August 2010, China provides duty free access to 4762 products imported from 33 LDCs, which accounts for 98 percent of all LDC exports to China and 60 percent of all tariff lines.

members, which often propose game-changing rules, most of the proposals by China focus on either the procedural issues or the special and differential treatment for developing countries and rarely leave a major impact on the negotiations.

One can interpret this to mean either that China is content with the current rules or that China lacks experience in WTO rules. However, neither of these theories explains why China has been actively pushing for changes to the current rules through the WTO dispute settlement system and FTA negotiations. As I have argued in another paper, China has transformed itself from a “rule taker” that passively accepts existing rules imposed by other countries, to a “rule shaker” that tries to exploit the existing rules to its advantage, to a “rule maker” that is making new rules that reflects its own interests.<sup>4</sup> For example, in several recent WTO cases, China has been trying to persuade WTO panels to interpret China-specific provisions in a way that minimizes their negative impacts. Similarly, in each of its dozen FTAs, China has been rewriting a key term in its accession package by demanding the recognition of its full market economy status from its FTA partners.

Therefore, the better explanation is that China has lost interest in the normal negotiation process in the WTO. It seems rather bizarre that the largest exporter in the world is not interested in making new rules in the WTO, but once we put all these into the proper context of China’s accession package, it all becomes crystal clear. When China joined the WTO it reluctantly accepted many clauses tailor-made for itself as the price for its accession. These include, among others, non-market economy status in antidumping investigations, special safeguard mechanisms against Chinese exports, and a special annual transitional review mechanism. While some WTO Members deem these provisions necessary to soften the impact of China’s accession on other members, the Chinese resent them as discriminatory treatments.<sup>5</sup> As these provisions were specifically designed for China, they have a much more direct impact on Chinese exports than the normal WTO rules, at least before their expiration.<sup>6</sup> While the exact relationship between these special provisions and the normal WTO rules is still subject to debate, most commentators would agree that these special provisions would take precedence pursuant to the principle of *lex specialis derogat legi generali* (special rules prevail over general rules). Thus, at least for the first few years after its accession, the revision of these provisions is of more direct interest to China than the revision of the general WTO rules. Unfortunately, revising these provisions through the WTO negotiations is a task that is extremely hard, if not impossible.

To start with, the WTO is ill-equipped for this task. Among the WTO agreements, none contains explicit provisions on the revision of the accession protocol. Furthermore, in practice, there has been no precedent of comprehensive revisions of accession terms. Thus, if China were to insist on revising these provisions, the default consensus rule would probably apply. As we have seen from the history of the WTO, consensus is extremely hard to come by - that is one reason why the DDA has taken so long. More important, most other WTO members are not interested in the idea of revising these provisions: as accession negotiation is pretty much a one-way deal, China doesn’t have much to offer in the multilateral setting to compensate for the revisions.

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4 Gao, H. “Ascent in Global Trade Governance: From Rule Taker to Rule Shaker, and Maybe Rule Maker?” in *Making Global Trade Governance Work For Development*, ed, Carolyn Deere-Birkbeck. Cambridge: Cambridge University Press, 2011: pp. 153-180.

5 For a detailed discussion of these clauses, see Gao, H. “China’s Participation in the WTO: A Lawyer’s Perspective,” *Singapore Year Book of International Law*. 11.SYBIL 1-34 (2007): 54-57.

6 These clauses have different expiration dates. The special textile safeguard mechanism expired in 2008. The transitional product-specific safeguard mechanism and non-market economy status will expire in 2013 and 2016, respectively. The alternative benchmark methodology in subsidy-countervailing investigations has no explicit expiration date.

Against this backdrop, the recent calls by the US and the EC for China to shoulder more responsibility and make more concessions in the DDA are a bit ironic: on the one hand, the US and the EC imposed these harsh conditions in the accession negotiation and effectively denied China the normal membership status; on the other hand, the US and the EC now want China to behave like a normal WTO Member, or better still, go beyond what other WTO Members would offer by taking up the leadership responsibility. Before the US and the EC abandon such a double standard and start to treat China on a non-discriminatory basis, why should China be expected to contribute to the round above and beyond what is expected of a normal Member?

Without the effective participation of the largest exporter, the multilateral trading system cannot last long. Therefore, to revive the long-stalled DDA, my first suggestion is that the WTO Membership seriously consider abolishing all the discriminatory provisions against China so as to provide China with proper incentive and the WTO with moral authority to encourage more contributions from China in the DDA. A better treatment of China can also provide assurance to other new Members, especially Russia, that the WTO is a rule-based system where old and new members will be treated no differently.

### 1.3 Lessons for Other Emerging Economies

Compared with China, the other emerging economies have an entirely different story. Take Brazil and India, for example: both have been founding GATT contracting parties with a long experience of participating in world trade governance. The good side of this is that they are much more experienced than China in trade diplomacy. Indeed, they have been so successful in trade negotiations that they have long been included in the inner grouping of world trade governance as leaders of developing countries. On the other hand, they have also become victims of their own successes. In the 1960s and 1970s, they started with the premise that developing countries were losers in the global trading system and successfully fought for special and differential treatments that prevent the vigorous application of the normal GATT rules. However, the world has changed a lot since then. As we enter the new millennium, the emerging consensus is that the only way of prospering or even surviving in the new world is to don rather than shun the “golden straightjacket,” a term coined by Thomas Friedman to refer to a set of economic policies such as the liberalization of the trade regime.

In this regard, China’s experience provides a good example: while most countries envy the double-digit growth of China, few seem to be willing to try China’s ultimate success formula - autonomous market liberalization carried out during the two decades before China’s WTO accession. For example, as of 2010, the average bound tariff levels of Brazil and India are respectively three and five times that of China. During the past 15 years, both countries have been reforming their trade regime by cutting tariff levels. However, their average applied tariff levels are still 30-40 percent higher than those of China. Moreover, unless they are willing to bind their tariffs at the current level, the benefits of lower applied tariffs might not last long, as it will be very easy for the government to retract from such liberalization.

In addition, among all WTO members, China probably is the only country where the central government made a serious and conscious effort to educate officials in various government agencies on China’s WTO obligations and streamline the compliance process at all government levels. While such a level of familiarity with WTO rules among all government officials might be unfeasible for most other developing countries (except Brazil, which has done a great job in educating both the public and private sector on WTO rules), at least they should try to educate lawmakers and officials in key central government agencies on the main WTO obligations. As eloquently put by Peter Sutherland, “playing to the gallery of critics is not a responsible position when the critics have no alternative to present as a

coherent replacement for the system.”<sup>7</sup> Rather than catering to the whim of the public, the government shall try to educate the public as to what are good economic policies and try to persuade the public to support such policies.

To sum up, my suggestion for the other major emerging economies is that they get rid of the mentality that they are entitled to special and differential (S&D) treatment in the multilateral trading system. As history has shown, S&D has done them more damage than good. After having enjoyed an easy ride for so long, it is time for them to step up and assume major responsibilities commensurate with their status as major players in world trade governance and make some meaningful commitments.

## 1.4 Responsibilities of Developed Countries

In terms of tariff reductions, developed countries have done a much better job than most emerging economies. However, they have failed to practice what they preach in two other aspects. First, while pushing developing countries to reduce tariff barriers, they have been erecting new forms of trade barriers. The best example is trade remedies measures, which have been a favorite trade policy instrument employed by the US and the EU. Second, they have been continuously shifting goalposts for developing countries. At first, they urged the developing countries to reduce their tariffs to promote industrialization. When developing countries became competitive in manufacturing activities, they “upped the game” by trying to introduce non-trade issues, such as investment rules, competition policy, and environmental standards into the equation. When the developed countries refused to accept these rules in the WTO, they turned to the FTAs and other fora (such as ACTA).

Such practices set a very bad example for the developing countries. Through these hypocritical acts, the developed countries are essentially telling the developing countries that the rules are made for others only and the developed countries can choose to play whatever game they want, even by breaking the very rules set by them; if the developing countries fail to go along, they will simply find a new play ground.

While in the past the developing countries had no option but to follow whatever rules developed countries made, things started to change when the emerging economies began to flex their economic muscle. One worrying sign is the widespread use of trade remedy measures by emerging economies, such as China and India, in the past decade. Similarly, emerging economies have also been riding fast on the FTA bandwagon. As their FTAs can be justified under the Enabling Clause, they are not required to have high trade coverage and this has resulted in many FTAs that are better characterized as PTAs that do not necessarily stimulate trade growth. Now that Russia has also joined the WTO, one cannot help wondering whether it will also follow the bad examples of the US and the EU in abiding by WTO rules only on a selective basis.

Thus, my suggestion to developed countries is that they should stop pursuing questionable trade policy instruments or cramming more non-trade issues into the WTO machinery, but instead focus on helping the WTO to do what it does best, i.e., reducing trade barriers.

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7 Sutherland, P. “The DDA: Political Challenges to the World Trading System - A Cosmopolitan Perspective,” in *Reforming The World Trading System: Legitimacy, Efficiency And Democratic Governance*, ed. E. U. Petersmann. Oxford: Oxford University Press, 2005: p. 42.

## 1.5 Conclusion

As astronomers have shown us, even though many new stars have been discovered, none of them can replace the sun, which, because of its distance, size, and mass, is perfect for earth. Similarly, the rise of emerging economies, no matter how bright they might be, will not engender the key roles of the US and the EU. Instead of being alarmed, the developed countries should learn to work with emerging economies to collectively facilitate the work at the WTO. Of course, the proper functioning of the universe of free trade depends on the orderly movement of every object along the orbits prescribed by the WTO rules. In this regard, a world trading system that is beneficial to everyone can be achieved only by the collective efforts of both developed countries and emerging economies.

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## 2. CHINESE AID FOR TRADE AND ITS IMPACT ON THE GLOBAL AID EFFECTIVENESS AGENDA

*Masato Hayashikawa*<sup>1</sup>

The first decade of the new millennium was marked by China's reemergence as a major player in the global economy as it overtook Japan to become the world's second-largest economy after the US. While trade and investment are two central means by which it engages economically with developing countries, China has also become a significant provider of South-South cooperation in Asia, Latin America, and especially in Africa. In many LDCs, China is now considered to be the major source of aid, trade, and investment. In fact, China has a long tradition of providing foreign aid, longer than that of some members of the OECD's Development Assistance Committee (DAC). However, it is important to note that the various instruments stated to be part of the Chinese aid programme cannot all be considered official development assistance (ODA) as defined by the OECD. In addition to technical assistance, concessional loans and debt relief, components such as non-concessional finance, preferential trade agreements, and investment schemes go well beyond the ODA definition.

How to engage with China in a manner that contributes to the international aid effectiveness agenda and the achievement of the Millennium Development Goals (MDG) has been a preoccupation for the DAC donors. China's endorsement of the principles, commitments, and actions enshrined in the Busan Partnership for Effective Development Co-operation is therefore a welcome step forward. This new global partnership provides the basis for promoting stronger engagement between China and DAC donors in delivering more and better development cooperation, including AFT. In fact, the data show that a significant proportion of Chinese aid activities involve building, directly or indirectly, recipient countries' trade capacities.

For example, in the run-up to the WTO's third high-level Global Review of Aid for Trade in July 2011, China launched a new aid programme to help LDCs participate more effectively in WTO activities, including accession negotiations. In the words of the Chinese Ambassador to the WTO, this new LDCs and Accessions Programme is a demonstration of the country's "firm commitment to the objective of common development with LDCs and its consistent support for the Aid for Trade Initiative of the WTO."<sup>2</sup> As China celebrates the tenth anniversary of its WTO accession, this contribution is also a testament to China's emergence as a major player, not only in the world trading system, but also in promoting global development.

This paper examines China's trade-related South-South cooperation in the context of the AFT Initiative. In particular, it analyzes, from an OECD perspective, what makes China's aid distinctive and its strengths and weaknesses. As China, OECD members, and other countries work together to establish the Global Partnership for Effective Development Co-operation agreed at the recent Busan High Level Forum, relationships should be rooted in common interests rather than common values. Finally, some implications for the AFT agenda are highlighted.

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1 Mr. Hayashikawa works in the Development Co-operation Directorate, OECD. The views in this article are solely those of the author, and do not reflect the views of the organization or of the governments of its member countries.

2 WTO. China Gives A USD 400,000 *Programme For Least Developed Countries*. Press/632, 15 July 2011. Available at [http://www.wto.org/english/news\\_e/pres11\\_e/pr632\\_e.htm](http://www.wto.org/english/news_e/pres11_e/pr632_e.htm).

## 2.1 Chinese Aid for Trade in Action

China embraces a different kind of development partnership - one more integrated with trade and investment.<sup>3</sup> In fact, in comparison with the practices in DAC members, the distinction between aid, trade, and investment is often blurred. The Chinese government does not use the same categories that are being used by the DAC. Aid is often delivered as part of a larger package of investments and trade deals, blended with much larger non-concessional loans and export credits. Nonetheless, a significant portion of China's aid activities - such as in the areas of transport, power, and telecommunications - appears to fall within the scope of AFT.

Trade-related activities have long been an integral part of China's aid programme. As such, China has attached great importance to the AFT Initiative from its inception and was among the 13 Members of the WTO Task Force on Aid for Trade. China reported in the recent OECD/WTO monitoring survey that trade-related cooperation activities had increased since the 2005 Hong Kong WTO Ministerial Conference and that it would further strengthen its efforts.<sup>4</sup> Similarly, at the 2010 UN High-Level Meeting on the MDGs, China stressed its commitment toward deepening financial cooperation and broadening economic and trade ties with developing countries, in particular the LDCs.

Like that of all states, Chinese aid is motivated by a variety of interests, including economic, political, security, and diplomatic. In terms of trade-related cooperation activities, the Chinese government highlights the following factors as the most important: i) relevance to ongoing bilateral, regional, and multilateral trade negotiations and agreements; ii) economic, cultural, linguistic, or historical ties; and iii) requests for assistance from recipient countries.<sup>5</sup>

While China's aid covers various sectors, it has historically focused on economic infrastructure and the productive sectors. According to a survey conducted by the OECD and the WTO, China's trade-related assistance is comprised of three elements: i) DFQF market access to products from LDCs; ii) large-scale infrastructure projects (e.g. roads, ports, and factories) to address supply-side constraints; and iii) capacity development training programmes and sharing of Chinese knowledge and experience in economic and trade development.<sup>6</sup>

Concessional loans are mainly used to finance projects that may qualify as aid for trade – although the primary purpose of China's concessional loans is to provide capital to Chinese exports.<sup>7</sup> According to its 2011 White Paper on Foreign Aid,<sup>8</sup> China has provided concessional loans to 76 countries supporting 325 projects. Of the total concessional loans provided by China, more than 90 percent (amounting to CNY 66.42 billion or about USD 9.7 billion) have been disbursed for the development of economic infrastructure (e.g. transportation,

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3 OECD/IPRCC. *Development Partnerships for Growth and Poverty Reduction*, China-DAC Study Group, OECD, Paris.

4 The Chinese government notes that its debt relief to LDCs and heavily indebted poor countries (HIPC) has also played a positive role in facilitating the improvement of the trade capacities of these developing members. OECD/WTO. *China's Response To The OECD/WTO Questionnaire For South-South Co-Operation*, OECD, Paris. Available at: [www.oecd.org/dataoecd/43/8/43148076.pdf](http://www.oecd.org/dataoecd/43/8/43148076.pdf).

5 OECD/WTO. *China's Response To The OECD/WTO Questionnaire For South-South Co-Operation*, OECD, Paris. Available at: [www.oecd.org/dataoecd/43/8/43148076.pdf](http://www.oecd.org/dataoecd/43/8/43148076.pdf); question 4.

6 Ibid.

7 Hubbard, P. *Aiding Transparency: What We Can Learn About China ExIm Bank's Concessional Loans*, CGD Working Paper 126, Washington DC: Center for Global Development. 2007.

8 Information Office of the State Council, *China's Foreign Aid*, April 2011. Available at: [www.scio.gov.cn/zxbd/wz/201104/t896900.htm](http://www.scio.gov.cn/zxbd/wz/201104/t896900.htm).



communication, and electricity infrastructure); energy and natural resources (e.g. oil and minerals); industry and agriculture. China reported at the WTO's second high-level Global Review of Aid for Trade in July 2009 that its aid for trade had increased by 20 percent and 30 percent in 2007 and 2008, respectively, compared with the 2002-2005 period (WTO, 2009: 76).

Complete projects (i.e. completed by Chinese engineers and labour and delivered as finished products to the recipient country) are another major form of China's aid. These projects are financed with either grants or interest-free loans and account for 40 percent of China's aid expenditure. By the end of 2009, China had completed more than 2,000 complete projects in various sectors, such as transport, power supply, telecommunications, agriculture, industry, and so on.

From its response to the OECD-WTO questionnaire on South-South cooperation, China does not appear to have a specific regional approach to its South-South cooperation. Still, between 2006 and 2009, China doubled its grants and interest-free loans to African countries and offered USD 5 billion in preferential loans.<sup>9</sup> At the Fourth FOCAC Ministerial Conference in Sharm El Sheikh in 2009, China offered USD 10 billion in preferential loans to African countries mainly for infrastructure construction. China also actively supports infrastructure construction in Asia. Between 2006 and 2008, China provided USD 8.3 billion in preferential loans to ASEAN countries (ibid). In April 2009, Premier Wen Jiabao pledged to provide ASEAN with credit (including loans with preferential terms of USD 1.7 billion) of USD 15 billion in the following three to five years and to establish the China-ASEAN Investment Cooperation Fund, amounting to USD 10 billion, targeting investment opportunities in infrastructure, energy, and natural resources with the goal of enhancing trade flows and interconnectivity among China and ASEAN nations. China also ensures good diplomatic and economic relations with other regions through regional cooperation forums.

## 2.2 Harmonizing Chinese Aid for Trade

Aid for trade is about enabling developing countries to use trade more effectively to promote growth and poverty reduction and to achieve their development objectives, including the MDGs. To achieve these objectives, aid for trade - as is the case in any development cooperation programme that cuts across various sectors - involves complex relationships among recipient country governments, bilateral donors, multilateral and regional agencies, the private sector, and other non-governmental organizations. Each of these stakeholders has different priorities, operating arrangements, timeframes, and financial and human resources. Moreover, the complexity and interdependence of trade with a country's overall development strategy - coupled with the proliferation of sources of donor aid and activities at the country level - makes some challenges particularly critical.

The importance of aid quality was underlined in the 2006 Recommendations of the WTO Task Force on Aid for Trade, in which WTO Members agreed that the principles outlined in the Paris Declaration on Aid Effectiveness would lay the foundation for how aid for trade should be delivered. In effect, the Aid for Trade Initiative has become an integral part of the broader aid effectiveness agenda. Strong country ownership, donor coordination, alignment, and harmonization are particularly important in aid for trade given the magnitude of the trade capacity building agenda.

In practice this means that developing countries, on the one hand, need to integrate trade objectives into their development strategies and take the lead in their implementation.

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<sup>9</sup> WTO. China, *Report by the Secretariat*, Trade Policy Review, WT/TPR/S/230/Rev.1, WTO, Geneva, 5 July 2010.

Donors, on the other hand, are expected to align their aid around these strategies and priorities and use local systems for the provision of their aid. Furthermore, all aid-for-trade activities provided by donors should be delivered in a harmonized and transparent manner. In particular, harmonization is a key component of the aid effectiveness agenda, making sure that donors coordinate their efforts to avoid duplication of supports, which tends to result in lower marginal productivity of aid resources. Finally, managing for results and being accountable for them should ensure effective delivery of aid for trade.

Co-financing is often used as a way to promote harmonization of multiple donor interventions to overcome a common development obstacle. The regional and sub-regional transport corridor projects (e.g. the Greater Mekong Sub-region corridor projects in Southeast Asia) are good examples, which typically involve multiple donors working together in several component parts, building toward a larger whole. A number of donors also channel aid-for-trade contributions through multilateral programmes (e.g. the Enhanced Integrated Framework) or multi-donor trust funds (e.g. WTO Global Trust Fund) as part of their efforts toward donor harmonization.

There is evidence that demonstrates the positive results of aid for trade. For example, a recent empirical study of the US support to trade capacity building in the LDCs found stronger positive impacts on exports from countries where the USAID was working more fully in the integrated framework process.<sup>10</sup> However, harmonization remains wanting in the area of aid for trade, which given its cross-cutting nature and manifold objectives implies or requires a high level of coordination between donors. In fact, separate coordination arrangements for different sectors covered under the rubric of aid for trade already exist in many recipient countries, involving also different line ministries. But the existing structures are still dominated by sector-based aspects (e.g. private sector, transport, agriculture, etc.) and have not yet adapted to the requirements of aid for trade as a comprehensive and cross-cutting initiative.<sup>11</sup> Furthermore, because there is no single government unit responsible for controlling and spending the bulk of aid-for-trade resources (like in the case of support to education or health sectors), such harmonization instruments, as sector-wide approaches, basket/pooled funding or budget support - the so-called programme-based approaches - have not been generally employed in the aid-for-trade sectors in the past.

China has traditionally preferred giving aid through bilateral channels and has stayed out of donor mechanisms or instruments set up in many recipient countries to coordinate and harmonize aid activities. Some commentators have argued that China's reluctance to participate in aid harmonization mechanisms (e.g. budget or programme support, or pooled funding) is reflective of its belief that aid should be mutually beneficial, which is much more difficult when aid is delivered collectively or through a multilateral channel. The Chinese also see their commitment to non-interference as a comparative advantage in dealing with most recipient governments, and thus, are reluctant to join donor groups that are still oriented toward using conditionality.<sup>12</sup>

Nevertheless, recent years have witnessed an increasing readiness for China to engage with others on issues related to foreign aid and global development challenges. The White Paper on Foreign Aid stresses that the international community should strengthen cooperation so

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10 Bearce, D.H., Finkel, S.E. et al. *The Effects of US Trade Capacity Building Assistance on Trade-Related Outcomes, 1999-2008*, Final Report. Pittsburgh: University of Pittsburgh, 2010.

11 Voionmaa, P. and Brüntrup, M. *German Aid For Trade: Past Experience, Lessons Learnt, And The Way Forward*, DIE Studies 52, Deutsches Institut für Entwicklungspolitik GmbH, Bonn. 2009.

12 Brautigam, D. *China's African Aid: Transatlantic Challenges*. Washington, DC: German Marshall Fund of the United States, 2008. Available at: [www.gmfus.org/galleries/ct\\_publication\\_attachments/Brautigam0410aFINAL.pdf;jsessionid=at9U8JAU70o\\_f6VwOL](http://www.gmfus.org/galleries/ct_publication_attachments/Brautigam0410aFINAL.pdf;jsessionid=at9U8JAU70o_f6VwOL).

as to meet jointly the challenges facing development - climate change, food security, energy security, and epidemic diseases. To this end, China confirms that it stands ready to “make unremitting efforts to build, together with other countries, a prosperous and harmonious world with lasting peace.”

China does not officially adopt the Paris Declaration on Aid Effectiveness as a donor but has become more active in recent years in the international dialogue on aid effectiveness in its capacity as a provider of South-South cooperation. For example, China signed on to the *Vientiane Declaration on Aid Effectiveness* in 2006, a local Laotian version of the Paris Declaration. A Chinese delegation headed by the then Vice Minister of Commerce, Fu Ziyang, attended the Third High Level Forum on Aid Effectiveness held in Accra, Ghana in 2008. China’s perspectives were taken up in the Accra Agenda for Action, which recognized South-South cooperation as a valuable complement to traditional North-South cooperation. More recently, China participated in the Fourth High Level Forum on Aid Effectiveness held in Busan in 2011 and adopted the outcome document, the *Busan Partnership for Effective Development Co-operation*.<sup>13</sup> China is expected to join the Global Partnership for Effective Development Cooperation, to be established by June 2012 in order to support and ensure accountability for the implementation of commitments made at the Busan Forum.

Chin and Frolic<sup>14</sup> observe that China has become less reluctant to get involved in donor-coordinated initiatives, particularly with multilateral organizations that include China among its membership. China has been expanding trilateral cooperation, working notably with the United Nations Development Programme (UNDP), FAO and the Asian Development Bank (ADB). The Greater Mekong Sub-region (GMS) programme - facilitated and supported by the ADB - is one example. China is jointly funding with Thailand and ADB the construction of the Laotian section (240 km) of the Kunming-Bangkok Expressway, the key part of the North-South Economic Corridor under the framework of the GMS programme. China has financed a third (CNY 249 million or USD 30 million) of the total project costs of USD 90 million and helped build the 86 km stretch of the expressway in Lao PDR in 2006. The entire section was completed in 2008, greatly promoting the expansion of new trade links within the sub-region.<sup>15</sup> Therefore, cooperation is more likely to happen in a multilateral arena, or on a regional or sectoral level.

Nevertheless, some commentators conclude that the primary driver and rationale for Chinese aid, whether in the form of grants or concessional loans, is strategic economic interest. For example, China is among the biggest donors in Cambodia and the two countries have enjoyed close political and economic ties dating back to the 1950s and 1960s. In Cambodia, China’s assistance is mostly directed to economic infrastructure projects, i.e. transportation, power, and telecommunications. A recent study<sup>16</sup> analyzing the effectiveness of the aid-for-trade initiative in Cambodia shows that of the 11 projects funded by China, 8 are trade-related infrastructure projects (i.e. can be classified as aid for trade), ranging from construction and rehabilitation of national and provincial roads to bridges across the Mekong and Tonle

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13 Busan Partnership For Effective Development Co-Operation. *Fourth High Level Forum On Aid Effectiveness*, Busan, Republic Of Korea, 29 November to 1 December, 2011. Available at [http://aideffectiveness.org/busanhlf4/images/stories/hlf4/OUTCOME\\_DOCUMENT\\_-\\_FINAL\\_EN.pdf](http://aideffectiveness.org/busanhlf4/images/stories/hlf4/OUTCOME_DOCUMENT_-_FINAL_EN.pdf).

14 Chin, G.T. and B.M. Frolic. *Emerging Donors in International Development Assistance: The China Case*, Canada: IDRC. 2007/

15 OECD/WTO. *China’s Response To The OECD/WTO Questionnaire For South-South Co-Operation*, OECD, Paris. Available at: [www.oecd.org/dataoecd/43/8/43148076.pdf](http://www.oecd.org/dataoecd/43/8/43148076.pdf): question 9.2.

16 Sok Siphana and Associates *Country Assessments of the Effectiveness and Development Impacts of the Aid for Trade Initiative: Cambodia Country Study*, An ICTSD Research Project on Monitoring and Evaluation, 2 August 2011.

Sap rivers, irrigation schemes, and to dam and water resource development. The study further reports that, although it does not participate in donor coordination meetings, China does adhere to the basic tenets of the Paris Declaration, namely ownership, accountability, harmonization, and alignment.<sup>17</sup> China is also said to apply few conditions for aid compared with traditional donors operating in Cambodia. But, it also finds that all Chinese-funded projects have been or are being implemented through a parallel implementation unit that is not integrated into the national system.

## 2.3 Finding Common Ground

Improving the quality and impact of foreign aid requires active engagement of all actors, including China. The DAC is stepping up its efforts to accelerate engagement with actors beyond its membership, in support of the common objective of reducing poverty, promoting sustainable economic growth, and responding to global development challenges, such as those embodied in the MDGs. Consequently, the DAC is now actively seeking opportunities for working with China and other providers of SouthSouth cooperation to learn from their experiences and improve the quality and impact of aid.

In April 2011, the DAC issued a statement, welcoming the “contribution of all providers of development co-operation resources and expertise” and expressed their hope “to forge new relationships with these new partners through open dialogue without preconditions.”<sup>18</sup> The DAC is now embracing the approach of “common but differentiated responsibilities” toward promoting more effective development cooperation. The statement highlights that “emerging” donors bring a unique experience as developing countries (as well as recipients of ODA) and have an impressive track record with development over recent years. This provides the basis for a rich dialogue and exchange of experiences.

The next step is working out how China and the DAC can best collaborate in promoting harmonization of aid. For instance, a report by the China-DAC Study Group on development partnerships concludes that “The comparative advantages and complementarities of the range of development partners can and should constitute a more or less coherent overall effort. This will require ongoing dialogue, rather than detailed coordination, at the international level.”<sup>19</sup> Indeed, while recognizing the increasingly pluralistic nature of international development cooperation, the DAC’s relationships with China are more and more rooted in the realization that we share ‘common interests’ rather than ‘common values’ in promoting global development.

A major objective that OECD members and China have in common is the achievement of the MDGs. As underscored in its White Paper on Foreign Aid, China also recognizes that the international community should strengthen cooperation and jointly rise to the challenges facing development, which have aggravated existing imbalances in the global economy and widened the gap between rich and poor people.<sup>20</sup> Moreover, China and many DAC members have also signed the G20 Development Principles agreed at the Seoul Summit in November 2010, which, among other things, commit all actors to coordinate their different but complementary development efforts.

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17 The study points to the Cambodian government’s position that Chinese support is consistent with the general principles of the country’s development needs (See *supra* Sok Siphana & Associates, 2011: 48).

18 OECD. *Welcoming New Partnerships in International Development Co-operation*. OECD Development Assistance Committee Statement, 6 April 2011. Available at [www.oecd.org/dataoecd/7/3/47652500.pdf](http://www.oecd.org/dataoecd/7/3/47652500.pdf).

19 OECD/IPRC. *Development Partnerships for Growth and Poverty Reduction*, China-DAC Study Group, OECD, Paris: 16.

20 OECD/IPRC. *Economic Transformation and Poverty Reduction*, China-DAC Study Group, OECD, Paris: 18.

China acknowledges in the White Paper on Foreign Aid that the quality and effectiveness of its foreign aid programme needs to improve. The government, for example, considers the following factors as fundamental for effective aid: “country ownership with mutual respect; time-bound delivery with tangible results; satisfaction rating as a primary indicator to measure the impact of aid; and software and hardware support.”<sup>21</sup> Therefore, ownership, capacity development, and mutual learning are among those shared concepts that provide a basis for complementary efforts by China, DAC donors, and other development partners.<sup>22</sup> In order for recipient countries to be fully in the driver’s seat in their relations with aid donors - a precondition for effective development aid - it will be important for them to have more complete information about levels and conditions of assistance and on the effective terms of various commercial deals that they are bringing to the table.<sup>23</sup>

Finally, the recent Fourth High Level Forum on Aid Effectiveness in Busan marked a turning point in international discussions on aid and development. Its outcome document, the *Busan Partnership for Effective Development Co-operation* was negotiated among all key development stakeholders - developing countries, the DAC members, providers of South-South cooperation, international organizations, civil society organizations, and private actors - participating in the forum. The document sets out a number of actions and commitments in areas, such as transparency, accountability, and results, that have implications for all participating actors.

One of the key objectives of the Busan High Level Forum was to bring into the fold the new development actors, including China. The new Global Partnership for Effective Development Cooperation forged in Busan strongly embraces diversity and recognizes the distinct roles these providers of South-South cooperation can play “on the basis of common goals, shared principles, and differential commitments” (§14). Although with the proviso that implementation is “on a voluntary basis,” China (along with India and Brazil) agreed that the principles, commitments, and actions agreed in the Busan Partnership are a reference point for South-South cooperation. In this spirit, China has also committed to playing a role in shaping the new Global Partnership for Effective Development Cooperation that has been mandated to monitor the implementation of the Busan outcome document.

One characteristic of the Aid-for-Trade Initiative is its emphasis on South-South trade-related cooperation. The Busan outcome document, which also recognizes the importance of aid for trade as an engine of sustainable development (§32d), now provides the common framework to strengthen the alliance between the providers of South-South cooperation and the DAC in delivering more and better aid for trade. The Global Partnership can be used as a platform for active knowledge-sharing, including lessons from the success of South-South trade-related cooperation.

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21 WTO. *Second Global Review of Aid for Trade, 6 and 7 July 2009, Summary Report*, WT/COMTD/AFT/W/15, WTO, Geneva, 28 October 2009.: 77.

22 OECD/IPRCC. *Development Partnerships for Growth and Poverty Reduction*, China-DAC Study Group, OECD, Paris: 16.

23 OECD/IPRCC. *Economic Transformation and Poverty Reduction*, China-DAC Study Group, OECD, Paris.: 13.

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## 3. THE ACCESSION OF LEAST DEVELOPED COUNTRIES TO THE WORLD TRADE ORGANIZATION

*Nicolas Imboden*<sup>1</sup>

### Outline

This document deals with the struggle of acceding LDCs to become members of the WTO and provides ideas on how to address the imperfections of the accession process as designed and implemented today. The document coincides with the decision of the 8<sup>th</sup> WTO Ministerial Conference held in Geneva in December 2011 on the accession of LDCs, which confirmed the need for urgent action on facilitation of the process. The arguments presented in the paper and its recommendations are compatible with the newly adopted decision and help clarify the need for concerted action on making the decision fully operational.

### 3.1 Introduction

The WTO is considered to be in a crisis. The DDR started with great expectations ten years ago, but has not yet been able to achieve results. A successful conclusion is not even in sight. Clearly multilateral trade negotiations are at an impasse, which also brings into question the relevance and usefulness of the organization. At the same time, the WTO has been very successful in developing from a rather homogeneous and small club of major economies into an inclusive and universal trade organization counting 157 members at various levels of development with differing needs and aspirations. With the membership of Russia, all major economies are today part of the WTO. Most of the countries outside the organization are in the process of accession.

### 3.2 The Special Case of LDCs

- Among the acceding countries, ten LDCs aspire to become Members of the club that defines and guarantees the application of a rules-based system to international trade relations. This group of countries has specific characteristics, which make their integration into the world economy difficult:
- As latecomers in the multilateral system LDCs are rule takers not rule makers. They have to adapt to the already established system;
- Their economies are normally small both in absolute size and taking into account the purchasing power of their populations. Their economic and social fabric is fragile. It is challenging for them to undertake deep structural adjustment and at the same time to compete internationally;
- LDCs have in general weak institutions and a shortage of qualified and experienced administrators. In such circumstances, designing and implementing substantial reforms of the economic framework is a very difficult task. .
- Most of these latecomers have followed an economic model largely based on regulated markets and state intervention. A majority has undertaken reforms to open up their economies and introduce market economy elements into their production structure but based on selective and discretionary decisions by their governments. Doing business

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was not a right, but a privilege. In the multilateral rule-based system, doing business in a country is not a privilege, but a right. Governments therefore can no longer make ad-hoc decisions, but have to clearly define and publish the conditions that have to be fulfilled and the rules and regulations that have to be followed to conduct business. This requires a new way of thinking for the whole administration.

The accession process requires patience and understanding as well as the technical support of the international community. In fact, WTO Members recognize the difficulties that LDCs face when adapting their internal systems to the international rules as well as the imperfections of the model of accession negotiations. They adopted, in 2002, special guidelines for the accession of LDCs to the WTO (WT/L508), which recognize the fragility of their economic systems and their limited institutional capacities and institute differential treatment for them. The WTO secretariat and WTO Members provide a substantial amount of technical assistance both to train the officials of the countries concerned as well as assisting them in the set-up of legislative and regulatory frameworks.

Despite this, only five LDCs<sup>2</sup> have acceded to the organization since its establishment in Marrakech. Ten more are still in the process of accession -some for more than ten years.<sup>3</sup> Clearly the guidelines and the assistance provided are either not sufficient or not correctly implemented.

### 3.3 Why is the Accession of LDCs Slow and Complex?

The slow progress of LDCs' WTO accession is due to various factors both internal to the LDCs and to the process of accession.

#### 3.3.1 LDCs often start the accession process under false assumptions

Most countries decide to become members of the WTO for political reasons: they aspire to be members of major international organizations. It is only after they start the process of accession that they fully realize that becoming a member of the WTO entails numerous difficult political, social, and economic reforms and years of hard work.

Another frequently quoted objective of the WTO Membership is to have a guaranteed access to markets. In fact, most LDCs already benefit from preferential access for their products. LDCs thus realize that the costs of adjustments are much higher than imagined and that the expected benefits are much lower than envisaged. Thus, the initial enthusiasm to become member fades quickly. Reforms in the process of accession start seriously only after the country realizes that:

- WTO Membership is not a goal, but an instrument to ensure that their economies have the required framework conditions to become competitive;
- Reforms are not made to please WTO Members or to gain access to their markets. They allow the candidate's economy to become competitive in order to harness the opportunities the world market offers and become attractive as a production place;
- The WTO provides a secure, predictable, and non-discriminatory economic framework

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2 Cambodia, Nepal, Cape Verde (which graduated from LDC status after the accession), Samoa and Vanuatu

3 Yemen - negotiations started in 2000, Laos - 1998, Sao Tome And Principe-2005, Comoros- 2007, Sudan - 1994, Liberia - 2007, Ethiopia - 2003, Equatorial Guinea - 2008, Bhutan - 1999 and Afghanistan - 2004.



based on the rule of law, allowing domestic and foreign investors the opportunity to invest, thus increasing both the productivity and export potential of the country.

### 3.3.2 Reforms are complex and lengthy

The reform and liberalization process is politically much more complicated than generally perceived, especially for weak institutions such as the ones in most LDCs. It requires both difficult political decisions and substantive technical knowledge. The rule of law and the liberalization of the economy benefit the majority, but often hurt the powerful. With the disappearance of discretionary decisions the power (and the money) of influential agencies fades. The same is true of liberalization, which abolishes monopolies in the economy. Political resistance will rise as the accession process advances and it needs to be taken into account and dealt with.

The reforms and liberalization process are also technically demanding. Acceding countries have to ensure that the liberalization produces a socially acceptable result by defining predictable rules and regulations for the economic actors that are in line with WTO obligations and their development objectives. Technical assistance is clearly highly appreciated and needed. However, the national authorities are the ones to determine what is socially and economically feasible in their country. Experts can only provide suggestions on how different objectives can be attained by WTO-compatible instruments: they should fully respect the national constraints and not influence the objectives of the government. Establishing coherent policies and the corresponding WTO-conforming instruments is an iterative process that includes many authorities and agencies and requires a sustained dialogue with the private sector and civil society: a long and time-consuming process. The accession process is thus lengthy, as it requires a major shift of attitude from all stakeholders in the country.

Time is not the issue: it is better for all stakeholders that the process takes a little longer and enables them to take the full ownership of the results than to have a quick accession where countries enter into obligations they are not able or willing to assume. The international community and the acceding country should accept this and work together to implement the reform process, even if it takes time. The objective of improving the accession process should not be primarily to accelerate it, but to ensure that the process is as conducive as possible to the sustained development of acceding LDCs and that it is predictable, rather than a moving target - as it is often perceived to be.

### The accession process: how does it work?

The accession process is divided into three interrelated parts:

1. The multilateral negotiations in the form of Working Party Meetings (WPMs). The purposes of the WPMs are to: (i) analyze - together with WTO Members - the economic and trade regime of the country; (ii) see whether it is in line with WTO requirements; and (iii) define what has to be changed to make the country's policies and system compatible with the WTO.
2. The Legislative Action Plan (LAP) contains all the laws and regulations the acceding country agrees to change or pass to bring its regime in line with WTO requirements. The LAP is de-fined by the discussions in the WPMs and is adapted according to the proceedings of the WPMs.
3. The bilateral market access negotiations: Normally, the liberalization process starts with a multilateral offer by the acceding countries:

- The goods offer reveals the acceding country's applied tariffs and the bound tariffs to which it is willing to commit within the WTO.
- The services offer presents the services sector (and the different modes) the country is willing to open up.

Once the overall offer is more or less in line with what WTO Members consider reasonable, bilateral negotiations are undertaken with any country that has specific requests to the candidate. Any concession made to a country is finally multilateralized in the schedule, which will be the basis of the accession commitments of the country concerned.

### 3.4 What are the Main Issues Accession Process?

The WTO accession process should be a collective effort of the world community to assist the acceding country in integrating into the world economy in order to enhance its sustainable development.

The practice is somewhat different: the acceding country perceives the process more as a tribunal to its trading practices than a cooperative effort toward ensuring that its trade regime is in line with international rules and standards. It explains its policy and the measures taken or proposed to bring its regime into line with the WTO requirements. WTO Members scrutinize and question its statements, generally taking as a yardstick their own context. They tell the candidate what it has to do to become member of the WTO rather than advising it on how it can best bring its regime in line with WTO requirements. The principles guiding the process are not the development needs of the acceding country, but the particular interests and views of WTO Members. Discussions are diplomatic, but there is very little effective dialogue or cooperation in finding mutually acceptable solutions.

The asymmetry of this process is visible already in the composition and the functioning of the WPMs:

- The acceding country is represented at the level of the minister with a relatively large and high-level delegation from the capital, which has worked for months to prepare the extensive information required by the WTO Members;
- WTO Members are often represented by lower-level representatives of the permanent missions based in Geneva who have often not the time or the possibility to familiarize themselves with the economic, social, and political realities of the acceding LDCs.

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*The basic issue of the accession process is the approach: rather than having a dialogue on how WTO Members can assist and accompany the acceding country in its efforts to put its economic and trade regime in line with its sustainable development requirements and international best practices, WTO Members often pursue their own commercial interests and/or formal requirements of the WTO.*

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### 3.5 Possible Avenues Improve Accession Process

The three integral parts of the WTO accession process could be implemented and technical assistance provided in a way that would greatly enhance the reform process in the acceding country as well as the credibility of the multilateral system:

The multilateral negotiation's process is necessary and useful. WTO Members are well

advised not to compromise on this. WTO multilateral rules are an excellent yard stick for a country that wants to bring its regime in line with international best practices to achieve its sustainable development objectives. However, the multilateral negotiating process has two weaknesses:

1. Acceding LDCs have many important reforms to undertake, but they do not have the capacity to do them all at once. Unfortunately, WTO accession does not prioritize the reforms according to their importance for the country's development, but according to the interest of the WTO Member countries. *Illustration: Clearly reforming the archaic licensing system of some acceding countries is a very high priority. Setting up an intellectual property rights system - which is very demanding and costly in terms of institutional capacity - is also important in the long term but perhaps not crucial in the short term.*
2. WTO Members recognize that some of the commitments require both institutional build-up and training, which cannot be done in the short term. Therefore, the principle of transition periods - accompanied by action plans with concrete dates of implementation - is accepted for some of the commitments, such as implementation of CVA, TRIPs, etc. More clearly defined rights and obligations for the transition periods and action plans would streamline the process and make it more predictable.

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*Proposal: To facilitate and streamline the accession and reform process:*

- *Transition periods should be defined relatively early in the process;*
  - *The action plan should contain commitments for technical assistance to ensure the country has the means to implement the various activities foreseen and agreed upon.*
- 

The LAP is the resultant of the analysis made in the WPMs. It is clearly the responsibility of the acceding country to prepare and adopt laws and regulations bridging the gap between national reality and international rules. The WTO defines very accurately the principles a country should apply in its trade regime. It leaves, however, the application of the principles to each country so as to adapt them to its situation. Unfortunately, WTO Member countries increasingly request acceding countries to apply those principles according to their own interpretations. As a matter of fact, some countries request acceding countries to apply their wordings of the relevant articles while ignoring local specificities.

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*Proposal: WTO Members should be requested to respect the legislative system in the acceding country and refrain from asking adoption of wordings that follows their own national legislation. While technical assistance is necessary and useful, experts should propose various approaches and acceding countries should not be forced to accept proposals that would favour or advocate the positions of any WTO Member. Instead, the assistance should be geared toward promoting the development objectives of the acceding country while fulfilling the WTO obligations.*

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Bilateral access negotiations are the most difficult and least predictable part of most accession processes. In short, Members can force the acceding country to accept any of their requests or to forego accession. The issues are the following:

- Member countries often change their demands during the negotiations and/or introduce requests that are not in line with WTO requirements. This puts the negotiators in very difficult situations. They convince their partners in the government to make an ultimate concession so as to ensure accession, only to have to go back with new requests received from Members. Accession thereby becomes a moving target;
- While it is understandable and legitimate that member countries defend their commercial interest, this leads to a liberalization that does not necessarily correspond to the developing needs and interests of the acceding countries concerned and thereby gives the liberalization and the multilateral system a bad reputation in the acceding countries;
- Some Members request liberalization in the areas where they have no commercial interests, but so-called systemic or negotiating interests. It is not uncommon that acceding LDCs are required to give something that is under DDA negotiations- not because the requesting country is interested in the concession - but because it wants to ensure that the future member will be on its side in the DDA negotiations.

Fortunately, this kind of behaviour is not widespread and most countries are quite sensible in the bilateral access negotiations. However, as all countries have to agree to the accession, one Member posing onerous requests has the means to create difficulties for the acceding country and/or to retard its membership in the WTO unduly.

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*Proposal: This could be avoided by:*

*Agreeing on benchmarks that would give clear guidance and predictability to the acceding country;*

*Having some multilateral process to facilitate agreement on bilateral issues that unduly postpone accession of the new members.*

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Technical assistance is an important element of the accession process. WTO Members provide quite substantial and generous support that is highly appreciated by the acceding countries. The efficiency and the predictability of the assistance could be enhanced substantially through the following measures:

- A technical assistance programme should be established multilaterally at the beginning of the process. This would ensure that the support given corresponds to the needs of the reform program established. It might also ensure a better distribution of the assistance provided: indeed, some countries seem to receive more assistance than required and others have problems mobilizing a minimum required assistance. A multilaterally agreed assistance program would also increase the transparency of aid and the coordination;
- Technical assistance programmes often put greater emphasis on the administrative requirements of the donor countries than the needs and ownership of the receiving countries. Donor countries' governments are accountable to their parliaments and understandably want to ensure that their fiduciary requirements are fulfilled and that they can defend their aid in front of their parliaments. However, predefined and rigid assistance projects often give way to an unnecessary or untimely assistance while urgently required support cannot be provided. Misunderstood efficiency criteria and excessive reliance on indicators encourage consultants to put their emphasis on production of documents and events rather than on the content of the assistance or to neglect the more time-consuming transfer of technology and know-how through strong cooperation and efforts to explain to the partners the methods and results.

- Illustration: Piles of consultant's reports, which are stacked up in offices of acceding countries' officials without being read and are only used by new consultants who come to address the same issue.

### 3.6 Conclusion

Accession to the WTO is a long and challenging process that entails painful and complex reforms in particular for LDCs. It is a process that is essential to ensure that a country integrates into the world economy and follows a path of sustainable development. No country - and in particular no LDC - can develop in isolation. WTO accession should accompany and reinforce the reform process in line with the capacities and the development objectives of the concerned countries. The objective of a more streamlined and targeted accession process is not to make it easier or more expedient for the acceding country, but to make it as relevant as possible for its reform process. This would mean that during the accession, a country could adapt its economic structure to the requirements of the world market, thereby ensuring that its people fully benefit from the potential the world market offers. Such an approach is not only in the interest of the acceding LDCs, but also in the interest of its WTO partners. Let us not forget that the limiting factor to increased commercial relations with LDCs is not market access, but the low purchasing power of their populations. Only flourishing LDCs will be good commercial partners of WTO Members.

An accession process based on clearer and more predictable requirements for accession; an accession process that puts the development requirements of the LDC into the centre of the negotiations is clearly in the interest of not only the LDCs, but also the WTO Members and the multilateral trading system as a whole. A process that is perceived as being unfair and arbitrary, in which short-term interests of WTO Member countries prevail is not in the interest of the world economy or the multilateral trading system. Only a system that is - and is perceived as - fair will survive and thrive. Only reforms that are in the well-understood interest of the country are sustainable.

The decision on the WTO accession of the LDCs represents a welcome first step toward improving entry conditions for the LDCs. Clearly, the devil lies in the detail, and the period until July this year will pose many challenges to the process of making the decision operational. The negotiations should be aimed at resulting in concrete decisions with measurable benchmarks rather than in soft law - which already exists but delivers little.

In the end, it is rather odd that the organization with the purpose of promoting a rules-based trading system does not have any clear set of rules and criteria for entering the club. The decision adopted during the MC8 provided us with the opportunity to show that the multilateral trading system is able to take into account the needs of countries at different levels of development and that it is an engine and not a hindrance to their development. This is important not only for the acceding countries, but also for the credibility of the multilateral trading system. And the WTO, which governs this system, needs to regain credibility as an institution that can respond to the legitimate aspirations of all its Members, including the weakest ones. Therefore, the negotiations on making the decision on the WTO accession of LDCs operational are putting the WTO to a test of credibility and relevance. We all must do our utmost to avoid another failure.

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**The decision on the WTO accession of LDCs**

*The decision on the WTO accession of LDCs calls for “developing recommendations to further strengthen, streamline and operationalize the 2002 guidelines by, inter alia, including benchmarks, in particular in the area of goods, which take into account the level of commitments undertaken by existing LDC Members. Benchmarks in the area of services should also be explored.”*

*The decision further invites enhancing the transparency in the accession negotiations “by complementing bilateral market access negotiations with multilateral frameworks.”*

*The decision stresses further “the need for enhanced technical assistance and capacity building to help acceding LDCs to complete their accession process, implement their commitments and to integrate them into the multilateral trading system.”*

*Finally, the decision instructs the Sub-Committee on LDCs “to complete this work and make recommendations to the General Council no later than July 2012.”*

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## 4. BREAKING THE DEADLOCK ON MARKET ACCESS FOR LEAST DEVELOPED COUNTRIES

*Kimberly Ann Elliott*<sup>1 2</sup>

When the DDA negotiations were launched in 2001, a key objective was to more fully integrate the poorest and most vulnerable countries in the international trade system. A principal mechanism for achieving that is DFQF market access for the UN-designated LDCs. Now, with the broader Doha Round negotiations moribund, the DFQF initiative is seen as an essential element of any “early harvest” package.

But the link to the Doha Round is not absolute. Market access under unilateral trade preference programmes is not bound under international trade rules and, over the past decade, most rich countries moved ahead with programs providing full market access for LDCs. Indeed, the commitment by high-income countries to provide DFQF access originated in the 2000 Millennium Declaration, before the launch of the Doha Round.

Members of the WTO reaffirmed the commitment to DFQF market access in 2005 in the Hong Kong ministerial communiqué; only the US insists on linking implementation of the initiative to conclusion of the Doha Round. Moreover, at US insistence, the communiqué specifies the proximate objective of the initiative as covering 97 percent of tariff lines, with only a vague commitment to full access at some undefined time in the future. The communiqué also called on developing countries “in a position to do so” to provide improved market access for LDCs and several large emerging markets have taken steps in that direction.

In this brief, I make a pragmatic proposal to encourage the US to move on the LDC market access initiative by authorizing carefully circumscribed restrictions, but only for objectively identified competitive beneficiaries and not for as much as the three percent across-the-board product exclusions demanded by US negotiators. A compromise along these lines would address US concerns about the effects of DFQF market access, while ensuring that there are meaningful benefits for LDCs. In addition, whatever happens in the US, the benefits of the DFQF initiative would increase markedly if the large emerging markets also open their markets to LDC exports. Finally, these unilateral moves could also bolster prospects for an “early harvest” package if the elements are more balanced than earlier proposals. But the gains from DFQF market access should not be held hostage to the Doha Round negotiations.

### 4.1 Market Access for LDCs: US Constraints and Emerging Market Opportunities

Like other high-income countries, the US provides enhanced market access to LDCs under its GSP programme, but the LDC list of eligible products covers only about 80 percent of tariff lines, and it excludes key labour-intensive products, including footwear, textiles, and apparel. The African Growth and Opportunity Act (AGOA) offers much better access, providing duty-free (but not quota-free) market access for 98 percent of tariff lines for less developed beneficiaries, not all of whom are LDCs. Special provisions for Haiti under the Caribbean Basin Trade Partnership Act reach roughly 90 percent product coverage. Both programmes include duty-free access for apparel with flexible rules of origin, but

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1 Ms. Elliott is a Senior Fellow with the Center for Global Development.

2 This brief is based on “Open Markets for the Poorest Countries: Trade Preferences That Work.” in *The CGD Working Group on Global Trade Preference Reform*, ed. Kimberly Ann Elliott/Center for Global Development, 29 April. 2012. Available at: [http://www.cgdev.org/files/1423918\\_file\\_OpenMarkets\\_Final.pdf](http://www.cgdev.org/files/1423918_file_OpenMarkets_Final.pdf).

the benefits are capped and some key agricultural products are excluded, notably sugar, peanuts, and tobacco. For 15 Asian LDCs that are outside these regional arrangements, including Afghanistan, Bangladesh, Cambodia, Nepal, and Yemen, only 0.1 percent of their exports to the US entered under preferences in 2010.<sup>3</sup>

Moreover, if the US implements a DFQF market access programme in line with the Hong Kong ministerial communiqué, the Asian LDCs that receive little preferential access in practice would still see few gains. Research shows that the exclusion of just 3 percent of tariff lines robs the initiative of any benefit, as it would allow US policymakers to maintain restrictions on clothing, as well as those sensitive agricultural products that might otherwise be exported by some AGOA beneficiaries.<sup>4</sup>

The insistence on limiting coverage to 97 percent of items underscores US policymakers' reluctance to challenge producers in these US import-competing sectors. In addition, the handful of AGOA beneficiaries able to export apparel are concerned that full market access for other LDCs would undermine their competitiveness. Other AGOA-eligible countries that would benefit from a DFQF program including sensitive agricultural products have generally not spoken up.

Whatever the US does, increased participation in this initiative by the large emerging markets would significantly increase the benefits for many LDCs. Turkey implemented a limited version of the EU's Everything But Arms programme as part of its customs union with that region, but it excludes most agricultural products. China and India announced programmes expanding access for LDCs after the WTO ministerial meeting in Hong Kong and China recently became the first developing country to commit to (eventually) reaching 97 percent product coverage (albeit only for LDCs with whom it has diplomatic relations).<sup>5</sup> India's duty-free access extends to only 85 percent of tariff lines, with tariff reductions on another 9 percent. In December 2009, Brazilian Foreign Minister Celso Amorim announced that Brazil would expand preferential market access for LDCs beginning in 2010 with coverage for 80 percent of tariff lines and with full coverage phased in over four years. As of summer 2011, however, legislation to do so was still under development.<sup>6</sup>

## 4.2 Breaking the Deadlock on DFQF

The US negotiating position is that it will implement DFQF market access for LDCs only as part of a Doha Round agreement. Since the prospects for an agreement are uncertain at best, the US should drop this excuse and join the other high-income countries in implementing the initiative as soon as possible. There is no reason to think this would reduce the prospects for an agreement, and it might boost efforts to conclude a smaller "early harvest" package. Ideally, the two things would proceed together and reinforce one another.

The proposal here for breaking the deadlock on DFQF has three parts. The first is a pragmatic proposal aimed at addressing concerns about the impact of DFQF market access for LDCs

3 Elliott, K.A. *Opening Markets for Poor Countries: Are We There Yet?*. Center for Global Development Working Paper 184. 2009. Available at: [http://www.cgdev.org/files/1422923\\_file\\_Trade\\_Preferences\\_FINAL.pdf](http://www.cgdev.org/files/1422923_file_Trade_Preferences_FINAL.pdf).

4 Bouet, A.; Laborde, D. et al. *The Costs and Benefits of Duty-Free, Quota-Free Market Access for Poor Countries: Who and What Matters*. Center for Global Development Working Paper 206 (2010) Available at: <http://www.cgdev.org/content/publications/detail/1423986/>

5 See "China's Zero-Tariff Treatment Gains Wide Acclaim," China Daily USA 24 November 2010. Available at: [http://usa.chinadaily.com.cn/business/2011-11/24/content\\_14153735.htm](http://usa.chinadaily.com.cn/business/2011-11/24/content_14153735.htm).

6 See Elliott, above for updates on programs, see also United Nations Conference on Trade and Development, *GSP Newsletter*, Number 11, September 2011, UNCTAD/WEB/DITC/TNCD/2011/1.



on US producers, as well as competing exporters in Africa. The second calls for further improvements in emerging market programmes to ensure there are meaningful benefits. If progress is possible on either or both of those fronts, it could provide an opening to salvage something from the Doha Round.

#### 4.2.1 Overcoming US constraints

American (and African) resistance to providing improved market access for all LDCs is rooted in concerns about potential competition in apparel markets from Bangladesh and Cambodia, but a dozen other poor countries are caught in the stalemate. Even including Bangladesh and Cambodia, US non-oil imports from LDCs are less than 1 percent of total non-oil imports (Table 1). That is slightly more than the share of either Canada or Japan, and less than half the share in the EU. The LDC share of total Canadian imports did increase sharply after Canada opened its market *and* adopted a flexible rule of origin for apparel, but it remains well under 1 percent. A computable general equilibrium trade model of the potential effects on the US of providing full market access to LDCs suggests that the impact on American textile production would be a fall of one-half of 1 percent.<sup>7</sup>

Table 2. Trade with LDCs, 2010

Non-oil Imports from LDCs		
Partner	Value (million dollars)	Share of total imports (percent)
Canada	841	0.44
EU	15,164	1.32
Japan	1,009	0.33
Korea	543	0.35
United States	7,143	0.58
Brazil	30	0.09
China	1,911	0.83
India	1,766	1.33
Russia	374	0.28
S. Africa	380	0.95
Turkey	264	0.78

Source: UN Comtrade database, online.

7 See Elliott, above. The US apparel market is already dominated by imports but US textile producers oppose further opening to Asian exporters because it wants to protect markets for their intermediate products among Western Hemisphere apparel exporters. The US textile industry successfully lobbied for rules of origin in bilateral trade agreements that require the use of American inputs in apparel exported back to the United States under those agreements. The producers are concerned that increased imports from Bangladesh and Cambodia will displace imports from Western Hemisphere countries and, thereby, reduce US textile exports. For further discussion of similar issues in the case of Pakistan, see Elliott, K.A. and Decker, C., *Getting Real on Trade with Pakistan: Duty-Free Market Access as Development Policy*, CGD Working Paper 241, 2011. Available at <http://www.cgdev.org/content/publications/detail/1424821/>

Overall, the concerns about market access for LDCs seem exaggerated, but, in the spirit of not letting the best be the enemy of the good, some exclusions may be necessary to blunt political opposition. The first criteria for allowing exclusions should be that they apply only to more competitive exporters. For example, exporters with a market share greater than 2 percent of US imports at the two-digit tariff level (harmonized system) might be considered competitive. In 2010, according to data from the US International Trade Commission, that threshold would have captured the ten or so largest exporters of knit and woven apparel (HTS 61, 62), including Bangladesh and Cambodia, but no other LDCs. Those two are still quite poor countries, however, and they are currently competing with China, so they should not be left out of the DFQF initiative entirely, as the exclusion of 300 tariff lines (3 percent of the total in the tariff schedule) would effectively do.

The second criterion for limiting exclusions should be that benefits for exporters above the competitive exporter threshold are restricted only as much as needed to preserve space for other LDCs to compete. Thus, for example, there were four AGOA exporters in 2010 (Kenya, Lesotho, Mauritius, and Swaziland) that accounted for 95 percent of exports to the US (and only Lesotho is an LDC). Analysis of US import data at the detailed, 10-digit level shows that 22 tariff lines account for 70 percent of the exports from those countries, including all of the categories worth more than USD 5 million in value. Those same categories account for 40 percent of exports from Bangladesh and Cambodia, but restricting benefits just on those items would still allow more than half of Bangladeshi and Cambodian exports to benefit from DFQF treatment. Finally, those categories also account for roughly 40 percent of apparel exports to the US under the Central American-Dominican Republic free trade agreement, which would cushion any impact on US textile producers exporting to the region.

In addition to apparel, US policymakers face opposition to providing DFQF access for sensitive agricultural products, particularly sugar. In the case of tobacco and peanuts, the quantitative restrictions are no longer linked to domestic supply-management programmes and thus it cannot be claimed that easing or eliminating those restrictions for LDCs would threaten the support programmes for those commodities. With sugar, Malawi and Mozambique have small quotas in the US market, but Zambia has none at all. Moreover, restrictions on products containing sugar or dairy products undermine the incentives for West African cocoa producers to develop processing and downstream manufacturing capacity. The US should, at a minimum, ensure that LDCs have commercially relevant access to the US market, and it should remove quotas for downstream processed product exports from LDCs to encourage job creation. Even if not fully duty and quota-free, expanded access for these commodities would expand benefits beyond the handful of AGOA beneficiaries exporting apparel.

#### 4.2.2 Promoting South-South opportunities

According to the United Nations (UN) Comtrade database, LDC exports to the US and the EU grew by a little less than a third from 2005 to 2010 while growing four-fold or better to Brazil, China, and Turkey and by 40 percent to India. Trade models confirm that the large emerging markets are where the opportunities are for many LDCs, suggesting that the benefits of full DFQF market access would increase three-fold if Brazil, China, India, and Turkey join the industrialized countries in opening their markets to the LDCs. Global imports from LDCs were just 1 percent of the total in 2010 and were generally at that level or less in the large emerging markets, except India where they were 1.3 percent of the total (see Table 1) .

It is laudable that these countries are implementing programmes to expand access for LDCs, but even a small number of exclusions sharply limits the benefits in these markets, just as they do under high-income country programmes. African LDC exporters, in particular, would benefit from increased access to the large emerging markets. For example, a general equilibrium trade model suggests that the gains to Ethiopia increase by two-thirds, for

Mozambique three-fold and Senegal eight-fold if the large emerging markets join high-income countries in providing DFQF access. As suggested by the small import shares, however, the model also suggests that the impact on import-competing producers would be negligible.<sup>8</sup>

Finally, this analysis shows that the benefits of DFQF market access for the most competitive LDCs, Bangladesh and Cambodia, come overwhelmingly from access to the US market, reinforcing the conclusion that adjustment costs for the emerging markets would be small. There is thus little reason to think that the emerging markets would bear a disproportionate burden in terms of adjustment costs if they provide the leadership that the US sadly has not.

### 4.2.3 Interactions between DFQF and a Doha “early harvest”

It is difficult to conceive an “early harvest” package that does not include the DFQF initiative, but that does not mean that DFQF should be delayed by an agreement that may never occur. On the other hand, US progress in providing DFQF access could provide momentum to negotiations on an “early harvest.” For that to happen, however, the package will have to include items of interest to all countries, not just the poorest. Trade facilitation is one agenda item generally regarded as a win-win, and at least a short list of environmental goods and services that would see significant tariff cuts is another. Singling out US cotton subsidies for a standstill, however desirable, is a nonstarter while a standstill on *all* agricultural subsidies, including EU export subsidies, would be both more balanced and more useful. Finally, in the spirit of all WTO Members contributing something, particularly in areas of core principles, the LDCs should agree to a gradual binding of tariff levels.

## 4.3 Conclusions

Integrating poor countries more fully into the global economic system is a key objective of the WTO and of the DDA trade negotiations. Duty-free, quota-free market access for LDCs is a key marker for this goal and significant progress toward it has been made over the past decade. The US is a laggard among high-income countries, however, and the programmes introduced in recent years by key emerging markets are welcome in principal, but likely to be limited in their effects because of the limited product coverage.

A pragmatic approach to encouraging movement on DFQF market access by the US would allow for some restrictions to cushion the impact on current AGOA beneficiaries, while expanding benefits in agriculture for other African countries and also allowing excluded Asian LDCs to benefit. In promoting the objective of increased integration for poor countries, the US should not wait for the Doha Round to conclude and the emerging markets should not wait on the US.

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8 See Elliott, *supra*, at 14-15.

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## 5. CAN THE DOHA ROUND BE SAVED?

*Vinaye Ancharaz*<sup>1</sup>

One should be forgiven for one's pessimism about the future of the multilateral trading system at this critical juncture. The future, shaken already by little progress in trade talks in more than a decade, is being further darkened by the ongoing economic crisis in the EU and the US, the very countries on which developing countries had pinned their hopes for a revival of interest in the Doha Round. The financial crisis of 2008 created fears of a protectionist backlash as the hardest hit economies - the US in particular - exhibited tendencies of diverting demand homeward amid mounting discontent against openness. Fortunately, this did not happen.

However, there are some worrying signs of resurgence in protectionism since the beginning of the year. The WTO counted 108 trade-restricting measures by the G20 economies from April to October 2011, against 122 in the previous 6-month period. Through much of 2009 and 2010, the number was significantly smaller. We can only hope that this tendency is temporary, for giving in to the protectionist impulse could trigger a descent into a vicious spiral that could seriously undermine the world trading system and precipitate a recession of much bigger proportions.

The WTO Ministerial Conference in Geneva last December offered an excellent opportunity for the world's rich countries to reiterate their commitment to free trade by showing flexibility on some issues - such as agricultural trade reform - that have for long crippled the trade talks. The prevailing debt crisis, which has heightened budgetary pressures in the EU and the US, provided the perfect scapegoat. Domestic support and export subsidies in agriculture cost billions of dollars to the EU and US governments, and an agreement to phase out these trade-distorting measures could have reduced the financial burdens of these countries while enhancing economic efficiency. Furthermore, the mere decision to re-launch trade talks would have been seen as a strong show of solidarity and a fitting example of the spirit of coordination that some Euro-zone members recently showed in trying to save the single currency. It would have helped calm volatile markets, reassure investors, and create the confidence and dynamism needed to pull the world economy out of its current lethargic state.

However, other than welcoming Russia, Montenegro, Samoa and Vanuatu to the club and besides a few inconsequential decisions, the meeting ended in the same despair that has now become characteristic of the Doha Round. With yet another missed opportunity, rumours are running wild that the Doha Round is clinically dead. Against this sombre background, this paper assesses where the multilateral trading system stands today and seeks to understand the reasons for this. It argues that it is time to move beyond Doha and start thinking of a new round, learning from the failure of the current one and leaning on the extensive technical and empirical analysis generated over the course of the Doha Round.

### 5.1 Where do We Stand?

The multilateral trading system has suffered a major setback as a result of slow progress with the Doha Round until now. With hindsight, we can say that this failure is not surprising. The Uruguay Round achieved a significant degree of trade liberalization across both developed

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<sup>1</sup> Dr. Ancharaz, an international trade expert, is a senior lecturer on leave from the University of Mauritius, where he was Head of the Department of Economics and Statistics, Director of the MA Economics Programme, and WTO Chair holder.

and developing countries - the latter taking on a heavy load of new commitments as part of the single undertaking - and brought areas previously excluded or subject to weak rules (e.g., agriculture, textiles and clothing, services, trade-related investment measures, and trade-related intellectual property rights) under the purview of the GATT/WTO. This had several rather undesirable consequences for the next round of negotiations.

First, developing countries felt they had done more than their fair share by accepting the whole package of Uruguay Round obligations (admittedly with S&D treatment) as a condition to qualify for WTO membership; therefore, they expected some kind of compensatory treatment in the next round.<sup>2</sup>

Second, developed countries were less enthusiastic about the Doha Round since the liberalization of manufactured products by developing countries in the Uruguay Round, or unilaterally, meant that the marginal benefit from further tariff cuts was correspondingly lower.<sup>3</sup>

Third, since they had also substantially reduced barriers to their own markets, industrial countries were left with the last layer of politically difficult reforms in agriculture and textiles, which they were not yet ready to take. Consequently, they tried to muddle through the Cancun negotiations by pushing the Singapore issues to the fore much to the dismay of major developing countries, like Brazil, India, and Thailand, which expected the talks to focus on agriculture, leading ultimately to the breakdown of the negotiations. Indeed, this sequencing of the agenda in the minds of many negotiators - that is, progress on agriculture as a precondition for any negotiation in other areas - was a perfect recipe for disaster and explains the deadlock in the negotiations to date.

Fourth, the concept of single undertaking, newly introduced in the negotiations as a “bulwark against free-riding” by member countries, has made it harder to reach an accord since this requires consensus by all parties.<sup>4</sup> It is difficult to see how countries with wide and conflicting interests and at different levels of development could agree on everything on the negotiating table. While S&D treatment is meant to accommodate the sensibilities of some members - in particular the LDCs - it cannot fully guard against the adverse socio-economic impacts of broad liberalization commitments, as most developing countries learned at their expense at the conclusion of the Uruguay Round. These countries are naturally wary of embarking on another round of trade talks given their rather negative experience with the previous one.

Fifth, and related to the above, some critics have argued that developing countries have inherited a “development deficit” from the Uruguay Round, which merely adding the word “development” to the current Doha Round could not rectify. It appears that those who conceived the Doha Round as a development round failed to recognize what Adam Smith taught us centuries ago: that the pursuit of self-interest could lead to mutually beneficial outcomes. What this means for the Doha Round is that a business-as-usual approach to the negotiations could have delivered better results for development than focusing the entire round on a pretense of development. The effect of bringing development into a hitherto-mercantilist process had the undesirable side-effect of alienating the very parties who drove

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2 Schott, J.J. *The Future Of The Multilateral Trading System In A Multi-Polar World*, Discussion Paper 8/2008, Bonn: DIE. 2008.

3 Cline, W.R. “Doha Can Achieve Much More than Skeptics Expect,” *Finance and Development*. (March 2005): 22-23.

4 Kaukab, R.S. “To Have Or Not To Have A Round: The WTO At A Crossroads,” *Trade Negotiations Insights*, 10:9 (2011): 1-3..

the trade talks in the past - the corporate sector (Mattoo and Subramanian, 2005).<sup>5</sup> This private sector disinterest is due to a rather unfortunate combination of past achievements of the GATT/WTO as well as unilateral liberalization, and greater defensiveness by corporate actors to protect what has been acquired.

Sixth, although all countries - big or small, rich or poor - have equal voting power within the WTO, the ability to exercise this power has in practice been very unequal. With their strong delegations of skilled negotiators, backed by teams of trade and legal analysts providing strategic and timely data from home, rich countries have traditionally dominated the trade talks. Many developing countries have lacked the capacity to play an active role in the negotiations owing to limited human capacity, many competing demands, and inadequate means to fund participation in trade talks. The increasing complexity of the negotiations and the need to attend more meetings as the deadlock persists have further added to the cost of maintaining presence. Moreover, many poor countries have shown little interest in the negotiations and have generally been averse to their success, for at least two reasons. First, they see any liberalization as a threat to their preferential access to some markets (e.g., the EU's EBA initiative and the industrial countries' GSP scheme). Second, they realize that even if the talks resulted in improved market access for their exports, this would not automatically translate into bigger export volumes since they face formidable supply-side constraints locally. While the aid-for-trade initiative was designed to address these very constraints and to build poor countries' capacity to participate in and benefit from WTO negotiations, it clearly has not been enough.

Things are changing, but perhaps not in the direction we would wish. Several developing countries have emerged as major players in world trade, and they are taking an active interest in the negotiations. India and Brazil, in particular, have largely contributed to the current stalemate by demanding that agriculture be addressed as a matter of priority. On the other hand, the rapid rise of exports from China has also turned policy-makers in the US and Europe skeptical about further opening up their markets. China-bashing has been manifest in a number of anti-liberalization measures (such as antidumping and countervailing duties) taken by industrial countries recently to put a lid on China's exploding exports, and the current economic crisis seems to have awakened such sentiments.

## 5.2 Doha's Achievements

The Doha agenda is wide and ambitious, encompassing almost all areas of influence of the WTO. In addition to agriculture, services, and industrial goods, the agenda includes antidumping measures and subsidies, regional trade agreements, TRIPS, the DSM, the environment, and the Singapore issues. With hindsight, one may not be totally surprised by the failure of the Doha Round - for hard bargaining is needed to reach an agreement on any one of these areas. However, that is not to say that the Doha Round has achieved nothing.

Perhaps the most significant achievement of the Doha talks to date is the agreement at the Hong Kong Ministerial Conference in 2005 to eliminate all forms of direct and indirect agricultural export subsidies by 2013; to reduce the legally allowed level of domestic support; and to increase agricultural market access by harmonizing tariffs through a Swiss-type formula. In agriculture, there is an agreement in principle to provide three kinds of flexibilities to protect developing country interests: "sensitive products," "special products," and "special safeguard mechanisms."<sup>6</sup> Although implementation of these agreements has generally lagged behind commitment, the point remains that the Doha Round broke new

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5 Mattoo, A. and Subramanian, A. "Why Prospects for Trade Talks Are Not Bright," *Finance and Development* (March 2005): 19-21.

6 "Sensitive products" are not limited to developing countries but apply to all countries.

ground in achieving agreement in an area that had proved elusive up till then.

The Hong Kong ministerial meeting also saw a significant step in the direction of a development package consistent with the Doha Round's mandate when rich countries committed to providing DFQF access to LDCs' exports to their markets. This commitment has not been followed through to date, and it is doubtful if it would have a meaningful impact since the 3 percent of tariff lines that would be excluded from DFQF treatment cover about 99 percent of LDCs' actual exports.<sup>7</sup>

There are several other, smaller successes that could be credited to the Doha Round. These include agreement for setting up a Monitoring Mechanism for S&D treatment provisions and a Transparency Mechanism for RTAs; amendments to the TRIPS Agreement; and impetus to the aid-for-trade initiative following the 2005 Hong Kong ministerial. Aid for trade has contributed to enhancing developing countries' negotiating capacity and supported both trade liberalization and trade facilitation to enable these countries to better integrate into the world economy.

Conversely, negotiations on NAMA have generated a significant amount of analysis and debate, but they have fallen short of any concrete results. According to current proposals, industrial tariff cuts will likely be more ambitious than in agriculture. Developing countries will have the possibility of protecting their most sensitive products by exempting 5 percent of their tariff lines from tariff cuts. However, there is much controversy about the extent of effective liberalization and the distribution of gains among developing countries, with the risk that a few big players take away a major chunk of potential trade gains.

It is in services that the Doha Round has made the least progress, and prospects for talks to resume and make headway in this sector look very bleak. It appears that few commercial opportunities are on the table.

### 5.3 What's at Stake?

Substantial scope for protection to be negotiated downward exists in all key areas of the Doha agenda. In agriculture, high levels of domestic support and tariffs on products of critical export interest to developing countries persist. In 2010, for example, EU governments spent a whopping USD 101.4 billion on agricultural subsidies, equivalent to about 20 percent of gross farm receipts (Table 1). Japan alone provided agricultural support amounting to USD 52.9 billion, representing a significant 50 percent of farm income. MFN average tariffs applied on agricultural products are also high in these countries: 17.3 percent in Japan and 12.8 percent in the EU. In contrast, the US agriculture sector, for all the negative attention it receives from developing-country trade negotiators, features much lower tariffs (4.9 percent) and producer support (USD 25.5 billion or 7 percent of farm revenue).

Agricultural tariffs are particularly notorious for concealing tariff peaks (tariffs over 15 percent) and tariff escalation. In the EU, for example, one in every four tariff lines at the HS 6-digit level is subject to peak tariffs. Tariff escalation, that is, the tendency for tariffs to rise with the degree of processing of imports, has the effect of pushing developing-country exports into the raw material corner and impeding the development of higher value-added agro-industry.

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7 Rangaswami, V. "Nickel and Diming the Poor: US Implementation of the LDC Initiative," *Policy Outlook*, Carnegie Endowment for International Peace, July 2006.



**Table 3. Indicators of Agricultural Protection in Selected Developed Countries, 2010**

Country/ region	MFN average applied tariffs (%)	Tariff peaks (% of tariff lines)	Producer Support Estimate (US\$ billion)	PSE as % of gross farm receipts
Canada	11.3	5.8	7.4	17.7
European Union	12.8	24.7	101.4	19.8
Japan	17.3	22.6	52.9	50.0
Unites States	4.9	5.4	25.5	7.0

*Source: Author's compilation using data from OECD.Stat and WTO, ITC and UNCTAD (2011)*

Industrial tariffs are much lower, averaging 4 percent in the EU and 3.3 percent in the US. And, although tariff peaks and escalation are also less prevalent, they do exist and they can affect developing-country exports. A vivid illustration of tariff escalation in the EU tariff structure is the case of clothing. The tariff applied to cotton yarn is between 4 to 5 percent; cotton fabrics attract tariffs of 8 percent while apparel is hit with a tariff in the range of 6.3 to 12 percent.

A successful conclusion of the Doha Round will result in lower tariffs not only in developed countries, but also in developing countries, where tariffs on both primary and manufactured products are at least three times higher than those in industrial countries. Such high tariffs have the effect of protecting inefficient industries and delaying much-needed industrial diversification.

Moreover, there is an urgent need to deal with the proliferation and increasing use of trade-restricting measures, such as TBTs and contingency protection, including anti-dumping and safeguards. These have the effect of stifling world trade flows, and there is danger of their abuse as countries turn protectionist in times of crisis.

While trade talks falter, regional trade agreements are still going strong and account for an increasingly growing volume of global trade. RTAs are both a cause and a consequence of the current impasse. On the one hand, RTAs have diluted interest in the Doha trade talks by providing a convenient alternative to multilateral trade. Additional enthusiasm for regionalism derives from the fact that regional trade can be both a vehicle for regional cooperation and security as well as a buffer against adverse shocks to global trade that have become so frequent in recent years. Moreover, some protagonists of regionalism find comfort in the present deadlock since they see in Doha's success an unwelcome erosion of bilateral trade preferences. On the other hand, the failure of the trade talks has encouraged countries to turn to bilateral and regional trade agreements, which are easier to negotiate and promise to deliver bigger gains.

## **5.4 What's in it for Africa?**

If the Doha Round is development-focused, Africa, with 31 of its 54 countries classified as LDCs, must be a critical factor in the negotiations - indeed one by which the development outcome of the Round could be measured. After all, the very idea of featuring development so prominently in a trade round was to pay special attention to countries with a serious development deficit, the majority of which are African.

Yet, there is no evidence that Africa would gain from a successful conclusion of the Doha Round. While estimates of Doha Round gains and losses, based on varying assumptions, differ in magnitude, they tend to converge on one point: sub-Saharan Africa (excluding South Africa) invariably loses in most Doha Round scenarios.<sup>8</sup> These welfare losses range from USD 197 billion in the Carnegie model to USD 400 billion in the World Bank model. Gains for sub-Saharan Africa are positive only in the IFPRI model, which simulates the welfare impacts of alternative DFQF market access scenarios. Even so, the gains occur only under 100 percent DFQF - a very unlikely scenario. Only South Africa shows robust gains under most Doha Round scenarios across a number of empirical studies.

Sector-wise, exports of agricultural products, such as sugar, cotton, tea, coffee, and cocoa, are likely to increase following agricultural trade liberalization under the Doha Round. Conversely, the manufacturing sector - including textiles and clothing, leather and footwear, and metal products - will be hit hard by proposed industrial tariff cuts. Thus, a successful Doha Round will further undermine sub-Saharan Africa's timid efforts at industrial diversification while the boost to agricultural exports will increase the already high export concentration in primary products.

These results are not surprising. Africa is a heterogeneous bloc of countries; this is evident in the diverse coalitions comprising African countries at WTO negotiations. In agriculture, for example, Africa's bone of contention is the trade-distorting subsidies that the US government provides to local cotton producers. The effect of these subsidies is both to squeeze out African cotton exporters from the US market as well as to depress the world price of cotton. Africa would benefit from a reduction in cotton subsidies, as promised by the US government, but the gains will be limited to the four main producers of cotton (namely Benin, Burkina Faso, Chad, and Mali). However, if this comes as part of a package of agricultural trade reforms by developed countries, Africa as a whole might lose as lower subsidies will raise the prices of agricultural imports and adversely impact Africa's numerous net-food-importing countries, including the cotton exporters.

Industrial tariff cuts under current NAMA proposals will effectively amount to an erosion of the existing margin of preference for African countries under various schemes, including the EU's EBA Agreement, the EU-ACP economic partnership agreements and AGOA. Without such preferences, most African countries will not be competitive exporters of manufactured products.

Most simulation studies, including the ones referred to above, do not explicitly model service liberalization in the Doha Round, and understandably so. Service liberalization is difficult to quantify and it is hard to know what is on the table since negotiations in this area are governed by a process of requests and offers, shrouded in a veil of opacity. African countries will clearly gain from Mode 4 (movement of natural persons) liberalization. They might also benefit from opening up their own service sectors, especially banking, telecommunications, and retail trade, among others and by encouraging commercial presence of foreign firms in sectors in critical need of upgrading through technology transfers, such as specialized health and higher education. However, governments worldwide are reluctant to liberalize these services, and African governments are no exception.

While multilateral trade liberalization in both agriculture and manufacturing might generate increased demand for imports, it is unlikely that African countries will benefit from trade creation due to their notoriously poor supply response capacity. However, it is doubtful if tariff cuts in these sectors will translate into actual liberalization since the cuts apply to

8 See Polaski, S. "Winners and Losers: Impact of the Doha Round on Developing Countries," *Carnegie Endowment for International Peace*, 2006. Available at; <http://www.carnegieendowment.org/files/Winners.Losers.final2.pdf>.

bound tariffs, which are generally well above applied tariffs. In the case of DFQF access, which promises widespread gains to Africa, the proposal as it stands - that is, zero tariffs on 97 percent of industrial country tariff lines - is unlikely to make much of an impact since a number of products of export interest to African countries will likely fall under the 3 percent of tariff lines that will be exempted from the proposed tariff cuts.

## 5.5 The Way Forward

Seven years after the Doha Round was expected to be concluded, and after yet another missed opportunity to inject momentum into a failing round, prospects for the Doha Round to come to a successful end look very bleak. It is time that the WTO declares the Doha Round hopelessly inconclusive and paves the way for a new round that will be informed by the failure of its predecessor and that will, by design, be systematically less ambitious from the outset. The new round should be guided by the following observations and principles:

- The Doha trade talks failed in part because they tried to address an issue that has hitherto been a stranger to trade negotiations: development. The experience of a number of countries (including the “Asian tigers”) shows that trade is growth-enhancing. This, together with the view that growth is a precondition for poverty alleviation, suggests that trade can be poverty reducing. Hence, if a trade round succeeded in boosting developing countries’ exports, it would naturally pave the way for development. This means that a business-as-usual approach to trade negotiations could deliver development outcomes, and therefore, there is no need to explicitly introduce the development dimension in the trade talks, and in so doing, fend off business interests that actually drive the negotiations.
- The single undertaking requirement has made it harder to reach any agreement in the negotiations. It is high time the WTO revisited this requirement as part of reforming its decision-making rules.
- While far from perfect, it may be wise to take a piecemeal approach to trade talks. For example, the WTO could carefully craft the negotiation agenda to maximize the likelihood of an agreement being reached. For a start, negotiations should focus on the traditional areas - agriculture and NAMA. If developed countries could agree to reform trade-distorting agricultural support in exchange for easier access to emerging markets for their manufactured products, the momentum for multilateral liberalization could be unleashed.

Going forward, the WTO faces the challenge of staying operationally relevant. First, there is an urgent need to tame RTAs before they result in an irreversibly compartmentalized global economy. Unfortunately, there are few options for doing this. One is the idea of “open regionalism,” which has been floated as a plan to rescue multilateral trade. If countries in a regional bloc could extend preferences to non-members whether on a reciprocity or unconditional MFN basis, RTAs will increasingly resemble a multilateral treaty for freer trade. In certain ways, this is happening already through expanding memberships and efforts aimed at unifying potentially overlapping RTAs, as in the case of the proposed tripartite COMESA-EAC-SADC FTA. The second is by making RTAs more transparent. To this effect, the WTO General Council approved a “transparency mechanism” for RTAs in 2006. However, the agreement is provisional pending completion of the Doha Round. Since this is now unlikely, the WTO must ratify the agreement and implement it without further delay.

Second, although the WTO will continue to exist and play its critical role as guardian and enforcer of a rules-based world trading system, it will be constantly challenged to fight back protectionist tendencies. The WTO will need a lot of ingenuity and candour to deal with new

and increasingly elusive forms of protectionism as well as address emerging calls for new issues - for example, in the areas of climate change, labour protection, and food security - to be brought under its purview. The WTO must also answer to calls for a broadening of the definition of export subsidies to include disguised means of giving an unfair advantage to local firms through currency manipulation and other such practices.

Africa is probably reveling in Doha's failure - for the round was clearly not to its benefit. However, this is no cause for celebration. Tariffs in Africa remain high - the second highest, as a region, after South Asia - and peak tariffs in sensitive sectors prevail.<sup>1</sup> Such high rates of protection tend to stifle export growth and diversification away from traditional sectors and account in large part for Africa's marginalization in world trade. Independently of the Doha Round, it is in the interest of African countries to liberalize trade. The Aid for Trade Initiative should support this process by providing scaled-up financial resources for technical assistance and for protecting governments' revenue bases as tariffs fall. Greater aid-for-trade resources should also be directed to trade facilitation and to building productive capacity in Africa's poorest economies.

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1 The simple mean tariff for primary products and manufactures amounted to 12.1 percent and 10.9 percent, respectively, in 2009 and 2010.



**PART IV:  
INSTITUTIONAL REFORM OF THE WTO**

# 1. STRENGTHENING THE WTO DISPUTE SETTLEMENT SYSTEM: ESTABLISHMENT OF A DISPUTE TRIBUNAL

*Debra Steger<sup>1</sup>*

## 1.1 Introduction

The dispute settlement system has been the WTO's "crown jewel" during its first 17 years. Members have brought over 400 disputes, half of which have proceeded through to completion or settlement,<sup>2</sup> making the WTO the most prolific international dispute resolution system in the world today. In this time of economic turbulence and uncertainty, it is important to the overall legitimacy and credibility of the WTO to ensure that the dispute settlement system remains strong and effective, able to meet the challenges of the future.

As a result of the Uruguay Round negotiations, the dispute settlement system was significantly modified with the creation of the Appellate Body; reverse consensus decisions for establishment of panels, adoption of panel and Appellate Body reports, and authorization of suspension of concessions; as well as specific timeframes for stages of the dispute settlement proceedings. However, many of the operational aspects of the ad hoc panel system were not significantly modified in the Uruguay Round. The panel system has developed by gradual evolution since the first working party was formed in the 1950s. The panel system has served the WTO well in the past, but is it time, after over 60 years' experience with ad hoc panels, to consider a dispute tribunal for the WTO?

## 1.2 Problem/Opportunity

WTO Members have an opportunity to consider bold changes to strengthen the WTO dispute settlement system in the context of the DSU Review. As Members have decided that this review will proceed independently from the DDR, there is a unique opportunity for major improvement of the system if Members wish to seize the moment.

With the impasse in the DDR and the problems in the world economy, major new cases could be brought to the WTO in the future, which could seriously test the limits of the dispute settlement system. WTO disputes are already grappling with complex matters involving trade and other important economic and social policies, such as energy, public health, and the environment.

While many of the WTO cases continue to raise claims under the GATT and the trade remedies agreements, an increasing number of disputes are being brought under newer agreements, such as the GATS, the Subsidies and Countervailing Measures (SCM) Agreement, the Agreement on SPS, and China's Protocol of Accession. These cases often involve complicated issues of fact and legal interpretation. Hearing and deciding these cases at the panel level requires a great deal of expertise and skill.

Under the DSU, there is a clear division of labour between the panels and the Appellate Body. The function of panels is to be a sort of 'court of first instance.' Under Article 11, a panel is to make an objective assessment of the facts and of the matter before it. Therefore,

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2 Speech delivered by Chairman of WTO Dispute Settlement Body, H.E. Mr. Yonov Frederick Agah, in March 2011 on developments in WTO dispute settlement during his Chairmanship from 19 March 2010 - 24 February 2011, available at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/speech\\_agah\\_4mar10\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/speech_agah_4mar10_e.htm).

the role of a panel is to be the fact-finder: to determine the facts based on the evidence presented by the parties and to determine whether the respondent Member has acted in accordance with its obligations. The function of the Appellate Body is set out clearly in Article 17.6. An appeal is limited to “issues of law covered in the panel report and legal interpretations developed by the panel.” The role of the Appellate Body does not extend to hearing evidence, making factual findings or reviewing factual determinations of the panel. In recent years, the disputes have become far more complex in terms of the number of claims, the number of agreements, the number of parties involved, the novelty of the legal provisions being interpreted, and the complexity of the facts. Fact-finding and appreciation of evidence as well as interpretation and application of the law are all skills requiring specific expertise and training. It is important that panellists have the requisite skills and experience required to perform these important tasks.

Timeliness is a fundamental feature of the WTO dispute settlement system. Uruguay Round negotiators built explicit timeframes into several provisions of the DSU to ensure that the proceedings are completed in a timely and efficient manner. This is crucial to businesses for which time is money. As it is, under current DSU rules, businesses often complain that the WTO process takes too long to resolve disputes and therefore, is ineffective from their perspective, especially considering that a case can take four to five years from consultations through to implementation and remedies are prospective. In the DSU Review, Members have recognized the importance of the timeliness of WTO dispute settlement procedures by discussing various proposals to shorten specific timeframes in the DSU.

While Members are seeking ways to shorten timeframes in the DSU to make dispute settlement procedures more expeditious, in practice, the dispute settlement system has not functioned strictly within DSU timeframes. The DSU states: “In no case should the period from the establishment of the panel to the circulation of the panel report to the Members exceed nine months.”<sup>3</sup> Since 1995, the average panel proceeding has taken approximately 14 months. Since 1995, only 28 of a total 135 panels have been completed in less than 10 months.<sup>4</sup> Recently, the Appellate Body, after years of observing its maximum 90-day deadline for appeals,<sup>5</sup> has requested the DSB to extend timeframes by delaying adoption or the start of an appeal of a panel report under Article 16.4 of the DSU.

The number of disputes, however, has decreased since the early days of the WTO. Consultation requests peaked at 155 in the first four years from 1995 - 1998, dropped to 63 from 2007- 2010, and to 8 from January - September 2011. The number of panel reports circulated from 2007 - 2010: 34, was nearly half the number circulated in the peak period from 1999 - 2002: 63.<sup>6</sup> Similarly, the number of Appellate Body reports adopted in the recent period from 2007 - 2010: 18, was half what it was from 1999-2002: 36.<sup>7</sup> These figures demonstrate that the workload of panels and the Appellate Body has been declining in the past five years, as compared with the early years of the WTO, and yet, there has not been an improvement in the speed with which panels complete their reports.

Also, the number of disputes in which the Director-General has been requested to compose panels is increasing. In 2010, he was asked to compose the panels in seven of nine cases,

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3 DSU, Article 12.10.

4 WTO dispute settlement statistics, 1 January 1995-23 September 2011, provided to author by WTO Secretariat.

5 DSU, Article 17.5.

6 Supra note 3. This figure includes Article 21.5 Compliance panel reports.

7 Ibid. This figure includes Article 21.5 Appellate Body reports.



and so far in 2011, he has been called upon to compose the panels in three of four disputes.<sup>8</sup> Since 1997, the Director-General has composed approximately half or more of the panels each year, and since 2002, he has composed two-thirds or more of the panels each year. Since 1995, panel composition has taken on average 74 days, but the longest took 234 days.<sup>9</sup> In the case of composition by the Director-General, the DSU calls for panels to be composed within 30 days after they are established.<sup>10</sup>

These facts demonstrate that although the number of disputes has declined in recent years, the panel system has not improved in the efficiency with which it produces reports. Moreover, perhaps due to the increasing complexity of disputes, the problem of lack of timeliness has now crept over into the Appellate Body as well.

### 1.2.1 Responses

Establishing a dispute tribunal to replace the current ad hoc panel system is a necessary reform at this stage in the evolution of the WTO dispute settlement system not only to ensure that it will be able to meet the challenges of the future, but also so that it does not risk becoming weaker and less effective. The idea of creating a permanent panel body has been proposed before;<sup>11</sup> however, the reasons for establishing a dispute tribunal are even more compelling today.

The model proposed is a dispute tribunal composed of 25-30 part-time members appointed by the DSB. Qualifications would be similar to those required for appointment to the Appellate Body - members would be required to be persons with knowledge and experience in law, international trade, and the subject matter of the covered agreements generally. When appointed, they would be required to be unaffiliated with any government in order to be free from any perceived conflict of interest. Their terms of appointment would be similar to those of Appellate Body members, each member would be paid a retainer to ensure his/her availability to serve on cases at all times and on short notice as well as compensation for each case. In order to provide greater incentives for independence, impartiality, and consistency in decision-making, each member should be appointed by the DSB for one non-renewable term of six to eight years.

## 1.3 Reasons

### 1.3.1 Timeliness and Efficiency

A dispute tribunal would save time and be more efficient than the current ad hoc panel system. It would save time by eliminating the panel composition process as well as through other organizational and procedural efficiencies that would result from having members available at all times and on short notice to work on cases. In 2006, William Davey estimated

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8 WTO Dispute Settlement Statistics (as of 10 November 2011), provided to the author by WTO Secretariat.

9 Supra note 3.

10 DSU, Article 8.7.

11 See *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding*, TN/DS/W/1 (13 March 2002) and TN/DS/W/38. See also W.J. Davey, "Expediting the Panel Process in WTO Dispute Settlement", in M.E. Janow, V. Donaldson, A. Janovich (eds), *THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES* (Juris 2008), 409-470 [Davey I]; W.J. Davey, "The Case for a WTO Permanent Panel Body" (2003) 6 *Journal of International Economic Law* 175 [Davey II]; "Mini-Symposium on the Desirability of a WTO Permanent Panel Body" (2003) 6 *Journal of International Economic Law* 175.

the time saving from panel composition in the median case at 50 days<sup>12</sup>; today, in the average case it would be 74 days.

There would be significant additional efficiencies and improvements to be gained when members are available to work together in Geneva on a case for the duration of the proceeding. These could lead to a significant modification of the current panel process that could result in even greater time savings. A standing tribunal could also be given the ongoing jurisdiction to deal with such issues in future as preliminary matters, remands from the Appellate Body, and remedies.

### 1.3.2 Expertise and experience

Currently, the required qualifications for WTO panellists are that they be “well-qualified governmental and/or non-governmental individuals.”<sup>13</sup> The overwhelming majority of them have been current or former government officials, as well as international trade academics, lawyers, economists, and former Secretariat officials.<sup>14</sup>

WTO disputes are becoming more complex: in relation to the number of claims being raised, the complexity of the measures and the facts, and the novelty of the legal issues in the cases. The cases will only become more difficult as a consequence of the DDR impasse, the economic instability in the world economy, and as pressures for unilateral action increase. The WTO dispute settlement system needs a dedicated, highly-qualified first instance tribunal to hear disputes, consider and weigh evidence, make factual findings, and make determinations based on WTO rules. The skills and experience required to perform these functions are essentially judicial-like or legal skills. The knowledge required relates to international trade law and the WTO agreements.

Training in judicial skills could be “easily accomplished in the framework of a Permanent Panel Body. The result should be a more credible - more legitimate - panel process that produces better decisions.”<sup>15</sup> More experienced panellists would lead to higher quality panel reports, and less work for the Appellate Body,<sup>16</sup> especially in reviewing factual determinations and questions of mixed fact and law. While the Appellate Body’s mandate is limited to reviewing issues of law and legal interpretation in panel reports, increasingly it appears to also review complex factual and evidentiary matters.<sup>17</sup>

### 1.3.3 Independence and impartiality

Independence and impartiality on the part of a decision-maker are hallmarks of any dispute settlement system. Independence comes from one of the two key principles of natural justice, which requires decision-makers to be free from bias and to keep an open mind. Independence and impartiality can be influenced by the type of mechanism selected, the process of appointment, the qualifications of the persons appointed, the terms of their

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12 Davey I, *ibid.*, at 426.

13 DSU, Article 8.1.

14 Davey I, *supra* note 10, at 433.

15 *Ibid.*, at 435.

16 M.L. Busch and K.J. Pelc have shown that panellists’ experience does make a difference in whether or not the Appellate Body reverses the panel report. See M.L. Busch and K.J. Pelc, “Does the WTO Need a Permanent Body of Panelists?” (2009) 12 *Journal of International Economic Law* 579.

17 See, e.g., WTO. Appellate Body Report, *European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R adopted 1 June 2011.

appointments, and the renewability of their terms.

A dispute tribunal would eliminate any potential for perceived conflicts of interest because members would be required to be unaffiliated with any government. Ideally, the tribunal would be served by a small staff, separate from the rest of the WTO Secretariat, similar to the Appellate Body Secretariat. This would alleviate concerns about potential conflicts of interest between government and secretariat officials involved in negotiations or those giving legal opinions to governments, and those advising panels.

#### 1.3.4 Collegiality and consistency

A standing tribunal would provide for collegiality and a shared sense of institutional purpose and memory among its members. Because members would serve for a specific term and work on several cases together, it would also provide for greater coherence and consistency in their decisions over time than would an ad hoc panel system. This should lead to higher quality decisions and less work for the Appellate Body.

#### 1.3.5 Greater Geographic Diversity

As a result of his extensive study in 2006, Davey concluded that a typical WTO panellist has been “a current or former government official from a small developed country.”<sup>18</sup> More recently, there have been a greater number of panellists from developing countries.<sup>19</sup> However, because of the rule against panellists being selected who are nationals of parties or third parties to a dispute,<sup>20</sup> panellists tend not to be chosen from all of the major users of the dispute settlement system.

A standing disputes tribunal would allow for greater geographic diversity in the appointment of members of panels while ensuring against conflict of interest.

#### 1.3.6 Strong Two-Tier System

The WTO needs a strong, two-tier dispute settlement system. Establishing a dispute tribunal at the first instance level is the logical next step after the creation of the Appellate Body. There now appears to be a risk that the Appellate Body could incrementally become a one-level tribunal. The Appellate Body is increasingly reviewing facts and evidence and taking more time to hear cases. There is a risk that the panel system will become weaker, and unless the first instance level is strengthened, the Appellate Body may become the tribunal of choice. In order to maintain a strong, two-tiered system, a dispute tribunal should be established.

#### 1.3.7 Panel Roster or Panel Chair Body

Proposals have been made in the DSU Review to establish a permanent panel roster<sup>21</sup> or a panel chair body.<sup>22</sup> The panel roster proposal would replace the current indicative list with

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18 Davey I, supra note 10, at 431.

19 Ambassador Agah's Speech, supra note 1, fn 28, the number of panellists was 209, of which 110 were from developed countries and 99 were from developing countries (taken from [www.worldtradelaw.net](http://www.worldtradelaw.net)).

20 DSU, Article 8.3.

21 *Contribution of Canada to the Improvement of the WTO Dispute Settlement Understanding*, TN/DS/W41, 24 January 2003; 3-5.

22 *Contribution to Clarify and Improve the Dispute Settlement Understanding: Panel System, Communication from Thailand*, TN/DS/W31. 22 January 2003: 2.

a roster of qualified governmental or non-governmental candidates nominated by Members (each Member could nominate only one candidate, using qualifications similar to those of the Appellate Body). WTO panellists would be selected from this roster, composition would otherwise remain the same as under current DSU rules. The panel chair body proposal would create a group of persons from which all panel chairs would be selected. All other panellists would be selected pursuant to existing DSU rules.

The panel roster proposal would not provide major gains in terms of time savings and efficiencies, because current DSU procedures and practices on composition of the panels would continue to apply. Also, a panel roster would not ensure the same level of expertise and experience or collegiality, consistency, and coherence that a standing tribunal would provide. While a panel chair body would have the advantage of greater experience for one person on each panel as compared with the current system, it would not result in significant time savings and efficiencies because the rest of the members of the panels would still have to be composed under existing DSU rules. Moreover, the panel chair system could undermine collegiality among the panel members. The panel chair would have more experience, possibly more expertise, and a closer working relationship with the Secretariat, giving him or her more influence than his or her colleagues in the final decision in the case. For all of the reasons enumerated above, a dispute tribunal would be a far superior alternative than a panel roster or a panel chair body.

## 1.4 Conclusion

After the innovation of the Appellate Body, the next logical step in strengthening the WTO dispute settlement mechanism is to establish a dispute tribunal to replace the ad hoc panel system. Members have a unique opportunity in the context of the DSU Review to plan boldly for the future of the WTO, in the same way that Uruguay Round negotiators did 20 years ago.

There are compelling reasons to create a dispute tribunal at this point in the history of the WTO. As the WTO adjusts to the rapidly changing global economy, disputes are becoming more complex and challenging, both on their facts and in the novelty of the legal issues presented. Moreover, higher quality decisions would be produced by a tribunal whose members are available at all times and on short notice to serve on cases. This would allow the two-tier system in the WTO to function as it was designed and enable the Appellate Body to focus on its mandate, which is to review issues of law and legal interpretation in panel reports.

Finally, a dispute tribunal would result in significant time savings and efficiencies as compared with the present ad hoc panel system. Time would be saved in panel composition, and other procedural and organizational efficiencies would ensue from having members available at all times and on short notice to serve on cases and from the experience, knowledge, and collegiality that would develop over time in the dispute tribunal as an institution.

There is currently a gap between the goals of the DSU and actual experience with respect to the timeliness of the dispute resolution system. While the number of disputes has been declining in recent years, panels have not generally completed their cases within the DSU timeframes, and the Appellate Body has recently begun to request the DSB to extend its timeframes. These delays could ultimately be problematic for the reputation of the WTO both with Members and stakeholders. If these delays continue and become accepted practice, they could undermine respect for the DSU as well as the credibility and legitimacy of the WTO.

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## 2. THE FUTURE OF THE WTO: GOVERNING TRADE FOR A FAIRER, MORE SUSTAINABLE FUTURE

*Carolyn Deere-Birkbeck*<sup>1</sup>

### 2.1 Introduction

Mounting concern about the future of the WTO provides a long-awaited opportunity to improve the governance of the multilateral trade system and for institutional reform.

Recommendations on WTO governance and institutional reform strangely provoke fear in the minds of many trade analysts. Some reject that reform is necessary; others contend that reform is not politically plausible, that the time is not ripe, or that the first priority must be to bolster existing aspects of the WTO. Reform can indeed start by working with what exists, but there is also scope for innovation. Those who reject the need for reform risk taking for granted the credibility and relevance of the very system they mean to defend. For those who suggest waiting, the question they must answer is when the right time to address systemic challenges will arrive.

This paper calls for adapting and strengthening the governance of the WTO to better respond to the imperatives of development and sustainability.<sup>2</sup> At the 2011 WTO Ministerial Conference, governments concurred that reviving the Doha Round and the WTO's negotiation function will rely on new approaches to how WTO negotiations are conducted. The renewed focus on improving the functioning of the WTO must also look beyond the organization's negotiation function to other key functions of the WTO system. While there are many governance challenges at the WTO, this paper focuses on four that demand attention from the vantage point of sustainability, equity, legitimacy, accountability, and relevance, namely<sup>3</sup> 1) enduring marginalization of many developing countries, most notably the smallest and poorest among them; 2) inadequate mechanisms for integrating sustainable development concerns into trade decision-making and negotiations; 3) inadequate and underused 'spaces' for policy dialogue within the WTO system; and 4) inadequate political and public engagement.

The paper begins with a brief reflection on the WTO reform discussion to date, and makes the case for a stronger sustainable development focus. It then elaborates the four challenges set out above and recommends reforms that would strengthen how the WTO's institutional design, rules, processes, and Member States address them. Some of the reform proposals are new and some refer to initiatives or decisions that have already been partially taken or implemented, but where further improvements are still needed. While there is certainly

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2 For a full review of the literature on development and WTO reform and perspectives from a range of developing country scholars and experts on the challenges at hand, see Deere Birkbeck, C. "Development-oriented perspectives on global Trade Governance: A Summary of Proposals for Making Global Trade Governance Work for Development" in *Making Global Trade Governance Work for Development: Perspectives and Priorities from Developing Countries*, ed. Deere Birkbeck, C. Cambridge: Cambridge University Press, 2011.

3 Other challenges that warrant attention include, for instance, the role of the multilateral trading system within the broader context of global economic governances, in particular in the areas of finance and its role vis-à-vis other international governance initiatives, such as the G-20 Leaders' Summits. Further, there is a clear case of greater coordination at the national level with respect to the proliferating array of bilateral, regional, plurilateral, and multilateral processes as well as the rules and fora that have links to international trade.

the need for new ideas in some critical areas, there is also considerable scope for acting on long-standing proposals already on the table. For this reason, the paper emphasizes the importance of a political process for facilitating action, noting the need for dialogue both among and within governments as well as with stakeholders around the world on the kind of global trading system we need.

## 2.2 State of Play on Institutional Reform: A Stunted Discussion

The term 'WTO reform' has become a broad catch phrase. Many different topics and proposals fall under this umbrella, ranging from proposals on the principles underpinning WTO agreements to their scope<sup>4</sup> and content, and the process of WTO decision-making.

This article intentionally focuses tightly on governance and the institutional agenda for WTO reform.<sup>5</sup> In the 15 years since the WTO was established, the issue of institutional reform - whether it is needed, in what form, and via what kind of process - has been an ever-present issue for the organization and its Member States. To date, discussion of governance and institutional reform has mainly focused on improvements to the WTO's negotiation and dispute settlement processes, as well as on the appropriate relationship and balance between the two. The prominence of other areas of debate on governance and institutional reform has fluctuated over time.<sup>6</sup> On institutional reform, areas that have attracted discussion include the internal governance and management of the WTO Secretariat, its ideal size, and budget, as well as the role of the Director-General and the related selection process. The WTO's functions and activities in regard to the monitoring of national trade policies and trade-related capacity building have also drawn attention as has the WTO's relationship with civil society, industry, and parliaments.<sup>7</sup> The intersection of WTO rules and other global norms on issues ranging from human rights and the environment to food safety and labour standards has spurred debate as well. In addition, there has been debate on the appropriate role of the WTO in global economic governance, the WTO's relationship with other international organizations and agreements, and on the relationship between WTO agreements and the growing number of regional and bilateral trade arrangements.

Importantly, the WTO has not been a static institution. There have been a number of reforms to the WTO and gradual evolutions in its practices and procedures over the past 15 years.<sup>8</sup> These have been advanced in a number of different ways, including through incremental and informal changes in the negotiation practices of diplomats in Geneva, decisions of the WTO General Council, formal ministerial decisions, and actions taken at the initiative of the WTO Secretariat.

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4 While some analysts call for limiting the scope of the WTO negotiating agenda (i.e., to ensure it does not cover issues such as investment issues), others advocate expanding its scope (i.e., to better address issues of high importance to developing countries, such as movement of labour).

5 It acknowledges, however, that the issues are often entangled: some aspects of negotiations relate directly to the governance of the multilateral trading system (e.g., disciplines for regional trading agreements, principles of special and differential treatment, reform of the dispute settlement system).

6 In the lead-up to the selection of each of the WTO's Director-General, for instance, debates about the appropriate powers of the Director-General and the election process have resurfaced. Similarly, debates on the Green Room tend to intensify around the time of WTO ministerial conferences and mini-ministerial meetings.

7 For an overview of proposals in these areas see Deere Birkbeck, C. and Monagle, C. *Strengthening the WTO: A Mapping of Proposals and Statement on Reform*, Geneva and Oxford: ICTSD and GEG, 2010.

8 For a summary of these see Deere Birkbeck, C (ed.) *Making Global Trade Governance Work for Development: Perspectives and Priorities from Developing Countries*, Cambridge: Cambridge University Press, 2011.

Regrettably, proposals on WTO reform are frequently advanced on the basis of ill-defined concerns about weak “efficiency” or “performance,” without a sufficiently clear articulation of the broader goals, normative purpose or benchmarks against which the WTO’s performance, efficiency, or credibility should be judged.

Discussion of institutional reform and WTO governance should properly be motivated by the need to address the two challenges at the heart of the current crisis in WTO negotiations: 1) responding to developing countries’ varied needs and bolstering their relative power in the system; and 2) advancing sustainable development. Not all commentators share the view that these goals should indeed be a core purpose of the system or of reform, and others may prioritize other issues (such as full employment, human rights, or expanding the production of and trade in goods and services). There is, however, a clear legal rationale for a focus on sustainable development and developing country needs as benchmarks for judging the WTO system and holding it to account to national stakeholders.

In legal terms, the preamble to the Marrakesh Agreement Establishing the WTO (the WTO Agreement) recognizes the importance of sustainable development, calling on governments to conduct their economic and social objectives in trade relations in a way that allows for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development. The WTO Agreement’s preamble also recognizes that the particular needs of developing countries in the trading system include, *inter alia*, the objective of greater employment. Several of the WTO agreements detail general principles and objectives that emphasize Members’ development and public policy objectives, as well as other national goals, such as political security. In 2001, WTO Members reaffirmed normative objectives in the Doha Ministerial Declaration, stating their conviction that the open, multilateral trading system and sustainable development “can and must be mutually supportive” (Para 6, Doha Ministerial Declaration) and making development the stated purpose of the Doha Round (while recognizing that the needs of particular countries may vary widely).

In practical terms, those who argue that the WTO ought not to be a development institution, or a sustainable development organization, or indeed anything more than a forum for commercial bargaining have already been overtaken by political reality. Issues of sustainable development and the concerns of developing countries already feature prominently across the Doha trade negotiations. Indeed, the fact that trade deals are so difficult to reach is in large part because governments cannot escape the real-world need to respond to political demands for greater equity and to address the social and environmental impacts and potential of trade and trade rules. The challenges that governments face in responding to such demands and achieving international agreements at the WTO derive in part from shortcomings that could be addressed through institutional reforms and improvements to WTO governance.

## **2.3 Key Challenges Institutional Reform Can and Should Address**

### **2.3.1 Persistent shortfalls in attention to development**

Optimism about the proliferation of developing coalitions in WTO negotiations and the rise of some emerging countries to the centre of WTO decision-making should not distract attention from the enduring marginalization of many of its poorest and smallest Members. Most developing countries remain disadvantaged in negotiations, in dispute settlement, and in monitoring and understanding the impacts of their own trade policies and those



of the major trade powers. While developing countries are now better represented and participate more actively in WTO negotiations, particularly through coalitions, for most of the WTO's developing country Members, the challenges of translating their voice into actual influence and promises into concrete outcomes remain. Further, developed countries have inadequately fulfilled their promises to take development considerations more fully into account in multilateral negotiations. While greater opportunities to have their voice heard will neither suffice to address the power asymmetries that structure global trade relations, they are a necessary prerequisite for greater attention to their needs and for broader progress in WTO negotiations.

On a positive note, the mounting emphasis of WTO Members and the Secretariat on aid for trade since 2005 has yielded new resources and initiatives to help developing countries take advantage of trade opportunities. There has also been important progress by the WTO and the OECD secretariats in monitoring aid-for-trade flows (e.g., an improved aid-for-trade database and the Aid for Trade 'At a Glance' report), but such measures fall short of what is needed to enable developing countries to hold developed countries accountable on their delivery of aid-for-trade commitments. Furthermore, aid for trade still offers too little in terms of empowering developing countries to make effective use of the WTO system.

### 2.3.2 The sustainability and equity deficits

In the context of global economic crisis, governments must balance crisis management with the need to implement long-term international commitments to sustainable development goals. Similarly, while governments work to restore global trade flows, the quality of trade, the distribution of its social benefits, and its impacts on environmental sustainability also matter both practically and politically.

In addition to the world's climate change crisis, the international community faces the collapse of global fish stocks, deforestation, biodiversity loss, and many forms of air, soil, and water pollution. On all these counts, there are aspects of global trade rules that contribute to or enable unsustainable practices to persist and that could be part of the solution. Likewise, trade policy can be part of the problem and solution. Indeed, the link between trade negotiations and social outcomes is a core reason that negotiations stall: Members have competing national policy priorities with respect to poverty alleviation, the creation of good quality work, and risks to social cohesion from rapid adjustments, and their capacities to manage the economic and social adjustments vary.

Despite the many links between trade policies, WTO rules, and social and environmental outcomes, the multilateral trading system lacks adequate mechanisms for gathering, reviewing, and assessing data on the relationship between trade rules and flows and key environmental and social indicators. It thus lacks the information and processes for enabling governments to harness the multilateral trading system to mitigate problems where it can and to adjust its rules where they may cause or exacerbate harm.

### 2.3.3 Inability to respond and adapt flexibly to emerging issues and trends

The WTO system has proven unable to respond assertively and adequately to many of the new issues that have emerged in global trade and the global policy arena over the past decade. While many of the new issues - such as climate, energy and food security - in fact already feature in many negotiations, many governments fear that any 'new issues' introduced at the WTO may become additional topics of negotiation, adding to an already overwhelming negotiating agenda and further complicating the configuration of trade-offs. The resort of many governments to protectionist measures in the current global financial crisis illustrates how quickly the interests, priorities and policies of states can shift, highlighting that dynamic

processes for dialogue and flexible decision-making mechanisms are especially important at times of crisis.

In short, the WTO and its Member states lack sufficient mechanisms for such policy dialogue and stakeholder engagement in the system, and those that exist are under-utilized for this purpose (such as the WTO Ministerial Conference and the WTO's regular committees).

### 2.3.4 Weak political and public engagement

Even as the Doha Round has ailed, politicians, officials, commentators, advocates and stakeholders have failed to build public understanding of the importance of multilateral trade rules, shore up the credibility of the WTO as their guardian, and respond to public distrust in many countries.

WTO negotiations are protracted because the issues are complex and the legal rules highly technical, demand-intensive processes of learning (about challenges, implications, and possible solutions), and require time-consuming efforts to build political support for potential deals in Geneva, among political leaders at the national level and among relevant national constituencies. Moreover, many of the challenges in the Doha Round emerged from substantive differences in trade policy objectives and interests. Where economic and political stakes are high and priorities diverge sharply, the legitimacy of negotiated outcomes and the prospect that governments will implement them demands public engagement not technical and diplomatic solutions. This need is especially high as interpretations of the mandate and purpose of the WTO remain an issue of debate among stakeholders. On the one hand, there is broad consensus on the importance of the WTO as the provider of a rules-based multilateral framework for international trade. On the other hand, there remains strong debate about whether the WTO's core purpose is the liberalization of trade or the provision of a regulatory framework for trade, and whether and how such a framework should work explicitly to promote a broader set of social and economic goals.

Although there have been improvements over the past 15 years, such as the hosting by the WTO of an annual public forum, the multilateral trading system still lacks adequate routine mechanisms and processes for the constructive engagement of stakeholders, whether from unions, nongovernmental organizations, academia, or the business sector, in ways that feed into decision-making processes to ensure trade rules respond to public concerns and expectations. There has also been inadequate engagement of political leaders - whether from government or parliaments. Too often, Ministers have been engaged too late in the process, without adequate briefing, or in ways that confuse the need for political direction and decision with technical negotiations on how to implement them.

## 2.4 Proposals for Institutional Reform

### 2.4.1 Democratize and expand developing country participation

There are many areas where efforts are needed to boost the engagement of developing countries and attention to their interests. The following discussion sets out recommendations in relation to three of the WTO's functions: negotiations, dispute settlement, and capacity building/aid for trade.

The concern about how to revive the Doha Round in some form and improve the WTO's negotiating function have an important systemic governance dimension - how to have decision-making that is accountable, legitimate, and efficient and that delivers on the core objectives of the system. At the heart of discussions of the WTO's negotiation function must be an effort to boost the participation and influence of developing country WTO Members,

particularly the smallest and poorest, and their coalitions in decision-making.

At the 2011 WTO Ministerial, the Chairman's statement, which summarized the discussions, proposed advancing the Doha negotiations in those areas where progress can be achieved such that members might reach provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking. There are, however, clear grounds for scepticism that promises of inclusiveness in the context of new approaches will translate into reality. While the prospect of variable speed negotiations offers some opportunities (for example, it reopens the possibility of completing an early harvest for LDCs), the proposal for new negotiating approaches also poses significant risks. The Chairman's statement was ambiguous on how new negotiating approaches can be pursued while retaining the principle of the single undertaking. Further, neither the statement nor subsequent informal discussions among governments have yet yielded more concrete explanations or proposals as to how governments plan to achieve the delicate balance between inclusiveness, transparency, and openness on the one hand, and greater efficiency in producing outcomes from negotiations, on the other. A key scenario to avoid is one where small and poor countries are engaged on only a narrow set of issues, such as discussions on cotton, market access, and S&D, while the broader systemic and regulatory issues that define the multilateral system are negotiated exclusively by larger players.

Whatever configuration future negotiations take, support must be directed to empowering more effective participation and influence of developing countries. From the standpoint of good process, priorities for future negotiations whatever their configuration include:

- a. Promoting more effective sequencing and predictability of negotiations to enable individual countries and their coalitions to prioritize the issues to which they devote in-depth analytical resources and government time. This would facilitate the ability of countries to move beyond broad political statements to devise concrete positions and fall-back positions on negotiating issues;
- b. devising guidelines on the composition of the Green Room and other small group meetings to ensure that countries are invited where subjects are of key interest or directly impact them (even if they are not the major trading powers or actors in that area). While flexibility is indeed important in negotiations, and smaller numbers can improve efficiency, the result is too often that important decisions are made by large countries in smaller groups.
- c. improving the transparency of Green Room Meetings, informal negotiations and small group consultations and ensuring a fuller briefing by the WTO Secretariat and coalition representatives on what has occurred in meetings;
- d. ensuring adequate "time out" for back and forth between coalitions and their representatives in the heat of negotiations so that countries can negotiate rather than simply be represented;
- e. designing clearer rules for access. The asymmetry in negotiating power between existing members and acceding developing countries, most of which are developing countries (LDCs comprise 40 percent of accession candidates), makes the need for clearer rules on the accession process vital, particularly to help shield countries from demands that go beyond their level of development and current WTO rules.

In terms of boosting the participation and influence of developing countries, some further priorities include:

- a. greater support to small and poor WTO Members to ensure they have permanent

representation in Geneva. Representation should not be left to a country's own financial resources or to the unpredictable generosity of individual WTO Members that may provide assistance, it should be considered central to the accountability and credibility of the WTO. In cases where small developing countries have a demonstrated commitment to achieving an effective presence in Geneva, they should be able to formally approach the WTO to complement the national financial resources they can afford to invest. This can be accomplished either through mandatory contributions by Members to the WTO's core general budget or through a voluntary, supplementary contribution scheme;

- b. establishing travel funds, as many other international organizations have, to facilitate the participation of technical experts from small and poor countries to participate in relevant committees and meetings;
- c. boosting the WTO's organizational support to support the level of engagement and efficiency of coalitions of small and poor countries in negotiations. While countries can turn to other sources for analytical and substantive inputs on topics of negotiation or debate, the WTO Secretariat should step up its provision of input that it is uniquely positioned to provide. It could, for instance, provide more systematic objective information on the status and process of negotiations and on the implications for LDCs of various specific proposals under discussion, particularly when negotiations move into a rapid or technical phase.

More effective participation will also rely on more strategic use of coalitions by developing countries and the use of a greater range of negotiating strategies and tactics. In addition, there is a need for improved internal management of coalitions to ensure their effective leadership, transparency, and accountability to their members.

In the area of dispute settlement, the use by developing countries of the WTO's dispute settlement system remains uneven. Improvements could include:

- a. supporting small developing countries and LDCs build legal capacity at the national and regional levels. This should include support to governments and domestic industries to identify and monitor where their trading interests are compromised by changes in trade policy of trading partners that violate WTO obligations as well as support for countries to follow and learn from ongoing WTO legal proceedings.
- b. boosting financial contributions to the Advisory Centre on WTO Law (ACWL) to expand its ability to respond to developing country requests for assistance. This could include by extending to small developing countries the subsidized support the ACWL's provides to LDCs.
- c. finding ways to help small and poor countries make greater use of mediation and alternative processes for resolving trade disputes;
- d. creating a 'small claims' procedure at the WTO; and
- e. advancing the possibility of compensation as a remedy for countries that have limited political prospects for using either retaliation or cross-retaliation as a way to secure compliance with WTO decisions (due to the deterrent effect of potential trade threats).

In the area of aid for trade and capacity building, key governance reforms should include:

- a. Greater efforts to ensure ease of access to available funds and transparency of what support is on offer.. A shift of support from bilateral trade-capacity building to multilateral initiatives would offer greater prospects of assistance delinked from

mercantilist priorities of donors.

- b. Greater support to regional trade institutions and arrangements as vehicles for channelling aid for trade.
- c. Boosting third-party monitoring and evaluation of donor performance (e.g., through annual independent evaluations and/or peer-reviews of trade-related capacity building from the recipient's perspective).
- d. Greater support for establishing durable capacity and expertise in developing countries and regions and less reliance on a network of international trade consultants.
- e. Greater public disclosure of the performance of each major donor.

Improved governance of aid for trade and capacity building will also depend on developing country leadership to push for a greater role in the management of aid, better articulate their needs, and extract greater value from existing resources.

#### 2.4.2 Assess and respond to social and environmental impacts

In the absence of adequate data and monitoring of environmental and social impacts, there is a need to consider how best to add an assessment or evaluation function to the WTO system that would review the effects of actual and proposed trade rules against objectives, such as sustainable development and employment, and identify national trade-related hurdles that impede their realization. Given political concerns about the potential for links to dispute settlement proceedings, such a function should likely be separate to the peer review/transparency function of the WTO's trade policy review.

Specifically, reforms for consideration could include:

- a. Establishing independent mechanisms for assessing the ex-ante and ex-post impacts of WTO rules on sustainable development indicators and integrating the results of such exercises into multilateral processes with respect to the negotiation of trade rules and reviews of their implementation. Such a function could take place under the auspices of the WTO Committee on Trade and Development, the General Council or the Ministerial Conference. A further option in this respect could include research reports and monitoring processes led by the WTO Secretariat in collaboration with other international organizations, national governments, regional inter-governmental bodies, research centres, academic institutions, or nongovernmental organizations;
- b. calling for regular independent assessments of how the multilateral trading system is delivering on sustainable development goals and benchmarks the international community has set for itself (such as the MDGs and targets set at the World Summit on Sustainable Development and the Rio+20 process);
- c. opening up the work of some of the non-negotiation, committee-based work to experts and interested parties to facilitate informed debate about trends and trade policy options;
- d. expanding the scope of the WTO's trade policy review process to serve as a tool to help governments integrate sustainable development considerations into trade decision-making (see discussion on monitoring below);
- e. Making greater use of the good offices of the Director-General to problem-solve specific trade-policy tensions that arise. In addition, the creation of an Ombudsman Office to

which third parties could submit specific sustainable development concerns for the attention of Member states could be considered.

### 2.4.3 Broaden trade surveillance, monitoring, and transparency

The recent financial crisis has spurred interest in greater surveillance by the WTO Secretariat of protectionist measures by Member states. There is certainly a case for reinforcing and improving the WTO's existing institutional mechanism for monitoring how WTO Members honour existing commitments. However, to help the WTO trade policy review process to better serve as a tool to help governments integrate development considerations into trade decision-making, the trade policy review process could include an assessment of the effects of trade rules in light of development objectives and an identification of national trade-related hurdles that impede their realization. The review process could also serve a stronger role as a catalyst for governments to organize appropriate capacity building efforts.

Specific reforms should include:

- a. making the trade policy review process open to the public;
- b. using multi-stakeholder processes at the national level in the development of the national trade policy review reports;
- c. inviting recognized international experts as commentators in trade policy review meetings in Geneva;
- d. inviting commentaries from other interested national and international parties (for example, other inter-governmental organizations, industry groups, nongovernmental organizations, academics, etc.); and
- e. integrating a new component into the trade policy review process that evaluates the fulfilment by developed countries of their capacity building commitments to developing countries.

The expanded monitoring function need not, and perhaps cannot, be performed by the WTO Secretariat alone. Instead, the WTO's monitoring function might also be improved by engaging non-state actors through independent monitoring initiatives involving companies, nongovernmental organizations, academics, and foundations. This may also offer the possibility of swifter and more critical impartial analyses.

### 2.4.4 Boost public and political engagement and spaces for dialogue

Deliberations on WTO reform and strengthening multilateralism call for political engagement and leadership to clarify the strategic vision, direction, and mandate of the WTO; its role in global economic governance, and the values the multilateral trading system should protect and support. Effective governance demands attention to processes that foster dialogue, accountability, and transparency. Such processes demand high-level political commitment from trade ministers and from all parts of national governments involved in strategies for engaging in the global economy. The task of improved global trade governance is not a technical, legalistic, or bureaucratic matter that can be solved by trade negotiators and diplomats in Geneva.<sup>1</sup> Nor can it be achieved without a thorough consideration of the political demands and concerns driving divergent perspectives and expectations about the end goal(s) of the WTO.

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<sup>1</sup> Several scholars have already called for bringing more politics into WTO negotiations and decision-making as a desirable outcome and in favour of finding more spaces for political contestation to occur.

The debate over how to address new issues at the WTO highlights that venues for high-level policy dialogue will prove increasingly important for keeping the WTO dynamic and relevant. Moreover, the debate highlights the importance of who decides which issues warrant attention from the membership, in what form (i.e. as topics of negotiation, information-sharing, or general discussion) and how the WTO's weakest members can ensure they have a say.

As part of the reform agenda, governments should ensure attention to boosting the policy dialogue function of the WTO on trade matters, whether through its regular committees, the General Council, ministerial conferences, co-operation with other international organizations, or additional new mechanisms.

To this end, the reform agenda should include:

- a. devising mechanisms within the multilateral system, and making better use of the WTO's existing mechanisms, such as its regular committees, to ensure regular agenda-setting, dialogue on new/emerging issues and problem-solving where crises arise to ensure coherence of the WTO's activities with global policy priorities;
- b. making more strategic use of the WTO Ministerial Conference. The Ministerial Conference is the only formal forum the WTO system currently has for ministerial-level policy discussion and agenda-setting that engages all Members;<sup>2</sup>
- c. Engaging more stakeholders in the trade policymaking process at the WTO and in national processes. At the WTO, there are opportunities for greater stakeholder engagement across the WTO's negotiation, research, capacity-building, and monitoring activities. At the national level, there is a need to continue efforts to improve internal coordination of national trade policymaking processes to incorporate sustainable development considerations and to engage a broader range of domestic political actors - beyond trade technocrats - such as parliamentarians, the private sector, trade unions, and civil society. Governments should also commit to including relevant stakeholders in their delegations to WTO negotiations and to more active dialogue among parliamentarians from across the WTO's membership, including through the Inter-Parliamentary Union;
- d. Increasing support for independent research and analytical capacity on trade in developing countries at the national and/or regional level in universities, think-tanks, and research centres, as well as in the regional/national headquarters of various UN agencies, to feed into national trade policymaking processes<sup>3</sup>

## **2.5 A Process for Forward-Thinking on the Multilateral Trading System and Institutional Reform**

Concern about the status of the Doha Round yields a critical opportunity for dialogue on the systemic challenges facing the WTO, how to strengthen multilateralism in trade, and how to ensure that the multilateral trade system better delivers on its commitments to sustainable development and the needs of developing countries. The outcome of the 2011 Ministerial Conference highlights that without concrete guidance, official affirmations of the need for institutional improvements, which were already widely stated at the 2009 Ministerial Conference, are not enough to spur action, particularly when governments fear

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2 It provides an opportunity for ministers to fulfill their board responsibilities to set the WTO's strategic direction, provide budgetary oversight, approve work programs, and supply political leadership

3 Some initial steps in this direction are already being taken by the WTO Secretariat, albeit amid calls to still boost the WTO's own research capacity.

negative repercussions for the WTO's ailing Doha negotiations.

The fact that there is now an active discussion on the future of the WTO implies that at least some commentators, WTO members, and members of the WTO Secretariat are ready to engage in the serious deliberative task of policy dialogue and agenda-setting on the future of the system. This openness also represents a critical opportunity to take up issues of institutional reform.

To advance such deliberations, engagement and debate at the ministerial level are vital as are processes for engaging stakeholders and experts.

To this end, Ministers should push institutional reform issues higher up the multilateral trade system's official agenda. A discussion of WTO reform among the full WTO membership is vital to reinforcing the importance of a multilateral approach to global trade, to reviewing the mandate and performance of the WTO system, and to protecting the institutionality and existing agreements of the WTO system. In preparation for the next WTO ministerial conference, they should establish a standing task force of trade ministers to generate new proposals and seek ways to implement existing proposals that would strengthen the multilateral trade regime. They should empower and task the Secretariat to partner with external institutions to establish a working group of WTO Members and/or experts to propose WTO reforms - both incremental and more structural - that would involve opportunities for input from and dialogue with a diversity of stakeholders.

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### 3. WHAT NEEDS TO BE DONE BEFORE WE REFORM THE WTO

*Rorden Wilkinson*<sup>1</sup>

With little substantive progress in the Doha Round since July 2008, debate has again turned to how the WTO might be reformed. The majority of the contributions to this debate draw their rationale from diagnoses that point to the current impasse in the round, and in particular the standoff over reciprocal market access in the trade in goods (NAMA) and agriculture negotiations, as indicative of the WTO's ills. Myriad proposals for the institution's reform have been put forward, varying by degree of sophistication and likelihood. Yet, the debate about WTO reform has quickly come to replicate elements of debate about the Doha Round itself. Almost all commentators agree that something needs to be done, whether that is pursuing a multi-track approach to liberalization via some kind of variable geometry<sup>2</sup> or a 'club of clubs'<sup>3</sup> approach, altering the complexion of decision-making to take account of changed and changing global power relations, or rendering more transparent the inner and all-too-often obscure layers of decision-making among varying groups of core Member states (G4, FIPS, G5 and so on). However - and this is where the reform debate most resembles what is going on in the round - despite the appearance of a widespread consensus on the broad substance of the reform necessary (which is akin to the 'common sense' knowledge about what needs to be done to conclude the round), an agreement remains elusive.

Although the current impasse in the round provides a potentially fruitful moment to attend to aspects of the WTO's functioning and organization, adjustments that may actually prove beneficial not only to the further workings of the organization, but also to bringing about a conclusion to the round—there is a risk that a shift in gear from negotiating mode to reform mode might prove satisfactory only in that it translates pent-up frustration into action. It does not guarantee that such a shift will bring about a measured period of reflection prior to the commencement of a debate about reform; and this lack of reflection may lead to a failure to identify (or gloss over) a few bad habits and deeply rooted ills that afflict the multilateral trading system that need to be addressed *before* a fruitful debate on WTO reform can take place, particularly one that is helpful to the round.

There are at least four aspects of the current debate that we have to attend to before we can move seriously into a conversation about WTO reform. These are the language we have come to use when we talk about trade; the theatre in which we are engaged; the power realities with which we have to deal; and the purposes of our endeavours. The remainder of this note takes each of these points in turn before offering some concluding comments.

#### 3.1 Language<sup>4</sup>

We need to think about the language we use when talking about the ills of the multilateral trading system and recognize that particular ways of speaking about trade may be unhelpful

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2 See VanGrasstek, C. and Sauvé, P. "The Consistency Of WTO Rules: Can The Single Undertaking Be Squared With Variable Geometry," *Journal of International Economic Law*, 9:4 (2006): 837-864.

3 Lawrence, R.Z. "Rulemaking Amidst Growing Diversity: A Club-Of-Clubs Approach To WTO Reform And New Issue Selection." *Journal of International Economic Law*, 9: 4 (December 2006): 823-835.

4 A version of this section appears in Wilkinson, R. "Of Butchery and Bicycles: the WTO and the "Death" of the Doha Development Agenda," *The Political Quarterly*, forthcoming 2012.

and bound up with particular interests and ideological positions and dispositions. Moreover, we need to recognize that much of the debate about the WTO has become as adversarial as trade negotiations themselves, falling all too quickly into a pattern of accusation and counter-accusation. The recent exchange between Guy de Jonquières and Michael Hindley on the CUTS Trade Forum provides ample example.<sup>5</sup>

One of the most striking features of recent commentary about the WTO has been the use of dramatic and high-stakes language. All too often the state of the round, and the organization's very existence, is presented in life and death terms. In this presentation commentators frequently claim that the organization is 'doomed', or else they compete to be the first to proclaim the round 'dead' (and to write the obituary).<sup>6</sup>

In many cases, commentators choose to underline this life and death struggle with a metaphor or two. These metaphors are often medical - such as likening the state of the round to a 'coma' or else encouraging us to imagine that it is on 'life support' - though other metaphors are also used. Jagdish Bhagwati has, for instance, suggested that there might be some utility in seeing the round as a 'hanging' as a way of focusing minds. He has also likened proclamations of the death of Doha to Mark Twain's premature obituary.<sup>7</sup> Drawing on a slightly different, rather 'undead' metaphor, Duncan Green has suggested that the WTO is sliding into a 'zombie' state of irrelevance.<sup>8</sup>

The point here is that in pursuing a line of argument these metaphors are taken to their logical conclusion to reinforce the need to pursue a particular course of action. So, if the commentator is of the opinion that the Doha Round is, for whatever reason, no longer of value, we are encouraged to let the patient die, engage in a spot of euthanasia, or mount an assassination.<sup>9</sup> For those that see value in continuing the negotiations, metaphors are used to drum up support for dramatic intervention to salvage the negotiations in a manner akin to surgery, an essential amputation, or else advocate a pharmaceutical cure.

The problem with talking in such dramatic ways is that they presuppose and necessitate that quite dramatic action is necessary. In so doing, they hook readers into a form of argumentation that suggests that only a particular action consistent with the commentator's predisposition is worth pursuing. This, in turn, limits discussion to those options associated with a diagnosis that sees the situation as chronic and the solution as dramatic. The issue here is that the use of such high-stakes language crowds out discussion of solutions that are not dramatic and that do not speak to the solutions proposed by the original commentator.

Talking about trade in this way also encourages respondents to engage with the chosen metaphor, twisting it to fit their point of view. The consequence, however, is that in so doing

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5 Lehmann, J.P. "Concluding The Doha Round," *CUTS Trade Forum*. CUTS, 24 11 2011, 29 Apr. 2012. Available at: [http://groups.google.com/group/cuts-tradeforum/browse\\_thread/thread/5ab16dbce53d7791](http://groups.google.com/group/cuts-tradeforum/browse_thread/thread/5ab16dbce53d7791).

6 See, for instance, Kleimann, D., and Guinan, J. "The Doha Round: An Obituary," *Global Governance Programme Policy Brief*, Robert Schuman Centre for Advanced Studies, European University Institute, No. 2011/1 (June 2011). Available at: <http://www.eui.eu/Projects/GGP/Documents/Publications/PolicyBriefs/PolicyBrief2011final.pdf>.

7 Bhagwati, J. "The Doha Round's Premature Obituary," *The Economic Times*, 30 April 2011. Available at: [http://articles.economicstimes.indiatimes.com/2011-04-30/news/29490822\\_1\\_doha-round-doha-talks-wto-director-general-pascal-lamy](http://articles.economicstimes.indiatimes.com/2011-04-30/news/29490822_1_doha-round-doha-talks-wto-director-general-pascal-lamy).

8 Green, D. "The Doha Round Has Run Its Course But New Trade Realities Demand Solutions", *The Guardian*, 4 May 2011 Available at <http://www.guardian.co.uk/global-development/poverty-matters/2011/may/04/doha-trade-realities-demand-solutions>.

9 S Harbinson, S. "Calls To Pull The Doha Plug Show Naivety Not Realism," *Financial Times*, 5 May 2011.

participants become bound up in a language and a realm of what is held to be politically possible. Hence, counter-claims of the need for intensive treatment, incisive surgery, palliative care and the like fail to get us beyond Doha as life and death struggle. Moreover, they force us to think about solving the ills of Doha, and of the WTO, in too high pressured a fashion, crowding out time for measured contemplation. In turn, they take us too quickly into a realm of discussion about the state of the round or reform of the WTO in a way that is too panicked.

Metaphors have long been a staple of trade commentary, often being rolled out, as George Orwell put it in his critique of the state of the English language, 'like sections of a prefabricated henhouse' simply because they make trade politics dramatic, theatrical, and newsworthy.<sup>10</sup> As Bhagwati notes in suggesting that we should perceive the round as if it were a hanging, these metaphors and the ways of talking that accompany them, are powerful, bringing to the fore particular solutions given rise to by the forms of logic that underpin the language used.<sup>11</sup>

During previous rounds metaphors were used to help maintain or provoke forward momentum in trade negotiations by encouraging us to believe that if progress was not maintained a catastrophic event would ensue. More often than not, the metaphor used was that of a bicycle. At those moments when the toppling over of a bicycle proved insufficiently powerful for describing what might happen should a trade deal fail, other metaphors were deployed. Occasionally this involved a train, with 'train wreck' and 'coming off' the rails being important aspects of unpacking the metaphor. Sometimes a ship was used, most often with 'wreck' as a corollary. Less frequently, but not uncommonly, liberalization was likened to a juggernaut, often to suggest that it was inevitable and all barriers to its progress should be removed *tout de suite*.

Yet, as with the use of terminal medical metaphors, these requests for us to think of trade rounds (and, in extension, the WTO's vital signs) as akin to material things that need to be kept, or just are, in motion are unhelpful. They create a pressure to act with speed that is not always helpful. And they are also discursive tools that belie ideological dispositions and claims about how trade ought to be organized. In short, they encourage us to take a leap of faith. The bicycle metaphor cajoles us into assuming that liberalization must take place or else the bicycle will crash and the world economy collapse, in much the same way that the only way to offer sustenance to the patient is to give them what they lack - that is, sustenance in the form of further market openings.

The trouble, however, is that these metaphors are all too often taken literally and arguments pursued by trying to outsmart opponents with new twists and turns on the theme. Moreover, they are deployed not just because of the images they conjure up. They are also used precisely because they bring with them certain entailments that flow logically from their application. So, as Glenn Hook points out, the depiction of something as cancerous necessitates that both dramatic and interventionist action be taken.<sup>12</sup> Likewise, the momentum of the bicycle must be maintained; the train must be prevented from coming off the rails; and a patient in terminal decline must either be treated immediately and robustly or else put out of his or her misery (both courses of action requiring political will). The point here is that the

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10 Orwell, G. 'Politics and the English Language' [1946], reprinted in *Inside the Whale and other essays*, (London: Penguin, 1962): 145..

11 Bhagwati, J. "'The Doha Round's Premature Obituary,'" *The Economic Times*, 30 April 2011. Available at: [http://articles.economictimes.indiatimes.com/2011-04-30/news/29490822\\_1\\_doha-round-doha-talks-wto-director-general-pascal-lamy](http://articles.economictimes.indiatimes.com/2011-04-30/news/29490822_1_doha-round-doha-talks-wto-director-general-pascal-lamy).

12 Hook, G.D. "The Nuclearization of Language: Nuclear Allergy As Political Metaphor," *Journal of Peace Research*, 21: 3 (1984), 262.

entailments that accompany a metaphor, or for that matter the manner about which a subject is spoken, set the boundaries of what is understood to be politically possible. The message is clear: bridge the divides and conclude the round, or else the breakdown of the multilateral trading system and something akin to the nightmare of the 1930s (which is almost always presented in stylized Orwellian terms) will be upon us. Yet, the perceived urgency of the situation ensures that we continue to think inside the box, to carry on doing things just the way we have without allowing space and time for thinking about how we might solve the ills of the multilateral trading system.

### 3.2 Theatre

A second area to which we need to attend is what Thomas G. Weiss calls the North-South Theatre.<sup>13</sup> Weiss argues that one of the reasons UN institutions produce such mediocre performances is the ‘diplomatic burlesque that passes for negotiations on First Avenue in Manhattan or the Avenue de la Paix in Geneva.’<sup>14</sup> He posits that this theatre is a residue of the way diplomatic space was carved out for countries on the global periphery in the 1950s and 1960s. However, he argues that these ‘acting troupes’ and the theatre in which they engage, “constitute almost insurmountable barriers to diplomatic initiatives. Serious conversation is virtually impossible and is replaced by meaningless posturing in order to score points in UN forums and be reported by media at home.” The result, however, is that what were once “creative voices ... have become prisoners of their own rhetoric.”<sup>15</sup>

Much the same could be said for events in the WTO. We have yet to move beyond the portrayal of trade politics as dominated by a North-South split, despite the fact that such a representation is often at odds with the empirical evidence. Indeed, many of us often invoke the idea of a North-South split as a way of conveying a message about the state of trade politics (often a normatively driven claim that the ‘West’ is trying to put one over on the ‘Rest’; or else, the round is being hijacked by developing countries) knowing full well that this does not quite stack up in reality. Moreover, even in those moments when a North-South split *has* seemed to be apparent, important deviations have existed. The debate over whether trade liberalization under the WTO ought to be linked to the maintenance of certain core labour standards in what became known as a social clause was perhaps the clearest North-South cleavage in recent times (with the North supporting a linkage and the South rejecting one).<sup>16</sup> However, even here the divide was not so clear-cut. At the 1996 Singapore Ministerial Conference, for instance, both Australia and the UK came out against the idea of a linkage between trade liberalization and labour standards while Argentina registered its *support for* WTO involvement in protecting core labour standards.

Whereas once this global fracture was useful in helping move agendas forward (the ‘threat’ of an alternative trade forum posed by the creation of UNCTAD was enough to ensure that Part IV of the GATT was agreed, for instance),<sup>17</sup> it has now dug us into trenches that we have difficulty getting out of and that prevent us from moving forward in ways that might actually address the biggest outstanding issue in the WTO, that we have not dealt with and continue

13 Weiss, T.G. “ECOSOC and the MDGs: What Can Be Done?” in *The Millennium Development Goals and Beyond: Global Development after 2015*, eds. R. Wilkinson and D. Hulme (London: Routledge, 2012).

14 Weiss, T.G. “Moving Beyond North-South Theatre.” *Third World Quarterly*, 30, 2 (2009): 271-84.

15 Weiss, T.G. “ECOSOC and the MDGs: What Can Be Done?” in *The Millennium Development Goals and Beyond: Global Development after 2015*, eds. R. Wilkinson and D. Hulme (London: Routledge, 2012).

16 Wilkinson, R. “A Tale of Four Ministerials: The WTO and The Rise and Demise of The Trade-Labour Standards Debate.” *IPEG papers in Global Political Economy*, No. 3, (April 2002).

17 Whalley, J. “Non-Discriminatory Discrimination: Special and Differential Treatment Under The GATT For Developing Countries,” *The Economic Journal*, 100:403 (December 1990): 1320.

not to deal with development properly, adequately, and substantively.

As Weiss notes, “moving beyond the North-South quagmire ... is an essential prescription for what ails ECOSOC and the United Nations. Fortunately, states have on occasion breached the fortifications around the North-South camps and forged creative partnerships that portend other types of coalitions that might unlog deliberations in ECOSOC and elsewhere.”<sup>18</sup> Certainly, there are glimmers of hope, but the disabling nature of the North-South theatre has managed so far to scupper the round; it would as likely be equally unhelpful in trying to reform the WTO.

### 3.3 Power

A third area that requires attention is the need to recognize that certain realities of power necessitate that the US is at the heart of any reform process and, perhaps more importantly, that the US has a moral obligation to ensure that any reform effort must be for the benefit of the global good. This does not mean that the US should dominate; far from it. But, it does mean that we need to find ways of bringing the US back into the fold and encourage it to take up this moral obligation rather than to pursue a policy of relative isolation (whether self-imposed or actively crafted by other negotiating partners). Indeed, with the Obama administration in power (albeit seemingly disengaged from WTO issues as it might be at the moment) there is a greater prospect that this moral obligation would be a task the US would rise to than with previous and, possibly future, administrations.

Why, given that in many ways the US is part of the problem, should it be at the heart of the solution? Craig Murphy offers a compelling insight into why this might be the case.<sup>19</sup> Drawing from the work of Charles Kindleberger,<sup>20</sup> Murphy argues that the depression of the 1930s was deeper and longer because of a failure on the part of the US “to take responsibility for the world economy, in particular by refusing to act as a lender of last resort, something that only it could do.” Similarly, John Ruggie has shown that the kind of international public goods put in place after the Second World War were the product of a uniquely US multilateral project that was both self-interested and benevolent.<sup>21</sup>

The point here is that reform of the WTO is neither possible nor desirable without the US. While US interests will inevitably feature prominently in any reformed institution, an engaged US is more likely to pick up on the moral obligation entailed by its global position and agree to, and even press for, reforms that are beneficial to all. Without US leadership, willingness, and support for a reform effort, trade regulation, and politics will more than likely continue in much the same way that they currently do.

### 3.4 Purpose

The final area that requires attention is our lack of a willingness to ask reflective questions about the very purpose of the WTO. We almost never ask ourselves what the point of the WTO is. And most discussions of WTO reform tend toward minor fettle as a result. For example,

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18 Weiss, T.G. “ECOSOC and the MDGs: What Can Be Done?” in *The Millennium Development Goals and Beyond: Global Development after 2015*, eds. R. Wilkinson and D. Hulme (London: Routledge, 2012)..

19 Murphy, C.N. “Lessons To Be Learned From The Challenges To Achieving The MDGs In Africa,” in *The Millennium Development Goals and Beyond: Global Development after 2015*, ed. Wilkinson, R and Hulme, D. (London: Routledge, 2012).

20 Kindleberger, C. P. *The World in Depression 1929-1929*, Berkeley: University of California Press, 1973.

21 Ruggie, J.G. “Third Try At World Order? America and Multilateralism After The Cold War,” *Political Science Quarterly*, 109: 4 (1994).

most observers perceive the WTO's problem to be one of efficiency: that the institution's negotiating and decision-making machineries are operating in a suboptimal fashion and, as a result, trade facilitating bargains have become almost impossible to conclude. This preponderance of opinion has, in turn, identified a number of solutions that might overcome the problem so conceived.

However, while many of these proposals clearly have merit, most would offer only temporary respite. Moreover, none of them would alter in anything other than a minor way the workings or outcomes of the WTO. It is worth bearing in mind what George Orwell said about the United Nations Organization (UN) only six months after its formal creation when thinking about the way we design, redesign, and reform our global institutions. He lamented:

*In order to have any efficacy whatever, a world organization must be able to override big states as well as small ones. It must have [the] power to inspect and limit armaments, which means that its officials must have access to every square inch of every country. It must also have at its disposal an armed force bigger than any other armed force ... responsible only to the organization itself. The two or three great states that really matter have never even pretended to agree to any of these conditions, and they have so arranged the constitution of UN that their own actions cannot even be discussed. In other words, UNO's usefulness as an instrument of world peace is nil.<sup>22</sup>*

The point here is that like the UN, the WTO has at its core a set of embedded power relationships that advantage the leading industrial states and disadvantage their smaller, less capable, developing counterparts. Tinkering at the edges may give an appearance of reform, but it may also gloss over the need to fundamentally unpick the organization's very design so that it might be refashioned in a way that serves the interests of all of its members.

It is here that we must return to that least asked, but most pressing of questions: what is the point of the WTO? If we ask ourselves that question and come up with an answer that says we want a system that consistently delivers unbalanced trade deals favouring the richer industrial states over their poorer, less able developing counterparts and that has become increasingly moribund, then let us fiddle round the edges and leave the institution largely as it is. But if we come up with an answer that says the WTO should generate trade-led growth for all (something that we all ought to be able to agree on), then we need to redesign it as such, getting rid of competitive negotiating as a mechanism for delivering gains, and accept that in facilitating trade-led growth for all it will inevitably become a development institution (and we should accept that it is one).

Indeed, the last point requires a little underlining. Over the course of the Doha Round certain commentators have been at pains to point out that the WTO is not a development organization. This comment has always been the source of some puzzlement. Most of these same commentators are also at pains to point out that because trade equals growth, which in turn equals development more trade should equal more growth which, in turn, should equal more development. Yet, here is the paradox: if more trade equals more growth, which in turn leads to more development, then surely any organization that is concerned with facilitating more trade must by definition be a development organization. And if this is the case, we ought to recognize that this is the case with the WTO and we should act accordingly.

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22 Orwell, G. "In Front of Your Nose." *Tribune*, 22 March 1946.

### 3.5 Conclusion

There are of course other reasons for reflecting seriously on the purpose of WTO - changed global power relations, the disjuncture between transnational economic activity and international political bargaining, the end of geographies of production and consumption and so on - but the most compelling is that our global economic institutions are not presiding over welfare gains for everyone. We need to sit back and ask ourselves why the WTO is not playing its part; ask questions and come up with serious answers that ensure that in the future it does; and we should do this quite soon. Otherwise, we risk not only leaving growing inequalities and deepening deprivations across the world unchecked, but also the risk of talking, acting, thinking, and doing what we have always done for years to come. Jumping straight into a process of reform is unlikely to move us in the right direction.

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## 4. WHAT KIND OF INSTITUTIONAL REFORM IS THE WTO RIPE FOR?

*Roberto Bouzas*<sup>1</sup>

### 4.1 Introduction

Three stylized facts describe the present WTO conundrum.

First, while most analysts would agree that a broadly based multilateral regime is the best mechanism to manage the coordination problems posed by an increasingly connected world trade regime, many of them would also acknowledge that the political underpinnings of such an arrangement (at least as we know it today) have been shaken by relative power shifts, the emergence of new actors, and a more complex and sensitive negotiating agenda.

Second, many observers have taken the fact that the DDR has dragged for over a decade as an indicator of institutional crisis. By measuring success as the outcome of negotiations, the WTO risks becoming characterized as an increasingly irrelevant (or ineffective) institution. The “bicycle theory” has provided a familiar parable to this view in a sort of self-fulfilling prophecy: if concluding negotiations is to be taken as the indicator of institutional success, failure to conclude them would be a signal of institutional failure. This biased evaluation has become widespread despite the fact that the WTO has continued to perform other key functions, such as the provision of a forum for deliberation and dispute settlement and the deterrence of protectionism in the middle of the worst financial crisis in nearly a century.

Third, many analysts agree on the fact that the negotiating agenda of the WTO has become outdated and fails to pay adequate attention to what will be the important issues of the future.<sup>2</sup> The result is an ever-growing list of topics that the WTO would have to address in order to recover a more pivotal role in the world trading system, from climate change mitigation to currency misalignments and security concerns. In the present context, this ever-expanding list brings to mind Albert Hirschmann’s characterization of the logic behind Latin American policy-makers: if you cannot reach your target then raise the bar, make the challenge even harder and forget about your original problem. Are we facing a “Latin Americanization” of the world trade regime?

In my opinion the overlapping of these three facts has created a political hurdle. Most pundits favour a multilateral approach, but at the same time admit that the political underpinnings required to make such an arrangement work have been seriously weakened. Similarly, while the WTO has continued to provide useful services to the world trading system, many fear that the DDR stalemate threatens its legitimacy and future prospects. Finally, despite the growing evidence of institutional paralysis as a negotiating forum, many demand a broadening of the WTO agenda and point out an ever-expanding list of challenges.

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2 Mattoo, A. and Subramanian A. *Multilateralism Beyond Doha*, Center for Global Development Working Paper No 153, 2008.

## 4.2 The WTO: one junction and three paths

This paper argues that the WTO has reached a point where a decision about three alternative paths ought to be taken. The stylized options are the following:

- a. continue on a “business-as-usual” course,
- b. broaden and deepen to embrace the trade agenda of the future,
- c. pursue a strategy of damage control by re-focusing on some core functions and take note of existing political constraints.

It should be clear from the start that option (b) would be superior to all others, provided it could effectively materialize. But this paper is not about what should ideally be done (there is a chorus of very influential voices clamouring for that) but about what could be done given the prevailing constraints. The functional demand for enhanced international cooperation is an important consideration. But, unfortunately the coin has two sides, the other one being the political pre-requisites to make that cooperation happen. In the present context of power diffusion and political disfunctionality,<sup>3</sup> damage control may be a more appropriate (albeit certainly less inspiring) option than ambitious plans to broaden and deepen the WTO. In what follows I briefly discuss the pros and cons of the three paths.

### 4.2.1 Option (a): “business as usual”

The Doha Round negotiations have been dragging for more than a decade, making them the longest negotiating process in the GATT-WTO’s history. This is not the place to examine in any detail the reasons for such lack of success. However, it may be helpful to point out a number of features of the process. First, the DDR was decisively motivated by political (rather than economic goals). Second, the price paid to embark many developing countries on a new negotiating round was to formally focus the negotiations on developmental issues. The idea of a “development round” was a compromise to try to compensate for the perceived imbalanced outcome of the Uruguay Round and its implementation. Third, in contrast to the allegations that a broader agenda (as the one which emerged in the Uruguay Round) would increase the scope for mutually beneficial trade-offs, the Doha Round has remained stuck on quite traditional issues. Moreover, the abandonment of the so-called Singapore issues during the DDR negotiations has made no contribution to overcoming divergent national positions on traditional issues, such as agriculture and NAMA. In sum, the impasse in the negotiations can be attributed to two major facts: (a) pending issues of the traditional trade agenda are the hardest bones to bite following half a century of liberalization, and (b) the mix of consensus and coercion that moved the GATT forward for half a century is no longer working as a result of large shifts in the structure of power.<sup>4</sup>

In this context, the “business-as-usual” scenario would entail extending the present stalemate into the future, hoping that some kind of agreement (minimalist or otherwise) is eventually reached. A minimalist agreement anytime soon may enable us to focus on the institutional challenges faced by the WTO. However, since the chance that even a minimalist agreement is reachable in a reasonable period is low, the prospect of a continuing impasse in the negotiating role of the WTO remains a distinct possibility. Even if the WTO continues to perform other roles effectively (as it has done in recent years), stalled negotiations will remain a source of attrition and will trigger dissent and acrimony among its members, giving ground to allegations of institutional failure. Considering the adverse economic environment

<sup>3</sup> Barton, J., Goldstein, J. et al. *The Evolution of the Trade Regime* (Princeton: Princeton University Press, 2006).

<sup>4</sup> Ibid

that is likely to prevail in the short- and medium-term, “business-as-usual” seems to be a path toward seriously undermining the legitimacy of the WTO.

#### 4.2.2 Option (b): broaden and deepen

The Uruguay Round brought a significant broadening and deepening of the trade agenda. Apart from the treatment of non-border issues affecting goods’ trade (a quite controversial issue by and for itself), the Uruguay Round included an ambitious (and arguably poorly designed) agreement on trade in services and an agreement on trade-related aspects of intellectual property rights (docked in the WTO for political economy reasons). The so-called Singapore agenda incorporated new issues in the trade debate, although they were temporarily abandoned during the DDR negotiations. There is no doubt that the broadening and deepening of the trade agenda mirrors the growing interdependence of national economies and the inclusion of new policy areas into the domains of international regulation. The ever-growing fragmentation of production and the emergence of new global challenges (such as global warming mitigation) have added further dimensions to the regulatory agenda of the WTO.

It thus looks like common sense that the WTO should accommodate these new functional demands to stay tuned to the times. As Baldwin and Evenett argued, the DDA contains a list of topics agreed ten years ago and initially identified during the negotiations of the Uruguay Round.<sup>5</sup> If the WTO is to stay tuned and relevant to the international trading system of the next quarter of a century, it needs to update its agenda accordingly. This may well be the case. But how is that going to be made?

First, the proposition that broadening the agenda would increase the potential for trade-offs has not been confirmed, since the DDR has gotten stuck around quite traditional issues. Moreover, in the only historical precedent so far, the Uruguay Round was able to successfully broaden the agenda in a *tour de force* that left developing countries with no alternative but to accept the inclusion of new agreements or risk losing the benefits negotiated since GATT-47. Certainly, the perception that the Uruguay Round outcome was imbalanced is not independent from this fact.

Second, broadening and deepening the agenda is also likely to be impossible without a major institutional reform that introduces new procedures, such as ending the single undertaking, implementing “critical mass” methodologies, or multiplying plurilateral agreements. But, it is unclear why many developing countries will accept these institutional innovations, which they may perceive as going against their own interests. By the same token, it is hard to understand why key developed country players will invest political resources in such institutional reforms when they could move forward in the same direction through probably more convenient substitutes, such as PTAs. The fact that the WTO disciplines on PTAs are at best feeble and that Member states have shown little interest in strengthening them, suggests that they prefer to maintain their leeway to move forward picking up partners, issues, and opportunities as they see fit. For sure, PTAs cause inefficiencies and are a relatively costly way to move forward even for individual countries. However, the balance of concessions obtained by developed country partners in PTAs are considerably more favourable than what they would be able to obtain multilaterally. In addition, the counterfactual against which to measure the results of PTAs may not be an effective multilateral trade regime but, for the time being, the “business-as-usual” option examined in section (a).

The development of international regimes in other critical areas for international cooperation

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5 Baldwin, R. and Evenett S. *Next Steps: Getting Past the Doha Round Crisis*, (VoxEU.org,2011), Available at: <http://www.iadb.org/intal/intalcdi/PE/2011/08348.pdf>.

(such as climate change) also illustrates the limited scope for meaningful progress along the multilateral path. In particular, the world climate change regime has gradually evolved from a multilateral top-down approach toward a more decentralized bottom-up scheme. While this evolution will pose new challenges to the international trading regime (decentralized national or regional mitigation policies will most likely collide with existing trade rules), it also illustrates the lack of inclination for meaningful multilateral deals.

In sum, deepening globalization of production and growing and more complex global externalities demand more effective global governance, at least in some policy domains. The rationale for this demand has been aptly justified by numerous analysts. However, when account is taken of the political constraints to enhanced global cooperation, the demand for more effective international regimes may sound like a “shout in the desert.”

#### 4.2.3 Option (c): re-focusing the WTO

Re-focusing the WTO, taking stock of prevailing political constraints will not be an easy option, not least because the existing package of agreements has been the result of a political equilibrium that will be hard to change. But, if the counterfactual of re-focusing the WTO is “business as usual” rather than “broadening and deepening,” re-focusing may bring some benefits to all parties involved at least as a transitory response.

The attractiveness of re-focusing will very much depend on the assessment that one makes of the results of the broadening and deepening exercise undertaken during the Uruguay Round. My own perspective is that the Uruguay Round agreements overstretched the regulatory ambitions of the WTO, consolidating a vision that the path toward liberalization and international disciplines was a linear one. In my view, the idea that the WTO should lead this process lacks a solid political basis and has had unfortunate consequences for the institution.

The Uruguay Round not only ended with an imbalanced deal between developed and developing countries (a major issue in itself), but some of its major innovations were over-ambitious; poorly designed (such as the GATS); or simply opportunistic (such as the TRIPS Agreement). This is not the place to go into any detailed discussion over the shape and content of these agreements, but both seem to be the result of political economy dynamics combined with a bout of enthusiasm with the enforcement of universal rules. It seems that in these areas (as was the case in others, such as financial deregulation), ideas (or ideology) moved faster than reality, losing touch with the underlying political requirements for regulatory design.

The re-focusing option may come in different sizes and colours. My own favourite would be to re-focus the WTO on its regulatory and deliberative (as opposed to negotiating) roles. As far as negotiations are concerned, ambitions should be reduced and re-focused on disciplines affecting trade in goods, including non-border trade measures that will continue to grow in importance in the future. Even though this may reduce the potential for trade offs offered by a broader agenda, practice has shown that such possibility has been only that (a notional possibility) that has failed to materialize. Reducing the scope for trade offs may be a temporary price reasonable to pay in exchange for preserving other key roles of the WTO. Re-focusing the negotiating agenda on goods’ trade may also enable more open discussions on the developmental aspects of trade policy interventions.

What would be the implications of re-focusing for GATS and TRIPS? My own favourite would be to keep GATS under the umbrella of the WTO, but make negotiations subject to a set of rules different from those of the GATT and its associate agreements. First, negotiations on goods and services should be delinked from one another and proceed along different

paths. Second, GATS should evolve toward sector agreements with selective participation, effectively implementing plurilaterals on a sector basis. Third, the reach and ambition of general disciplines in the services area should be given a second thought.

The TRIPs Agreement poses a different kind of problem. The reason the TRIPs Agreement is in the WTO is opportunistic and explained by political economy considerations. At present this is more widely recognized than two decades ago, when the agreement was signed. As far as the TRIPs Agreement is concerned, my favourite option would be to examine alternatives to locate the TRIPs Agreement outside the regulatory reach of the WTO. Although this will do nothing to reduce differences over the TRIPs agenda, it would eliminate a source of institutional tension.

What would be the advantages of an approach that downsizes the WTO and makes few inroads into dealing with the issues of the future? This would reduce the burden falling upon the institution in a period of significant political constraints and reintroduce some balance to the Uruguay Round package given the evidence that the DDR is unlikely to deliver significant results. This is far from a heroic scenario, but may contribute to damage control. Overloading the WTO with new tasks and responsibilities has added little to the effective governance of the world trading system. At the same time, it has endangered the patiently sown results of five decades of international cooperation.

### 4.3 Conclusion

This paper does not propose a great leap forward for the WTO. That would be most desirable from the point of view of an increasingly globalized economy. However, political constraints make such a step highly unlikely. There is no clear candidate to provide hegemonic stability, and the structure of power is in a state of flux. Under such conditions it seems unlikely that a cooperative approach for deeper integration will succeed in the near future. If this scenario is correct, the WTO should focus on damage control.

This short paper has not provided a detailed road-map for the WTO. Rather, it has proposed a new (albeit more modest) look at the institution, its role, and its agenda. In practical terms, member states should set a date to close (as soon as possible) the DDA on whatever basis is agreed (including the possibility of no new agreement) and re-focus on the deliberative and oversight roles of the WTO, as well as the core functions of the GATT. I am fully aware that this is not an inspiring scenario for the WTO, but there are times when it may be wiser to keep what has been achieved than to make great plans that end up undermining both institutional efficiency and legitimacy.

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## 5. SHOULD THE WTO DEAL WITH PRIVATE SECTOR INITIATIVES?

*Pedro da Motta Veiga and Sandra Polónia Rios*<sup>1</sup>

### 5.1 Introduction

Brazil's aspiration for international recognition of Brazil, the "founding myth" of Brazilian foreign policy,<sup>2</sup> has been pursued through an active presence in multilateral fora since the second half of the 20th century, when the first efforts at multilateral coordination began, including in the area of trade (creation of the GATT).

Until the mid-1980s, Brazil practically did not negotiate specific questions in the GATT. Instead, it focused its attention on some principles, including S&D treatment of developing countries with respect to commitments assumed in a multilateral context. Until then, Brazil had avoided being a target of demands for liberalization made by the developed countries and did not present demands to the other members of the GATT.

Beginning with the Uruguay Round, the negotiating limits of the Brazilian strategy were to become clear, in a period in which a large number of developing countries adhered to the liberal paradigm of policies and engaged in structural adjustment programs with the IMF and the World Bank. On one side, the developed countries began to demand greater market opening in large developing countries, and on the other, Brazil laid out its demands in a sector that was brought to the GATT's agenda during the Uruguay Round and in which the country was rapidly developing a new competitive advantages: agriculture.

### 5.2 From Defensive Stances to Protagonism

At the beginning of this century, Brazil defended the launching of a new multilateral trade round and actively participated in negotiations that made such a round feasible at Doha in 2001. In addition to the demands for liberalization in agriculture, the Brazilian agenda included a review of the agreements on subsidies and countervailing measures, especially with respect to the rules applicable to export credits based on the Organisation for Economic Co-operation and Development (OECD) Arrangement - a direct result of the Brazilian experience with the Embraer - Bombardier controversy during the post-Uruguay Round period.

Throughout the Doha Round, Brazil became one of the main actors in the negotiations, alongside the US, the EU, India, and China. Among the factors that help to explain the increase in importance of Brazil in these negotiations are:

- The political environment in which these negotiations took place, which favoured the integration of large emerging countries in the decision-making processes of the round. The hegemony of the liberal views and policies, unchallenged during the 1990s, had dissipated, and the non-trade concerns, including "development issues", had again become a priority. In this new environment, it became politically unfeasible to maintain the typical decision-making mechanisms of previous rounds (restricted to the Quad) and the large developing countries played a relevant role in defining the multilateral agenda itself.

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<sup>2</sup> Soares de Lima, M. R. *Aspiração Internacional E Política Externa*. In Revista Brasileira de Comércio Exterior n. 82, January/March, 2005.

- The leadership exercised by Brazil in creating the G-20. The G-20 was an unlikely coalition of developing countries in the area of agricultural negotiations, perceived after the Cancun Ministerial meeting as the result of a legitimate effort by those countries to push their interests in the WTO negotiations.
- The pragmatism and flexibility shown by Brazil in negotiations on topics considered sensitive by the country, like the regulation and access to markets for industrial goods, etc.

Brazil's actions in the G-20 and its pragmatic positions in the final stage of the round increased the legitimacy of Brazilian positions in the negotiations and gave the country the political capital to participate in the select groups of Members that would become the actual, although informal, mechanisms of negotiation and decision-making (the G-5 then the G-4) throughout the round.

### 5.3 The Economic Crisis and Brazil's "New Agenda" at the WTO

With the failure of the efforts to approve the "Lamy Package" (during the European summer of 2008), the discussion on the factors capable of explaining the difficulties and impasses of multilateral trade negotiations intensified. Even before this, the difficulties in making progress to liberalize trade on a multilateral basis and the simultaneous proliferation of low-quality regional/bilateral trade agreements had been leading to debates on the governance of the multilateral trade system.

In these debates, Brazil generally adopted a clearly conservative stance in relation to the decision-making processes, the modalities of negotiation and dispute settlement, and the scope of the WTO agenda, etc. This official position of Brazil reflects the historic hegemony of defensive domestic interests (*import-competing*) over the Brazilian trade agenda as well as the perception that the country has been a beneficiary of the multilateral trade system. Within this system, and thanks to it, Brazil has become a protagonist in trade negotiations and gained an international political projection that largely corresponds to its weight in world trade.

The defence of the *status quo* of trade multilateralism by Brazil was shown very clearly in the resistance to enlarging the scope of the negotiations agenda. In the Uruguay Round, Brazil opposed the introduction of the topic of services; it resisted the so-called Singapore topics at Doha; and it has always criticized the attempt to associate environmental and social themes with trade matters.

Nevertheless, with the outbreak of the international economic crisis in the second half of 2008, Brazil's activity at the WTO began to reflect an overarching concern about the impact of exchange rate misalignments on competitive conditions in the international markets, a concern that government representatives made explicit in the G20. More recently, this led Brazil to present, for the first time, what could be considered a proposal for a "thematic enlargement" of the WTO agenda.

It was necessary for a large-scale international crisis to occur for Brazil to formulate a proposal that would lead in practice to a broadening of the multilateral negotiation agenda. In fact, principally after 2011, Brazil intensified its efforts to bring to the WTO the discussion on the trade effects of exchange rate misalignment. The objective of Brazil is to fight alleged "exchange-rate dumping," resulting from exchange rate policies of trade partners that promote competitive devaluations of their currencies. These policies were alleged to be eroding the protection granted by import tariffs.

Within this context, Brazil presented a proposal to the WTO Working Group on Trade, Debt, and Financing<sup>3</sup> for the Member countries to discuss the trade policy instruments available in the multilateral trade system to compensate for policies that lead to high levels of artificial devaluation of exchange rates. This document recommends that the parties find a way for international trade regulation to include an agreement on tariff raising and trade defence mechanisms to compensate for these practices.

The impasse that characterized the Doha Round and the difficulties in dealing with this topic within the scope of the G20 do not indicate any likelihood of an agreement on new rules applicable to this topic within the scope of the WTO.<sup>4</sup> To the IMF the task of establishing a level of devaluation considered “anti-competitive” would also require that a technical and political consensus be reached, which is highly unlikely to occur.

## 5.4 New Topics on the Multilateral Agenda: Adapting the Brazilian Position to its Interests

Within the current context of impasse of the Doha Round, it would seem that not only the Brazilian proposal, but also any other proposal related to enlarging the scope of the multilateral trade agenda is doomed to failure. The political environment in which the negotiations are taking place is not conducive to innovation and does not create opportunities for governments or actors of the civil society to push new topics on the WTO trade agenda.

Therefore, overcoming the current scenario, even partially, appears to be a requirement for any innovative proposal in the area of negotiations to be feasible. Having stressed this, it is possible to list two topics for which treatment on a multilateral scope corresponds to the interests of a country like Brazil.

### 5.4.1 Rules, regulations, and public and private certification<sup>5</sup>

Although the international debate over the relationship between climate change and trade is concentrated on the possible negative impacts of border adjustment measures in developed countries, technical regulations and certification requirements of a governmental or private nature are already affecting exports of developing countries.

Since these rules and regulations can restrict trade even more effectively than those that result from adjustment measures at the border - as a product that does not meet the established criteria will not be allowed across the border - they have been affecting a variety of industries.

Some regulations originate from negotiations in international organizations, like the International Organization for Standardization (ISO), but most are of a national and unilateral nature. The industries most regulated tend to be those that use energy intensively, like the automobile and electric and electronic products industries.

Recently, there has been a proliferation of private initiatives, by major retailers or organized

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3 WTO. *The Relationship between Exchange Rates and International Trade*, WT/WGTDF/W/53, 13 April 2011 and WTO. *The Relationship Between Exchange Rates And International Trade*, WT/WGTDF/W/56, 20 September 2011

4 The regulatory framework at the WTO on this matter came from the original text of the GATT, from 1947, and is based on the fixed exchange rate regime, with no adherence to the current global macroeconomic context.

5 CINDES. *Mitigação de mudanças climáticas e comércio: riscos e ameaças para as exportações brasileiras*, Breves Cindes, 44 January 2011.



consumers, demanding compliance with a variety of standards, like emissions limits in the production process of certain food items, or “voluntary” labelling. In this case, products are required to show information on GHGs emissions during the production process (carbon footprint) and during the transport of goods (food miles) on their labels.

Requirements of a private nature, to comply with rules or “voluntary” labelling, can have a relevant impact on Brazilian food exports. In this case, Brazilian suppliers are at a clear disadvantage in destination markets compared with local competitors or those from nearby regions. The concern about the information on emissions related to merchandise transportation tends to benefit producers closer to major consumer centres. In general, relations between, on the one hand, private regulations and standards, and, on the other, the WTO rules, which are applicable to public policies and government measures, constitute a “grey zone” that is favourable to *de facto* discrimination against imported goods.

Another industry that has been strongly affected by technical regulations is biofuels. If, on one side, Brazilian exports can benefit from the trend in regulations in several countries requiring the addition of a minimum amount of biofuels to the fuel mix used for transportation, on the other, the use of ethanol is subject to technical and sustainability regulations, particularly in the EU, as previously emphasized. Brazil has been seeking to participate in fora and international work groups dedicated to the discussion of international regulations for biofuels.

The Brazilian ethanol industry has also been engaged in announcing the characteristics of ethanol production in Brazil. As a result, it has been able to influence the regulations of the European block and to obtain recognition from the US Environmental Protection Agency (EPA) for Brazilian sugar cane ethanol as an advanced fuel (in other words, one whose GHGs emissions during its life cycle are 50 percent lower than those resulting from the use of petroleum derived fuels). According to the EPA, Brazilian ethanol reduced greenhouse gas emissions by some 65 percent over its life cycle, thus achieving the “trigger” set by the US regulation.

In general, the proliferation of regulations and standards, both public and private, introduces new risks and threats for Brazilian exporters with respect to the predictability of their access to foreign markets, especially in the developed countries. As Veiga and Rodrigues note, in most of the commodities exported by Brazil, “there are several transnational initiatives of institutional arrangements that compete among themselves. For sugar, there are more than 50 initiatives for certification and standards that mix the global, transnational, public and the private.”<sup>6</sup>

This question has led to intense debate among Members of the WTO. The Sanitary and Phytosanitary Measures Committee has been working on this topic since June 2005, when Saint Vincent and the Grenadines manifested a concern over the operation of the EurepGAP<sup>7</sup> scheme in relation to the sale of bananas to supermarkets in the United Kingdom (UK). These debates evolved, and in March 2011, the members agreed to adopt five initiatives, referring essentially to cooperation and transparency. There are doubts among the committee members themselves as to the relevance of dealing with private standards in a forum (the WTO) whose attribution is to deal with governmental measures.<sup>8</sup>

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6 Veiga, J.P. and Rodrigues, P.C. *Certificação social e ambiental: arranjos institucionais e impactos sobre as commodities brasileiras*, Breves Cindes 34, August 2010..

7 EurepGAP is a private agency that defines voluntary standards for certification of agricultural products.

8 WTO. *Private Standards And The SPS Agreement*, G/SPS/GEN/746, 24 January 24, 2007.

According to Mbengue,<sup>9</sup> “the multilateral trading system was conceived primarily to deal with “public” standards, i.e. standards formulated by public regulatory agencies and/or elaborated by agreed international standardization organizations like the Codex Alimentarius. Unless an evolutionary interpretation of some of the core WTO Agreements involved in private standards is fashioned, the import of private standards into the WTO may be limited by legal impediments. For the time being, discussions on a so-called integration of private and commercial standards within the WTO framework remain slow and cautious, not to say controversial.”

The proliferation of private standards and rules has been affecting not only agricultural product trade, but also industrial goods and services. The emergence of the agenda of climate change mitigation and transition to a low-carbon economy is bringing additional stimuli to establish private regulations, which are becoming increasingly related to production methods and processes. Therefore, this is a cross-section issue for several committees and councils of the WTO.

The Agreement on Technical Barriers to Trade (TBT) contains a Good Practices Code (*TBT Code of Good Practices for the Preparation, Adoption and Application of Standards*), which applies to governments and para-governmental regulatory agencies. But, it is not clear whether this code applies to private actors.

The WTO is an organization that regulates relations among governments and disciplines public policies. But in a context in which the importance of private agents is growing in the definition of rules and standards that affect the flows of trade and investments, it is clear that this question must be addressed. This discussion should not be restricted to specific committees, but should be incorporated into the discussions on the future of the multilateral trade system.

## 5.4.2 Investments

The Brazilian government’s position with respect to intergovernmental initiatives related to foreign investments has been characterized by defensive stances aimed at limiting the scope of the negotiations and the reach of regulations. This explains not only why Brazil has never ratified a single Bilateral Investment Agreement, but also the defensive position taken by Brazil in relation to the efforts (of other countries) to bring investment rules under the umbrella of the WTO.

These positions are rooted in both the goal of preserving from these international regimes Brazil’s autonomy to formulate and implement active industrial policies, as well as in the fact that Brazil is a traditionally a recipient of FDI, and until recently, a marginal issuer of these types of flows.

Brazil continues to be a major receiver of FDI and maintains, even deepening it in recent years, its preference for active industrial policies. What has changed, among the factors that shape Brazil’s official positions regarding this matter, is the weight of the flows of outward FDI. These have grown significantly during the first decade of the 21<sup>st</sup> century, but this evolution has not changed the Brazilian position with respect to investment protection agreements. In the Doha Round negotiations, Brazil has also always had a defensive stance in investments negotiations, as previously stated.

In recent years, the questioning on a global scale of bilateral investment protection agreements has led to a series of new instruments focused on holding investors liable for

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<sup>9</sup> See Mbengue, M.M. “*Private Standards and The WTO Law*,” BioRes Review 5:1. ICTSD, Geneva, Spring 2011.

the impacts, especially the socio-environmental ones, of their activities in host countries. Some of these initiatives can be considered the functional equivalent, in the investment area, of standards and certifications applied to the trade of goods.

This results in the multiplication of public and private instruments applicable to FDI flows, producing a “regulatory pulverization” that does not seem to be of interest to an economy, like that of Brazil, which is the origin of increasing flows of FDI.

The agenda of negotiations in this area should not be restricted to “access to markets” for investments. This is an opportunity to conduct a broad evaluation of the international experiences with bilateral investment agreements (BIAs) and the investment chapters in different free-trade agreements in effect.

The negotiation agenda for a multilateral investment agreement should allow convergence and adaptation of the rules in effect in these agreements to what can be learned from recent experience, particularly with respect to the mechanisms of settling controversies between investors and governments and to the balance between the space for government regulations and the property rights of investors.

As in the case of private standards, the negotiation of such an investment agreement within the scope of the WTO would bring to the organization’s agenda the theme of the relationships between private and government actors and their role in the international arena.

## 5.5 Conclusion

The structural transformations that the Brazilian economy has undergone in the past 15 years produced the emergence of offensive interests in the trade and investment areas, in a marked contrast to the previous situation, in which the political economy of trade negotiations was completely dominated by the defensive interests of the import-competing industries.

Brazil’s conservative stance at the WTO, especially with respect to the topics on the negotiation agenda, is the external counterpart of this domestic economic policy. This position gradually loses functionality as offensive interests emerge in the Brazilian economy: exporters of agro-industrial products and companies in the process of internationalization acting in politically sensitive industries (mining, infrastructure) demand agendas that have not been on Brazil’s favorite menu previously.

The two topics indicated here are expressions of this new composition of Brazilian interests in the area of trade. Above all, for a country, like Brazil, that is not very receptive to preferential agreements, there is ample evidence of the advantages for them to be dealt with and regulated on a multilateral level. These two topics also represent important challenges for the WTO. As an institution whose purpose is to regulate relations between governments, how should the WTO deal with private sector initiatives that could represent barriers to trade or limit the regulatory capacity of countries?

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**PART V:  
FUTURE CHALLENGES FOR THE  
MULTILATERAL TRADING SYSTEM**

# 1. GLOBAL GOVERNANCE REQUIRES LOCALISING GLOBAL ISSUES

*Pascal Lamy*<sup>1</sup>

We live in a world of ever-growing interdependence and interconnectedness. Our interdependence has grown beyond anyone's imagination. Economic and financial shocks spread faster than ever before. With the recent economic crisis, we discovered that the collapse of one part of an economy can trigger a chain-reaction across the globe. With the climate crisis, that our planet is an indivisible whole. With the food crisis, that we are dependent on each other's production and policies to feed ourselves. And with the flu epidemic, that speedy international cooperation is vital. The scope of the challenges the world is facing has changed profoundly in the past decades.

The way in which people trade has itself undergone fundamental change. Due to lower transportation prices, communications and information technologies, it now costs less to ship a container from Marseille to Shanghai than to move it across Europe. From the past trade in products we have moved to trade in tasks. Production chains have become truly global, with companies locating various stages of the production process in the most cost-efficient markets. The most striking example of this globalization of the production chain is Apple, whose famous iPod is designed in the US, manufactured with components from Japan, Korea and several other Asian countries, and assembled in China by a company from Chinese Taipei. Nowadays, most products are not "Made in Germany" or "Made in US"; they are in fact "Made in the World".

Over the past 70 years we have constructed the legal and institutional framework to manage closer economic integration at the regional and global level. And, of course, the WTO is one part of this scheme with responsibility for the governance of international trade relations.

Yet, with the world becoming ever more interconnected and challenges become truly global, governance remains to a large extent local. The discrepancy between the reality of today's interdependence, the challenges resulting from it, and the capacity of governments to agree politically on how to deal with them collectively is striking.

And why is this so? Because the international system is very much founded on the principle and politics of national sovereignty. The Westphalian order of 1648 remains very much alive in the international architecture today. In the absence of a truly global government, global governance results from the actions of sovereign states. It is inter-national as in between nations. In other words, global governance is, or ought to be, the globalization of local governance.

But, it does not suffice to establish informal groupings or specialized international organizations, each of them being "member driven," to ensure a coherent and efficient approach to address the global problems of our time. In fact, the Westphalian order is a challenge in itself. The recent crisis has demonstrated this brutally. Local politics has taken the upper hand over addressing global issues. Governments are too busy dealing with domestic issues to dedicate sufficient attention and energy to multilateral negotiations, be they trade negotiations, climate negotiations, or macroeconomic coordination.

Global governance today faces four fundamental challenges. The first is leadership, i.e. the capacity to embody a vision and inspire action, in order to create momentum. Who is the

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global leader? Should it be a superpower? A group of national leaders? Or should it be an international organization? Moreover, who should select this leader?

The second challenge is efficiency, i.e. the capacity to mobilize resources, to solve the problems in the international sphere, to bring about concrete and visible results for the benefit of the people. The main challenge here is that the Westphalian order gives a premium to “naysayers” who can block decisions, thereby impeding results. The ensuing viscosity of international decision-making puts into question the efficiency of the international system.

The third challenge is coherence, for the international system is based on specialization. Each international organization focuses on a limited number of issues. The WTO deals with trade, the International Labour Organization with labour issues, the World Meteorological Organization with meteorology, the World Health Organization with health matters, and so on. It is a fact: the UN is not really overarching, assuming this was the initial intention.

The last challenge that I see is that of legitimacy – for legitimacy is intrinsically linked to proximity, to a sense of “togetherness.” By togetherness, I mean the shared feeling of belonging to a community. This feeling, which is generally strong at the local level, tends to weaken significantly as distance to power systems grows. It finds its roots in common myths, a common history, and a collective cultural heritage. It is therefore no surprise that taxation and redistribution policies remain mostly local.

We have seen attempts to deal with these challenges through new forms of governance at the regional level. The European construction is the most ambitious experiment in supranational governance ever attempted at the regional level up to now. It is the story of a desired, defined, and organized interdependence among its Member States. But it is not the only one. New forms of governance at the regional level are also being tested in Asia at the ASEAN group of nations. We are also seeing similar efforts in Africa and in Latin America.

These experiences in regional integration, and in particular the European one, which is the most advanced, teaches us valuable lessons for global governance.

The main one is that institutions matter. And on this one the European integration process shows that supra-national governance can work. Of course, this does not go without difficulties, and it is highly unlikely that what was done at the European level can be fully replicated as such at the international level. The European paradigm was developed under very specific conditions of temperature and pressure. It was shaped by the geographical and historical heritage of a European continent devastated by two world wars. Hence, there was a collective aspiration for peace, stability, and prosperity. But other regions have also understood the value of institutions. The ASEAN Vision 2020 goes in this direction. Regional parliaments, regional dispute settlements mechanisms, and regional execution bodies are slowly gaining strength.

I believe there are more optimal ways of articulating the four elements of governance at the global level through what I refer to as the “triangle of coherence.” On one side of the triangle lies today the G20, replacing the former G8 and providing political leadership, policy direction, and coherence. The second side of the triangle is the UN, which provides a framework for global legitimacy through accountability. On the third side lies member-driven international organizations providing expertise and specialized inputs, be they rules, policies, or programmes.

This “triangle” of global governance is emerging. Bridges linking the G20 to international organizations and to the UN system have started to be built. The WTO participates in G20 meetings, alongside other international organizations. The presidency of the G20 has organized regular briefings at the UN General Assembly. Specific sessions dedicated to



trade have been regularly organized during G20 summits, giving the WTO some needed political impetus. The political backing of the G20 allowed me, as Director-General of the WTO, at the dawn of the 2008 financial crisis, to launch a strengthened monitoring of trade policy developments, which has proved a useful and powerful tool to contain protectionist pressures.

The second one is the importance of using the “right tools”; the European experience of rule-making, transparency, and peer review offers interesting avenues for cooperation at the global level. Peer review appears to be an efficient “Westphalian” tool of governance. It leverages the pride of sovereign nations when reviewed by peers.

Regional integration processes also permit a progressive familiarization with supra-nationality. They allow us to address the questions of our time at a level where the *affectio societatis* is stronger and at a level where the feeling of belonging, of togetherness is more solid. From the point of view of legitimacy, regional integration represents the essential intermediate step between the national and the global governance level.

But we should be careful not to believe that regionalism constitutes a magical recipe. It may suffer from the same difficulties as global governance, falling victim to nationalistic tendencies that drag the level of ambition down, as evidence by the ongoing European integration crisis.

Finally, one needs to pay greater attention to values. Institutions alone, be they regional or international, are not the “be all, end all” of governance as our experience with global governance to date shows. A successful governance system requires not only institutional machinery, but also a common objective and shared values.

The success of the European monetary integration process is the result of the coming together of shared values and a common goal. It is the combination of these two elements that led to the establishment of institutional machinery. The creation of the Euro is a project that took 30 years to mature between the Werner report of 1969 and the report of Jacques Delors on the Economic and Monetary Union. The institutional structure then followed relatively quickly. The creation of the European Central Bank, the most federal of the European institutions, was decided in only three weeks.

Moreover, today Europe realizes that monetary integration cannot function without a deeper economic and political integration. A common currency is no longer enough. It requires other common European economic policies. At the same time, the existing institutions cannot compensate for the lack of shared values and common goals with respect to this much-needed further European economic integration. Absent a proper discussion and a shared vision about these common goals, Europe will continue to limp.

What is lacking today is a platform of common values at the international level, in the name of which actions would be taken. The question of social inequalities, for example, is not embodied in the UN vision as designed in the 1950s. Our world needs a platform of common values, which would be shared not only by the “West,” but also with the “rest.” Without a basic agreement of this kind, it is difficult to talk about “global public goods.” Public goods are necessarily underpinned by common values. If we are to efficiently address today’s global challenges, which in many cases are related to the defence, promotion, or protection of global public goods, we need to share a collective sense of values for a better global governance. In fact we need a new declaration of global rights and responsibilities.

We see the growing importance of values at the WTO itself. Rules are made less and less to protect producers, but more and more to protect consumers. Issues such as trade and health and trade and environment, where values play an important role, have gained in visibility.

As traditional obstacles to trade such as quantitative restrictions or tariffs are decreasing, regulatory discrepancies risk becoming an impediment to trade opening and economies of scale. The world of global trade is, to some extent, heading toward the stage where Europe was in the 1970s: no more tariffs, but not yet an internal market. Getting there, whether through harmonization or mutual recognition, will imply a higher level of trust. And trust is built on a bedrock of common values.

But, because of this fundamental legitimacy deficit of global governance, the solution is not to globalize local problems; it is to localize them; to make these more understandable and palatable to citizens in order to reinforce the sentiment of togetherness. This requires strong leadership not only at the international level, but also and above all at the national level as there is no international leadership in a Westphalian order without national leadership. Of course, such leadership is easier in smaller and homogeneous countries than in bigger and diverse ones, but the stakes of strong leadership are the same for all. It is, in my view, the most pressing issue global governance is facing today.

The WTO remains, in many ways, ahead of the curve among global governance fora. But as the current economic crisis has shown, it is not immune to developments in other areas. In fact, recent events have demonstrated that, whether on trade, on climate change, or on financial matters, global institutions cannot be in good shape if local systems are in bad shape. This is why progress in the multilateral trading system today requires progress in global governance.

## 2. GLOBAL PROBLEMS NEED GLOBAL SOLUTIONS: THE NEED FOR A MULTILATERAL FRAMEWORK ON COMPETITION

*Pradeep S. Mehta and Natasha Nayak<sup>1</sup>*

The long-ensuing debate about the relative merits of a market-based economy versus a state-controlled one seems to have now been put to rest in favour of the former. Countries across the globe are reforming their economies, and undertaking privatization and deregulation. As they do so, the forces of competition come increasingly onto centre stage in the economy as it has been witnessed that private players will flourish under an effective regulatory system and that the potential benefits of a shift toward a more market-oriented economy will not be realized unless firms are prevented from indulging in competition abuses. This is the reason promotion of competition is seen as a critical policy adopted in structural adjustment programmes for transition economies.

With trade liberalization opening markets, the world is fast growing toward one global village. The boundaries that separate nation states from one another are disappearing. While this is a much-desired development, on the flip side, it has witnessed unregulated spillovers of enormous proportions of anti-competitive practices beyond borders, to have caused damages especially to the lesser developed victims that have yet to establish strong competition regimes domestically.

While cross-border operations and international trade have spread at a fast pace, the same cannot be said about international cooperation to act against such anti-competitive practices, which seem to still be at a nascent stage. While agreements exist at the bilateral and regional levels, their potential is rather limited for developing countries. Globally, scholars and policymakers are of the view that only a binding multilateral agreement with a designed focus to promote competition throughout the world would be able to achieve this. Such an agreement could be looked at as an institution to uphold rule of law, enforce contracts, and deal with the problematic areas of IPRs, export cartels, and so forth.

The argument for internationalizing competition policy is not new. In 1948, the Havana Charter for the creation of an International Trade Organization included a Restrictive Business Practices chapter whose objective was to prevent business practices that restrain competition and adversely affect international trade. However the charter was never brought into effect. In 1996, an initiative was undertaken under the aegis of the WTO at the Singapore Ministerial Conference when a Working Group was set up to explore the interaction between trade and competition policy. Further, at the WTO Ministerial Meeting in Doha in 2001, formal recognition was given to the case for a multilateral framework to enhance the contribution of competition policy to international trade and development.

Unfortunately, the discussion on competition policy failed to gain consensus. Countries continuously expressed opposition to this idea, which was accompanied by investment policy, transparency in government procurement, and trade facilitation. Eventually three of these items, including competition policy, were dropped from the Doha Agenda in 2004. However, countries agreed to pursue trade facilitation. The biggest opposition was to investment policy, as that would have led to shrinking of the policy space, but not so much as the ones on competition policy and transparency in government procurement. Both these

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agreements are welfare enhancing.

Today when countries are continuing to pay overcharges for multi-jurisdictional mergers and the welfare-reducing export cartels that are exempt from domestic competition regimes of countries, the case for a multilateral competition agreement (MCA) depends largely on its capacity to address these issues adequately.

However, a big challenge remains with respect to the ongoing disagreement on the consensus of an MCA by those who argue that there are practical limitations of any multilateral agreement that amounts to a requirement for standardized domestic competition policy rules thereby homogenizing competition policy and depriving many (mainly developing countries) of important developmental instruments. However, given that some of the provisions of competition policy are already present within the WTO framework (although limited) and many bilateral and regional trade agreements of late have incorporated competition policy principles, why are they still opposed to a multilateral framework on competition that might help address some major transborder violations of competition that hinder international trade and impact global welfare?

This paper aims to analyze the need for a multilateral framework on competition both for the developed and the developing countries and explore certain responses to the challenges posed by such an initiative.

## 2.1 Problematique

Q.1 Would a multilateral framework on competition help in tackling different types of cross-border anti-competitive practices?

Q.2 Furthermore, is the WTO the appropriate forum to host such an agreement?

Some apprehensions about the MCA are articulated below:

1. The ambiguity surrounding the MCA is centred around the core WTO principles, which are likely to tilt the balance in favour of the developed countries and disadvantage the developing ones.
  - a. Non-discrimination: The inclusion of MFN status and national treatment would mean no special restrictions on foreign investments and hence in effect work to the detriment of the domestic companies that are not on equal footing to compete with foreign firms. Furthermore, many developing countries feel that they should be able to use different - read lenient standards - while dealing with a merger between two domestic companies than where one of the companies is big and of foreign origin. However, if the WTO core principle of non-discrimination were to apply to the multilateral agreement, using these differential standards would not be possible.
  - b. Market access: There was widespread apprehension when the EC proposed such a framework back in 2003 that the developed countries were the major proponents of such a multilateral framework because it would have to comply with WTO core principles, which includes market access. This would cater to the appetites of the large multinationals by giving them entry into transnational markets. The less developed countries might find it challenging to deal with powerful MNCs. An example worth reporting here is the agrifood system in Latin America, where FDI has totally altered the market structure and the competition scenario against local competitors. The supermarket revolution accompanied with rapid consolidation and internationalization has driven most local small farms and firms out of business with serious implications for income and employment.

2. **Case of export cartels:** Export cartels that have been categorized as officially sanctioned restraints on trade and have a significant influence on prices in general and on the swing of prices of primary products in particular. A recent study highlighted the overcharge paid by India due to anti-competitive practices in the global potash market. Under a competitive scenario, the price of potash would decline from USD 574 per tonne in 2011 to USD 217 by 2015, and subsequently increase to USD 488 by 2020. However, in the continuing presence of fertilizer cartels, the price of potash would steadily increase from USD 574 per tonne in 2011 to USD 734 in 2020 (Jenny, 2011). Interestingly such issues are usually not covered by competition policy. A multilateral agreement on competition that would be likely to ban such cartels may yield a mixed array of benefits and costs for developing countries. In particular, any prohibitions or bans on export cartels that directly impact international trade may imply detrimental consequences for LDCs that rely mainly on export earnings from primary commodities. For many LDCs, the export of primary agricultural or mineral commodities is the principal source of earnings from international trade. Therefore, the way such primary commodity trade would be treated under an international competition policy agreement would be of great concern.
3. **Ineffective treatment of cross-border violations of IPRs:** While developed countries are able to take action, developing countries lack the capacity to do so. A case in point is when the innovation market was threatened when Sanofi-Synthelabo proposed to acquire Aventis SA. Both the US and the EU had serious doubts that competition might be reduced to the detriment of patents and saw to it that Sanofi consented to sell or to grant licences for a series of pharmaceutical products in their market before authorizing the acquisition. Though the same effects could be felt in other developing markets, the transaction was not further challenged elsewhere. The TRIPs Agreement allows Member states to use their national competition laws to take necessary action. Such national laws might be absent in many cases of developing countries. There is no saying that an MCA would be able to provide effective protection against unfair competition and control anticompetitive practices related to IPRs, especially in the case of LDCs.

Furthermore, of late there has been a growing trend of anti-dumping actions slapped on developing country exports by developed country governments. These actions subvert the process of competition rather than protect it. Whether the MCA would be able to correct this is another challenge.

The second major question pertains to the debate that is centred on whether the WTO is the right forum to host the multilateral agreement. Many developing countries have put forward a broad veto in this regard, as they argue that in the past most agreements forged within the WTO framework have served to benefit the developed country Members. Also, the WTO has been accused of setting standards and rules in a “one-size-fits-all” manner. TRIPs, GATS, and other agreements have often been criticized as being grossly imbalanced against the interests of developing countries and consumers. Therefore, there is apprehension that negotiations for an MCA would focus more on market access rather than curbing abusive practices that affect social welfare and long-term sustainable development.

## 2.2 Responses to Challenges

When the idea of an MCA was dropped from the Doha agenda, along with investment and transparency in government procurement, the basic foundation of such opposition was that there was no consensus on the robustness of the link between trade and competition and on whether that linkage is strong enough to call for a multilateral competition policy. In addition, developing countries argued that given the lack of expertise and resources as well as ill-developed domestic competition regimes, they were sceptical about the gains from

such a multilateral accord. Nevertheless, during the launch of the Havana Charter in 1948, the demand for multilateral rules on restrictive business practices came first from developing countries. The demand was to address restrictive business practices by developed country firms rather than developing domestic regimes.

However, the scene has changed substantially. Today, nearly 130 countries have adopted a competition law compared with only 35 countries that had a competition law in 1995 when the WTO came into being. This is in spite of the fact that the discussions at the WTO themselves were a dampener for developing countries to adopt a competition law. Nevertheless, interactions between trade and competition could not be more intimate in a rapidly integrating global economy where trade is subjected to a variety of anti-competitive practices, investment rules, and intellectual property regimes. Global problems call for global solutions and a correct policy response can be hoped to emanate from a forceful multilateral agreement.

Such an agreement should be crafted in a fashion that balances the interests of the developed and the developing countries. This is why an overall approach based on full reciprocity with exceptions and exemptions would be the appropriate underlying principle behind all initiatives undertaken in this regard. It is therefore suggested that MCA be exempted from single undertaking commitment and public interest is made the inherent component in its enforcement. This would help strike a balance between economic interests (market access, merger issues, etc.) and social interests of developing countries.

Below are some of the recommendations for effective implementation of the MCA.

## **Setting up a Working Group on Multilateral Framework on Competition**

Now that it seems as though the Doha negotiations do not have an immediate future and that the WTO has to redirect its focus from trade negotiations to analyses, there is a need for a body that would conduct a dispassionate study on the interactions between trade and competition on a contemporary basis. This should also cover the impact of the cross-border anti-competitive practices suffered by countries globally, especially the less developed ones, to devise an effective mechanism of international economic governance.

Such a study would come up with findings that would form the core of the MCA. Some of the issues that it should look into in order to address the specific challenges mentioned in the earlier section are as follows:

### **A. Addressing the existing WTO agreements with anti-competitive effects**

#### **B1. Predatory pricing standards to replace antidumping rules in the agreement**

A good way to accommodate the interests of LDCs and their export-led growth strategies could be to replace anti-dumping rules with predatory pricing standards in adjudicating trade disputes. The competition policy rule might permit export prices, consistent with rational price discrimination, to fall all the way to marginal cost, and a price less than the home market price would not be construed automatically as a dumping price. This would enable them to make the best of their export-led growth strategies and sell at lower prices in export markets without attracting anti-dumping duties.

#### **B2. TRIPs related issues**

Developing countries have been granted some flexibilities under TRIPs obligations, such as with respect to compulsory licensing. While some developing countries, such as Brazil and South Africa, have been able to utilize these flexibilities to their advantage, others including

India have a long way to go. It would be very helpful, therefore, if the MCA could provide member countries with the necessary support (technical assistance and capacity building) in invoking such policy space granted under TRIPS so they are able to maximize their benefits.

### **C. Adopting an incremental approach**

The apprehensions surrounding the core WTO principles could be addressed by exercising some flexibility and incremental approaches. Such an approach would be used to frame the agreement with the objective of serving the interest of consumers. Therefore, it would focus more on making cooperation and information sharing than on market access achieved through such an agreement.

### **D. Technical assistance**

The WTO could assist LDCs through its Aid for Trade Initiative, especially in supporting them by meeting the adjustment costs of their trade reforms. It should also help build their capacity in terms of establishing a strong competition regime that would enable them to fight the negative externalities of the beggar-thy-neighbour policies of their trading partners.

### **E. Mandatory competition advocacy and the role of civil society**

Furthermore, if WTO competition procedures incorporate competition advocacy and the participation of civil society, the resulting outcomes will tend to have a better outcome. Civil society groups can also work to promote transparent investigation procedures.

### **F. Peer review and information sharing**

This mechanism is already used by the WTO to review countries' trade policies and practices (TPRM). It would create informal discussion forums where a gradual process of convergence is generated. This would be a platform for information sharing and technical assistance for members to learn from each others' experiences.

## **2.3 Appropriate Forum to Host the Multilateral Competition Agreement**

The only international trade organization that is presently capable of governing an enforceable multilateral agreement is the WTO. In fact, the WTO is by its very nature a competition regulator, as its aims are to tear down barriers that adversely affect trade flows and promote contestability among nations. The WTO is a rules-based institution and it is therefore better capable of enforcing such an agreement. Given that principles of competition are already built into several WTO Agreements and that an initiative was undertaken previously at the multilateral forum to address the interface between trade and competition principles, it has the desired level of experience and negotiating history to realize such an agreement. Having said that, certain concerns remain on part of the LDCs that believe that WTO framework has been found to be more favourable toward the developed world. It is, therefore, recommended that a joint body of the WTO and UNCTAD host such an agreement in order to ensure the participation of the developed and the developing countries. It can be designed like the International Trade Centre, which is a joint body of the WTO and UNCTAD with the object of assisting countries in trade promotion.

It is important to note that UNCTAD has a significant history and experience in the relevant area. In fact, a group of developing countries once promoted the idea of converting the UNCTAD Set of Multilaterally Equitable Agreed Principles and Rules for Control of Restrictive Business Practices (the Set) to a binding instrument. Hence, the participation of UNCTAD in such an initiative would make the developing countries more comfortable. It would help to reduce their apprehensions about such an agreement within the WTO forum alone could

result in losing ground to the developed countries, which might exploit the agreement to gain access in vulnerable economies, thereby defeating the main purpose of having such an agreement in the first place.

## **2.4 Conclusion**

We have discussed briefly the need for a multilateral competition agreement as well as the challenges involved. The appropriate forum to address these issues should be a joint initiative between the WTO and UNCTAD in order to have both the developed and the developing countries on board. However, this requires setting up a body that would launch a careful examination of the implications of the core principles of the WTO for a multilateral competition agreement and what is expected from such an agreement, which would then decide how it is to be drafted in order to align such requirements in its scope and substance. It would also engage with countries to assess the potential of such an international agreement to serve the interests of countries in terms of providing them with adequate protections from the growing menace of cross-border anti-competitive practices without compromising on their development strategies.

The success of the MCA would depend to a significant extent on whether it would be able to achieve the desired level of international cooperation between the developed and the developing countries so as to be able to serve the primary and most critical objective of addressing the developmental consequences of cross-border anti-competitive activities.



### 3. THE REVIVAL OF INDUSTRIAL POLICY: HOW SHOULD THE WTO ADDRESS IT?

*Xinquan TU and LIN Guijun<sup>1</sup>*

#### 3.1 Introduction

Industrial policy has been considered outdated since the 1980s when the Washington consensus became the dominant economic theory and policy. However, industrial policy is recently back in fashion. One important reason is for this is the rise of China, which seemingly proves that state-led industrial development might be a workable and even preferable model. Other major emerging economies, like Brazil and India, which once gave up government-oriented approaches now look to China for industrial policy. Another significant phenomenon is that, after the global financial crisis, many developed countries strengthened government intervention in the economy. The Western governments have not only lavished billions of bailout to suffering financial sectors and other industries, but also pursued active industrial strategies to either reindustrialize or establish new industries.

The global reemergence of industrial policy has serious implications for the WTO. The existing WTO rules were established in the Uruguay Round when the global policy-making community was dominated by orthodox neoliberal economics. The general aim of these rules was to restrict the use of industrial policy instruments. Therefore, the increasing use of industrial policy has led to many trade disputes between major members and posed challenges to the current WTO system. To maintain a stable and foreseeable trade policy environment, the WTO should promptly and carefully address the issue of industrial policy revival. The desirable response for the WTO might be rethinking the rationality of industrial policy in the new circumstances and accommodating the increasing demand for government intervention in industrial development.

#### 3.2 The Global Revival of Industrial Policy and its Implications

Industrial policy has been debated for a long time in both theoretical and practical domains. Since the early 1980s, the neo-liberal economic philosophy has assumed the dominance. This approach does not favour government involvement in economic activities beyond some functional intervention in the form of investment in education, health, and security. Meanwhile, a strong wave of trade liberalization and marketization has prevailed all over the world. The most significant examples are China and India. It once seemed shameful for an economist to defend industrial policy and even worse for a government to pursue it. But in fact, industrial policy never disappeared into history. While no one now would aspire to return to central planning, the role of government is still believed indispensable for industrial development. The reality is that industrial policies have run rampant during the last three decades, although it was less noticed until two new developments occurred: the rise of China and the burst of global financial crisis.

China's success was considered attributable to the adoption of a market economy and trade liberalization. Since its reform and opening up in 1979, China has kept moving toward a market-oriented economic system. China's accession to the WTO in 2001 seemed to indicate its resolution to join the liberal international club. However, after its ten-year membership,

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China's economic model with strong state control is still far from a free-market economy. In particular, the government is still conducting widespread selective industrial policy to promote preferred industries. Interestingly, the emerging economies, like India, Brazil, Russia, and Vietnam, are following China's model to preserve a large state sector and to undertake interventionist industrial policy. In fact, some countries, like Brazil, had given up the model of state-led industrial development during the 1980s and 1990s. But, when Brazil's economy stabilized in the mid-2000s, the government was able and keen to refocus on industrial policy.

Moreover, in the aftermath of the global financial crisis in 2008, many developed countries have taken a variety of steps to increase the role of government and to deepen the link between the government and the private sector. U.S. President Barack Obama claimed that the government must make "strategic decisions about strategic industries." His stimulus plan last year earmarked billions for innovation in sectors, such as renewable energy, high-speed rail, and advanced vehicles. Japan's Prime Minister, Naoto Kan, said that the government wanted to create a new "Japan Inc.," deepening the links between business and the state. The Ministry of Economy, Trade and Industry (METI) announced a strategy to combat the "increasingly aggressive" industrial policies of China, France, Germany, South Korea, the UK, and the US. The European Commission will unveil a new, active industrial strategy later this year, which will pay more attention to manufacturing and less to services and "knowledge" industries.

The global revival of industrial policy poses a serious challenge to the WTO. The current WTO rules were made in the late 1980s and early 1990s when government interventionism was disregarded and discarded. Therefore, industrial policy is largely illegal or at least undesirable in the WTO. A number of WTO rules have constrained the flexibility of its members in its choice of instruments, which may be used to pursue industrial policy objectives. But at the same time, there is no clear discipline about what can be done and what cannot. Now there are some major players, including China, listing industrial policy as a critical tool to promote industrial and structural upgrading, and the US is expending billions for innovation in sectors, such as renewable energy, high-speed rail, and advanced vehicles. However, all these policies are inconsistent with the orthodox neoliberal economic philosophy and questionable under the WTO rules. China has been under attack more often due to its industrial policy. There have been 43 countervailing duty cases against China since 2004, accounting for 50 percent of all cases during the period. The US also initiated several cases questioning China's industrial policies under the WTO dispute settlement mechanism.

Nevertheless, China is not the only country actively pursuing industrial policy. The US itself is not innocent. Hence, while the United States initiated an anti-subsidy action against the Chinese solar industry, China also reacted with an investigation on US subsidy programs for renewable energy. In the context of global competition for industrial policy, such conflicts could be expected to spread and worsen without clear guidance from the WTO. In particular, those countries seeking industrial policy are all major players in the world trade and economy. Their mutual confrontations could be damaging for the whole world. Therefore, the WTO should take prompt and careful actions to address the issue and come up with reasonable solutions to it.

### **3.3 What Should the WTO do with the New Wave of Industrial Policy?**

Industrial policy remains controversial in terms of its rationality. There have been successes, but also many expensive failures. Nevertheless, while not all countries pursuing industry policy are successful, almost all successful countries have undertaken some forms of industrial policy in their journey to industrialization. The global revival of industrial policy itself has proven its value and necessity in the current economic circumstances.

In fact, although industrial policy covers a wide range of instruments, such as import protection, export promotion, investment incentives, performance requirements for FDI, and subsidies, the current WTO rules have limited their applicability to a large extent. Some old-fashioned industrial policy tools, like high tariffs, quantitative restrictions, and export subsidies, are basically prohibited. As a result, the currently used industrial policy instruments are generally less trade-distorting domestic policy rather than trade policy. The most common one is production subsidies in various forms whose economic implications are perplexing and controversial. So, it is not a good choice for the WTO to preclude all industrial policies. The WTO should allow more policy space for both developing and developed members to establish their own selective industrial policy. It might be desirable to completely rethink WTO philosophy and redesign the WTO system, but it is beyond the intention of this paper, which is just trying to offer some policy choices within the system to accommodate the features of the new wave of industrial policy.

### 3.3.1 Revalidate the non-actionable subsidy provision

In the Uruguay Round Agreement on Subsidies and Countervailing Measures, subsidies are divided into three kinds, one of which is non-actionable subsidies. Article 8 of the Agreement allows for subsidies for research and development activities, to disadvantaged regions, and to environment-related investments. These subsidies are considered economically reasonable and have negligible distortion effects on international trade. However, according to Article 31, the Committee shall review the operation of the provision in five years, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period. On 20 December 1999, the Committee held a special meeting to conclude the review. At that meeting, no consensus was reached by the Committee to extend Article 8, either as drafted or in modified form. Article 8 has therefore lapsed, and there is no non-actionable subsidy any more. All production subsidies are actionable now.

A major goal of industrial policy is to promote technological development and help establishing new industries. A research and development subsidy is a very important instrument to achieve this goal and has strong economic reasonability. In the aftermath of the global financial crisis, the world is eager for new economic growth sources to get out of recession as well as for new technology to address global challenges, such as climate change. Moreover, income inequality among different groups and regions in many countries are believed to be a major root source of economic recession. Governments need to balance domestic economies through a variety of policies, including subsidies for disadvantaged regions. In all, non-actionable subsidies are a desirable and reasonable policy choice for governments to lift their economies out of economic recession. However, the lapse of Article 8 restricts their capabilities in adopting such policies. In response to the new reality of increasing demand for them, the WTO should again review the provision of non-actionable subsidies and legitimize their use. Under the current circumstances, members are likely to make a different decision than in 1999. The availability of legitimate policy tools would help to reduce the pursuit of other questionable options.

### 3.3.2 Due restraint in using countervailing duties

For importing members, there are two optional remedies for subsidized imports, one is to initiate countervailing actions and another is to file a dispute case with the WTO. In the 21st century, there was a declining trend in the use of countervailing duties, reaching the lowest number with six cases in 2005. But since then, the number of cases has risen again largely because China became a new major target. Cases against China account for half of all from 2004 to 2010.

In fact, imposing countervailing duties on subsidized imports is considered unwise by many economists. And compared with dispute settlement in the WTO, countervailing actions are more discretionary and arbitrary. As a result, many countervailing actions were brought to the WTO dispute settlement and found inconsistent with the SCM Agreement. This is actually a waste of resources and creates unnecessary tensions between importing and exporting Members. So it would be preferable to make cases under the dispute settlement mechanism than to initiate countervailing actions. It is not possible for the WTO to restrict members' choice. But the committee can try to reach consensus on due restraint in using countervailing duties. Especially if those major users of countervailing duties could make such a commitment, it is still a helpful movement to reduce trade conflicts relating to subsidy policies.

### 3.3.3 Allow for more space for green industrial policy

Green technology and industry is somewhat a global public good since climate change and environmental pollution are serious challenges to the whole world. Subsidies for green industrial policy arguably internalize environmental benefits not captured in the market price for green energy: primarily clean air and reduced GHG emissions. It is an empirical question whether the subsidies in any given case match the external environmental benefits, but at some level they will actually correct market distortions caused by underpricing of environmental benefits. Moreover, the green industry is still a new industry with not so much international competition. The policies in support of green technology and industry are mostly domestically focused and have little spillover and distortional effects on international trade.

However, some big countries are competing for the leading position in the new industry. Although all of them have conducted some forms of industrial policy, they still complain about each other, causing a lot of trade tensions between them. Several disputes have occurred between the US and China over each other's green industrial policy in solar and wind power industries. There is another dispute case between Japan and Canada on this issue.

Therefore, the WTO should allow for more space for green industrial policy and encourage all competent members to make their contributions to the development of green technology and industry. It might be infeasible to develop new rules on this issue, but the WTO can try to list green industrial policy under the non-actionable subsidy and acclaim such efforts.

### 3.3.4 More concrete S&D treatment for developing members

The LDCs usually have less developed market systems with higher possibilities of market failure. Therefore, developing countries are more in need of effective government intervention. The WTO system has taken into account different demands of members in different stages of development. A set of special and differential treatment rules are incorporated in all agreements. In particular, the LDCs almost do not have to take any responsibilities in many areas. However, for those more advanced and bigger developing countries, the WTO rules have little S&D treatment, and its increased intrusiveness into what were previously domains of domestic policy have significantly circumscribed the applicability of industrial policy. Although they have larger economic scale and trade volume, they are still in the process of industrialization. The government is still expected to play an important role in the process. Besides, the approach to S&D treatment in most agreements has typically been in the form of transition arrangements, which has little true value.

Indeed, the issue of what type of market system best suits a country remains keenly contested territory. The WTO should focus on those trade-related policies and trade

distortion domestic policies. A Member has freedom to choose the kind of market system it believes is most suitable. In the case of industrial policy, as long as it does not distort trade evidently, developing members should be allowed more policy space to formulate and conduct industrial policy to promote selected industries. No success is guaranteed. But, the WTO should not prevent them trying.

### **3.4 Conclusion**

Industrial policy prevails again in recent years. Not only are the emerging economies, like China and Brazil, pursuing explicit and larger government intervention in economic development and structural adjustment, but the developed countries like the US and the EU are actively striving to design government-led industrial strategy.

The revival of industrial policy is a challenge to the WTO system, because the current WTO rules are unable to accommodate the increasing demand for industrial policy space. Therefore, trade disputes and tensions have occurred among members with competing interests in developing their industries. It would hurt the stability of the world trade order.

The WTO should address the challenge promptly and carefully. The basic principle to deal with the new wave of industrial policy is to allow for more policy space for both developed and developing members. It should be recognized that in the new circumstances, industrial policy has its rationality and feasibility. The existing WTO rules established two decades ago might not be appropriate to judge what is done at present.

There are four actions that the WTO should and could do with industrial policy. The first is to revalidate the lapsed provision on non-actionable subsidies, permitting members to increase government investments in R&D and social development. The second is to call for due restraint in the use of countervailing duty actions and call instead for dispute settlement cases under the WTO. The third is to allow for green industrial policy to address global challenges and to nurture new industries. The fourth is to offer more S&D treatment to especially big developing members as long as their industrial policies are domestically oriented and have little trade distortion.

The role of the WTO is to restrict Members from distorting trade, rather than to teach Members to develop their economies. It is more agreeable for the WTO to leave more policy space to Members and to let them choose their own approaches to development.

## 4. THE TRADE TOOLBOX AND ENVIRONMENTAL SUSTAINABILITY: THE CASE FOR FISHERIES

*Peter Allgeier*<sup>1</sup>

### 4.1 INTRODUCTION

The increasing severity of global environmental challenges has prompted increased attention to the relationship between international trade and resource issues, especially how trade agreements and rules affect the global commons. Examples include climate change, fisheries depletion, and loss of biodiversity. A principal topic in the development of “21<sup>st</sup> century trade agreements” is the relevance, feasibility, and effectiveness of addressing environmental issues in international trade agreements. To date, efforts to incorporate environmental and sustainability considerations into trade agreements have largely been confined to fostering environmental cooperation among the parties, facilitating civil society views into government policy making, and promoting compliance with existing domestic laws and regulations. The impact of such agreements has been minimal in producing tangible effects on the environments of land, sea, and air.

However, the existing tool box of trade negotiators from other sectors could be applied effectively to environmental and sustainability issues. The WTO fisheries subsidies negotiations and discussions of a marine package in the Trans-Pacific Partnership (TPP) negotiations are examples of potential new approaches to trade and the environment.

### 4.2 PROBLEM/OPPORTUNITY

The world depends on the oceans for food and jobs. Hundreds of millions of people depend on fishing for all or part of their income. According to the UN Food and Agricultural Organization (FAO), the primary and secondary fisheries sectors support the livelihoods of approximately 540 million people (eight percent of the world’s population).<sup>2</sup> The sustainability of the fisheries also is critical to meeting the food needs of the three billion people who depend on fish for at least fifteen percent of their average animal protein intake.<sup>3</sup>

A critical factor in the economic welfare of countries’ fishing industries is the role of international trade—exports, imports, terms of competition, and international rules of trade as applicable to fishing activities and trade in seafood. Nearly forty percent of the total production of fish and fish products enters international trade, and had an estimated value of \$102 billion in 2008.<sup>4</sup> The fishing industry is particularly important for developing countries, as they account for 80 percent of world fishery production and 50 percent of world exports of fish and fishery products in value terms.

The world faces a major challenge to ensure the sustainability of the fishery resources that are necessary for the continued economic welfare and food security of the billions of people dependent upon the ocean’s health. According to the FAO, 85 percent of the world’s fisheries are now overexploited, fully exploited, significantly depleted, or recovering from

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2 FAO. *State of the World’s Fisheries and Aquaculture 2010* (SOFIA), Rome, 2010.

3 OECD. *A Green Growth Strategy for Food and Agriculture*, 2011.

4 FAO. *State of the World’s Fisheries and Aquaculture 2010* (SOFIA), Rome, 2010.

over exploitation.<sup>5</sup> The situation is so severe that, according to leading fisheries scientists, if current trends continue, the world's fisheries could be beyond recovery within decades. Fisheries management alone will not be sufficient. In order to relieve the pressure on the ocean's fish stocks, it is necessary to limit subsidies and eliminate illegal fishing. Subsidies permit fleets to fish more intensively, longer, and further afield than would be the case without subsidies, especially the operational subsidies such as fuel and construction subsidies. Thus, economic development, livelihood, environment, and food security all are endangered by the fishing subsidies that have helped to produce a global fishing fleet that is 2.5 times larger than necessary to fish at sustainable levels.<sup>6</sup> The global economic losses due to this overfishing are estimated at US\$50 billion annually.<sup>7</sup>

Even before the launch of the Doha Round, Leaders and Ministers recognized the importance of fish resources for trade and development, as well as the clear link between subsidies and depletion of those resources. This recognition led the WTO Trade Ministers at their Ministerial Meeting in Doha in November 2001 to include negotiations to discipline such subsidies in the Doha Round. This was the first time that the WTO included a specific environmental issue in its negotiation mandate. But the greater significance of the decision was that the environmental issue was not a mere "add on" to a commercial negotiation. Rather, the need to ensure a healthy fisheries resource was seen as fundamental for trade and development. At the Hong Kong Ministerial in 2005, the Ministers were more explicit about their objectives for a fisheries discipline. Their instruction to their negotiators was to strengthen disciplines, including through the prohibition of certain subsidies that contribute to overcapacity and over-fishing. Beyond its status as the WTO's first "trade and environment" negotiation, the fisheries subsidy negotiation has several unique characteristics that warrant discussion.

- It is more than a commercial negotiation. While one objective of the negotiations is a typical WTO "level the playing field" commercial objective, there also is---at least as important, if not the primary objective---the objective to promote the sustainability of the world's ocean fisheries. This is quite different than the negotiations to reduce or discipline agricultural or industrial subsidies. This sustainability objective creates a significant mental challenge to trade negotiators, whose DNA dictates that they negotiate for their own country's commercial interest. But if they are to achieve the sustainability objective, they have to adopt the mentality (at least on one side of their brain) of what's best for the global commons.
- Similarly, the solutions don't fit the normal WTO mold of adjusting the border measures, or internal policies, of each Member. The fisheries subsidy issue involves both activities within Members' marine "borders" (i.e., their Exclusive Environmental Zones or EEZs) and activities on the high seas beyond everyone's EEZ. And to make matters more complicated, migratory fish species move back and forth between EEZs and the high seas.
- Another important characteristic of these negotiations is that they cut across North-South lines. The major fishing subsidizing Members include both developed and developing countries. And those adversely affected by the subsidies---both economically and environmentally---include both developed and developing countries.
- The negotiations also raise new institutional issues for the WTO. What distinguishes the WTO from other international agreements is that the Members' commitments are legally

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5 Ibid.

6 Porter, G. *Estimating Overcapacity in the Global Fishing Fleet*, World Wildlife Fund, 1998.

7 World Bank and FAO. *The Sunken Billions: the Economic Justification for Fisheries Reform*. Washington DC, 2009.

binding and enforceable through a robust dispute settlement system. A question arises, however, is the current Dispute Settlement Understanding (DSU) equally workable for an agreement with a global sustainability objective and the commercial agreements in the current WTO?

Beyond the complications and challenges of these various characteristics, there is the overriding challenge of finding the proper balance between development and trade on the one hand and sustainability and the environment on the other hand. How can we do that? Actually, development and trade ultimately will not be realized if the sustainability objective is not met. Can the potential “tragedy of the commons” be a sufficiently powerful incentive for negotiators, and their political leaders, to adjust their mentalities and negotiating approaches to give proper weighting to the sustainability objective?

Even in purely commercial terms, fishing subsidies have a particularly pernicious effect. In areas such as agriculture or manufacturing, one country’s subsidizing production does not reduce another country’s production resources, even though it gives the subsidizing country’s producers a competitive advantage. In the fishing sector, on the other hand, such practices rob the other countries of production resources by depleting the fisheries that are everyone’s resource base.

## 4.3 RESPONSES

We have well within our grasp the ability to achieve these multiple objectives---commercial, environmental, and developmental---by applying familiar trade rules and measures to the fishing sector, as we do in other sectors. In addition to filling the fisheries gap in the international subsidies disciplines, we could address issues of illegal fishing and seafood fraud in similar manners to our treatment of such practices in trade in manufactures and agriculture. The point is that these are mainstream issues for trade negotiations, not a radical effort to insert extraneous non-trade issues into trade negotiations. A brief review of the trade disciplines and measures in the tool boxes of trade negotiators provides numerous examples of how to do this.

### 4.3.1 Subsidies

Subsidies in manufacturing and agriculture are addressed in the WTO, but as a practical matter disciplining fisheries subsidies is the missing piece. Those subsidies are huge--estimated to be between \$25 billion and \$29 billion annually.<sup>8</sup> The subsidy prohibitions under Article Three of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) apply only to situations in which the subsidies are contingent upon export performance or use of domestic goods over imported goods.<sup>9</sup> Neither of these conditions would appear to apply to most of the subsidies granted to fishing enterprises.

The SCM Agreement also defines a category of “actionable subsidies” that have “adverse effects” on the interests of another Member.<sup>10</sup> However, the definition of adverse effects is cast in terms that are much more oriented to head-to-head competition in a given manufactured product in the same market(s) than to adverse effects upon a common resource on which all producers depend. This traditional view of the trade-distorting

8 Sumaila, U.R., Khan, A. et al. “A Bottom-up Re-estimation of Global Fisheries Subsidies,” *Journal of Bioeconomics*, 2010.

9 Agreement Establishing the World Trade Organization, Annex 1A: Multilateral Agreements on in Goods, Subsidies and Countervailing Measures, Article Three, 15 April 1994, available at [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm).

10 Article Five



effects of subsidies misses the point that such subsidies, in addition to having the direct competition-distorting effects described above, also have a significant “adverse effect” on the sustainability of the underlying resource being produced (fish), which threatens the viability of all other Members’ fishing industries.

It would not be a huge leap in logic to supplement the current understanding of “adverse effects” in the SCM Agreement with a recognition that, by definition, subsidies that contribute to over fishing seriously damage the common interests of other Members with fishing enterprises. Given this global impact from fishing subsidies, the most appropriate treatment of such subsidies would be prohibition.

### 4.3.2 Illegal fishing

Illegal fishing takes a variety of forms: illegal, unreported, or unregulated (IUU) fishing. The basic characteristic of illegal fishing is that the vessels are operating in violation of the laws of a fishery, for example, fishing by vessels without nationality or flying the flag of a country not a party to the regional organization governing that fishing area or species. Vessels engaged in IUU fishing typically do not comply with safety measures, use illegal fishing gear, do not follow fisheries management regulations, and do not comply with regulations on quotas, fishing areas, closed seasons, or prohibited species. Obviously, these practices, and the fact that IUU catch is not recorded in catch registers, lead to over fishing and unfair competition with those vessels that comply with all of the conservation and operating rules and regulations. It is estimated that illegal, unregulated, and unreported (IUU) fishing is between \$10 billion and \$23.5 billion per year.<sup>11</sup>

Existing trade agreements already cover various forms of illegally traded goods. For example, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) includes provisions for border measures to prevent importation of goods suspected of violating intellectual property rights.<sup>12</sup> The Agreement also authorizes authorities to seize and destroy infringing goods or otherwise dispose of them outside the channels of commerce.<sup>13</sup> A related example of an international trade agreement to prevent trade in illegal goods is the pending Anti-Counterfeiting Trade Agreement (ACTA) among thirty seven countries accounting for more than 50% of world trade.<sup>14</sup> The ACTA requires Members to have procedures for seizing imported goods suspected of violating intellectual property rights and, after an appropriate determination of infringement, to destroy the goods or otherwise dispose of them outside the channels of commerce.<sup>15</sup>

The United Nations Kimberly Process Certification Scheme (KPCS) is another example of an international trade agreement aimed at eliminating illegal trade, in this case “conflict diamonds”. The 75 Member countries of the KPCS agree to import only those rough diamonds that are accompanied by a validated certificate that the diamonds are in compliance with the relevant UN Security Council and General Assembly resolutions.<sup>16</sup>

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11 FAO. *State of the World's Fisheries and Aquaculture 2010* (SOFIA), Rome, 2010.

12 Agreement Establishing the World Trade Organization, Annex 1C: Trade-Related Aspects of Intellectual Property Rights (TRIPs), Article 51, 15 April 1994, available at [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm).

13 Article 46 and 59.

14 Office of the United States Trade Representative ACTA *Fact Sheet and Guide to Public Draft Text*, Available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2010/acta-fact-sheet-and-guide-public-draft-text>.

15 Anti-Counterfeiting Trade Agreement (ACTA), 3 December 2010, available at <http://www.ustr.gov/acta>.

16 United Nations Kimberley Process Certification Scheme (KPCS), Section One-Three, 5 November

Thus, as in the case of fisheries subsidies, there are precedents for trade agreements to provide enforceable border measures against illegally captured fish. It's as much a commercial issue as illegal trade in any other product (e.g., watches, handbags, pharmaceuticals). But it also is an issue in achieving the sustainability of common marine resources.

### 4.3.3 Seafood fraud

Seafood is highly traded on global markets and particularly vulnerable to fraud, since only the European Union requires catch documentation and detailed traceability. In addition, the very nature of the product, especially after it has undergone a degree of processing (e.g., filleting) makes it very easy to substitute an inferior species for a more expensive one. Seafood fraud consists of misrepresenting a traded product to garner a higher price or to market unpopular species, or to elude regulations and laws by various forms of mislabeling. These practices are well-known in other areas of trade.

Trade agreements covering other areas of trade have included provisions to prevent false labeling or circumvention of rules through false claims of origin or product characteristics. The 1974 Multi Fibre Arrangement (MFA) governing trade in textiles and clothing contained extensive provisions on preventing circumvention of the quotas. The Uruguay Round Agreement on Textiles and Clothing, which established the transition measures for integrating textiles and apparel into GATT 1994, also granted Members authority to deny entry, or take other appropriate measures, in instances of attempted circumvention of quotas (e.g. by false declarations concerning country or place of origin, fibre content, quantities, description, or classification).<sup>17</sup> Once again, one finds that common trade agreement tools are available to address the problems of fisheries.

## 4.4 Conclusion

One hears much these days about the “Green Economy”. While there is no official definition of the Green Economy, certainly one of its basic concepts is that the economy should operate in a manner that takes proper account of the value of common resources---clean air and water, biodiversity, sustainable marine resources, etc. Obtaining sustainability is not purely a goal for the sake of the environment. Resource sustainability is necessary for developing countries to achieve standards of living on a par with the prosperity enjoyed by developed countries. Much of the criticism directed at the WTO and trade negotiations generally from environmentalists has been that trade negotiations exacerbate environmental problems. It is essential, therefore, that new trade opportunities be structured in a manner that also promotes sustainability of trade activities. Eliminating destructive fisheries subsidies through WTO rules is exactly the kind of environmentally supportive trade negotiation that the WTO should, and can, foster.

To achieve such an outcome, however, trade negotiators need to change their mentality. Traditionally, the mentality of trade negotiators has been to promote their countries' commercial interest by obtaining “concessions” from their trading partners. The primary objective of the negotiators has not been to solve a common global problem. In the case of the fish subsidy negotiations in the WTO, there certainly is the traditional commercial objective of “leveling the playing field” vis-à-vis the other trading partners' fishing fleets. But there also is an explicit environmental mandate for the negotiations, namely, to contribute in a concrete way to ensuring the sustainability of the oceans' fisheries. That

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2002, available at [www.kimberleyprocess.com/download/getfile/4](http://www.kimberleyprocess.com/download/getfile/4).

17 Agreement Establishing the World Trade Organization, Annex 1A: Multilateral Agreements on in Goods, Textiles and Clothing, Article Five, 15 April 1994, available at [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm).

mandate requires trade negotiators, and their governments, to make “concessions” to the common environmental good as well as to their trading partners. This is not an easy mental shift for negotiators or their governments. But to an increasing degree, governments will have to make that shift of perspective in international trade negotiations. The outcome of the fishery subsidy negotiations is a critical test of the WTO membership’s ability to change the paradigm for trade negotiations.

The lessons from this analysis, however, are not confined to trade negotiators and their governments. There’s a powerful lesson for pro-environmental advocates and activists as well. To be truly effective in promoting a sustainable global environment, they need to work at the center of international commercial negotiations. In other words, they need to frame the so-called environmental issues within the rubric of the commercial behavior that they wish to modify and seek enforceable trade rules to prevent practices that are both anti-competitive and resource depleting.

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## 5. IS AN ALL OR NOTHING WTO FISHERIES SUBSIDIES AGREEMENT ACHIEVABLE?

*U. Rashid Sumaila*<sup>1</sup>

### 5.1 Introduction

The practice by governments of providing financial support, whether direct or indirect, to the fishing sector, is known as fisheries subsidies. Since a back of the envelope calculation by the FAO revealed that the total amount of fisheries subsidies in maritime countries globally could be as high as USD 50 billion annually in the early 1990s, eliminating harmful fisheries subsidies has become a central issue in the quest to achieve sustainable fisheries globally. More recent detailed studies put this number at between USD 15-27 billion.<sup>2</sup> This is a substantial amount given that the total gross revenue from the world's fisheries is estimated at between USD 80-85 billion.<sup>3</sup>

There are two broad reasons for the objection to fisheries subsidies. One is the environmental degradation that harmful subsidies are known to catalyze and the other relates to their trade distorting effect. In this piece I will focus on the former effect, but will return to the latter in the conclusion.

There is a strong connection between fisheries governance, sustainable development, and how subsidies serve as a stumbling block for meeting sustainability goals.<sup>4</sup> The crucial issue is that subsidies that motivate fishers to exert more fishing pressure make fisheries governance and therefore the attainment of sustainability and conservation goals difficult if not impossible to achieve. These types of subsidies that lead to overcapacity and overfishing are called variously in the literature “harmful,” “bad,” or “capacity enhancing.”

Despite the significant amount of effort devoted to identifying and measuring fisheries subsidies and to analyzing their potential and actual impacts on environmental and economic sustainability over the past decade, there has been little progress made in formulating an international regime for the regulation of fisheries subsidies. The negotiation for the improved discipline on fisheries subsidies at the WTO has stalled in recent years and considerable challenges remain before a meaningful agreement can be attained. In this contribution, I identify a key challenge to the WTO negotiations, and offer possible solutions to the problem identified. The idea expanded herein is mentioned in Nature correspondence.<sup>5</sup> This is the first opportunity to expand on the suggestion.

### 5.2 Challenge to the WTO Negotiations

There are obviously several challenges to the WTO negotiations on fisheries subsidies. However, a key reason for the lack of progress in these negotiations, after seven years of

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2 Milazzo, M. *Subsidies In World Fisheries: A Re-Examination*, World Bank Technical Paper, 406. Fisheries Series, (Washington DC: World Bank, 1998): 86.

3 FAO. *The State of World Fisheries and Aquaculture 2010*. Food and Agriculture Organization of the United Nations, Rome, 2011.

4 Molte, A. ed.. *Fisheries subsidies, Sustainable Development and the WTO*, (Earthscan, 2010): 450.

5 U. Rashid Sumaila “Overfishing: Call To Split Fisheries At Home And Abroad,” *Nature* (correspondence): 2012, 481 (7381), 265-265.

trying, is that the negotiations suffer from the problem of “lumpiness.” By this, I mean negotiators aim for an all-inclusive deal or no deal at all. This lumpiness takes two forms.

First, the WTO negotiations are conducted as a “single undertaking,” meaning that results must be achieved in all areas of the negotiations, not only in those regarding fisheries subsidies, and must be applicable to all Member countries. Any potential breakthroughs in the negotiations on fisheries subsidies at the WTO must therefore be coupled with similar breakthroughs in the negotiations on the Doha Round as a whole. The fact that this requirement constituted a problem for the negotiation was recognized during the later stages of the stalled negotiations, leading to a last-minute and unsuccessful attempt to decouple fisheries subsidies negotiations from the others in the Round. I think this decoupling is needed if progress in the negotiations is to be made.

The second lumpiness, which is the focus of this contribution, relates to the goal of negotiators to arrive at a deal on subsidies that is all-inclusive, for all fisheries of the world, domestic or international; small or large scale, etc. This approach, I argue, has limited the ability of the negotiations to make progress by confounding the issues.

Within this all-or-nothing setting, the Chair’s Draft Report <sup>6</sup> was designed to have two core elements: a broad set of prohibited subsidies and a list of general exceptions to these prohibitions, with complementary regulations guarding against circumvention; and S&D treatment, giving policy flexibility to developing countries through provisions of additional exceptions based on various combinations of factors, such as types and locations of fisheries.

As with many international agreements (e.g., the Kyoto Protocol), it is always a sticky issue when, even though there are often good reasons for doing so, developing countries are given special exemptions. I think some of the resistance to such exemptions, in the case of fisheries subsidies, is the fact that developing countries are not a homogenous group - they consist of global powers, such as China, and very small developing island states, like Samoa.

Hence, several countries (e.g., Canada, Japan, and South Korea) or groups of countries (e.g., large developing countries, small vulnerable economies, and the Africa, Caribbean and Pacific countries) presented their positions and concerns regarding the Chair’s Draft.

I contend that the issues raised in the various positions tabled by different countries and groups of countries was due, partly, to the challenge identified in this contribution, namely, the lumpiness of the objective of the negotiations. The consequence of these positions was the inability of the WTO to reach an agreement on disciplining subsidies.

### 5.3 Response to the Challenge

This section discusses my suggestion on how to deal with the second lumpiness described in the preceding section. The starting point is to split the world’s fisheries into (i) domestic, i.e., fisheries that operate within country EEZs and target fish stocks that spend all their lives within the EEZs; and (ii) international fisheries, made up of fish stocks that do not qualify as domestic fisheries as defined herein. Thus, they consists of (a) transboundary fish stocks, i.e., stocks that are shared by two or more countries because they spend their lives within the EEZs of these countries; (b) highly migratory stocks, such as tunas that straddle the EEZs of countries and the high seas; and (c) discrete high seas stocks that spend all their lives in the high seas.

There are at least three reasons why the above split is necessary to help move WTO negotiations forward. First, the incentives for countries to eliminate harmful or overfishing

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<sup>6</sup> WTO. *Draft Consolidated Chair Texts Of The AD And SCM Agreements*. TN/RL/W/213 (2007).

subsidies differs significantly, depending on whether a fishery is domestic or international; and within the latter, whether a fishery is a transboundary, highly migratory, or discrete high seas stock. Second, the institutional framework needed to support the elimination of harmful subsidies is different, in the case of domestic fisheries. For example, I believe the heavy lifting has to be done at the home front with international support by organizations like the WTO. However, in the case of highly migratory stock international fisheries, a coordinated international framework is needed because unilateral action by one country is not likely to eliminate the problem of overfishing. Third, by dividing fisheries into these groups, it would be easier to identify the leverage points for eliminating harmful subsidies.

### 5.3.1 Disciplining harmful subsidies to domestic fisheries

The incentives for countries are clear here. If a country depletes its domestic fish stock, it would suffer the consequences, as Canada learned the hard way with the collapse of the cod stock off Newfoundland in 1992. Hence, the battle for eliminating or at least redirecting harmful subsidies for domestic fisheries should rightly be at home in individual countries. The key to success is to make it abundantly clear to fishing countries that it is in their best interest to divert harmful subsidies from helping diminish their fisheries stock (capital) into more constructive uses. Countries could use the resources in a number of innovative ways to help their fishers adapt to the elimination of harmful subsidies. Recent innovative approaches that have been floated include “fishing for plastic,” instead of fishing for vulnerable fish stocks and “trawling for data,” instead of fish. Countries that divert their harmful subsidies to provide skills to fishers to help them transition to more sustainable livelihood activities would see win-win benefits in the sense that they would keep the money in the fishing communities while reducing the pressure to deplete a renewable food source.

An important role for (local) fisheries scientists and managers is to help countries understand the harm caused by these subsidies and the immense benefits that could follow the elimination of harmful subsidies. Once countries, especially developing ones, realize that the benefits of taking action now will accrue exclusively to them, and that this is the best way to improve the quality of life of their coastal communities in the medium to long term, they would begin to take action to mobilize the resources currently used to provide harmful subsidies in ways that would ensure the sustainability of fisheries rather than their depletion.

The Norway story on subsidies should serve as a good example. In the early 1970s, the country was a leading provider of fisheries subsidies to its fledging fisheries industry. During this period, Norway could easily have won the competition as the country with the world’s most subsidized fisheries. The country provided both price support and cost-reducing subsidies that were clearly bad for the sustainability of the resource, and therefore the medium- to long-term benefits to the country’s fishing sector. By the mid-1980s, the country realized that harmful subsidies are ultimately bad for the fish and the fisher, and then the country quickly reduced its subsidies to almost nothing, with good results to show in both biological and economic terms.

In this framework, the international community, through institutions such as the WTO, the FAO, and the UN Environmental Program, and regional intergovernmental bodies, such as the OECD, African Union, and APEC could provide guidelines and incentives to help countries implement home-grown plans to discipline harmful subsidies to their domestic fisheries.

### 5.3.2 Disciplining harmful subsidies to international fisheries

At the international level, the incentives are less clear and more complicated: If a country subsidizes and over-fishes a highly migratory fish stock, the country enjoys the benefit of

doing so while the negative consequences are suffered by many countries. As a result of the asymmetric nature of the distribution of cost and benefits, the battle ground for eliminating harmful subsidies is at the international level - at the level of the WTO, for example.

The trick here is to identify the low-hanging fruit, i.e., international fisheries that would be relatively easy to get an agreement on while at the same time reaping high conservation benefits. The negotiations can then begin with these. Examples that come immediately to mind are high and deep seas fish stock fisheries and highly migratory high seas tuna stocks. For both of these international fisheries, the biology, economics, social and food security and legal and current management regimes indicate that it would be very difficult to argue for their subsidization .

Ecologically, high and deep sea fish stocks are known to have life history characteristics that make them vulnerable to overfishing. In addition, the legal and management structures are weak to say the least.<sup>7</sup> These fisheries are operated by a few, mostly, developed countries, producing a small percentage of the world total capture fisheries catch while employing only a few people. It has been estimated that without subsidies many of the bottom trawl fleet operating in the high seas will not be economically viable.<sup>8</sup> In effect, the production-distorting effects of fisheries subsidies are most pronounced in high seas fisheries. Thus, obtaining a WTO agreement on these fisheries would be a significant win for conservation and sustainability.

I can see a significant role for revamped regional fisheries management organizations, especially with respect to the management of transboundary and straddling fish stocks fisheries.

## 5.4 Conclusion

In this brief contribution, I have identified the lumpiness in the WTO negotiations as a key reason for the failure to reach an agreement after seven years of effort. Two types of lumpiness were identified, the first relates to the fact that results must be achieved in all areas of the negotiations, not only in those regarding fisheries subsidies, and must be applicable to all member countries. There is already an effort to decouple fisheries subsidies negotiations from the others in the Round. I think this decoupling is needed if progress in the negotiations is to be made. The second lumpiness relates to the goal of negotiators to arrive at a deal on subsidies that is all-inclusive. This approach, I argue, has limited the ability of the negotiators to make progress.

Next, I provide a sketch of how the second lumpiness can be dealt with. I propose that we need to categorize fish stocks and fisheries into domestic and international fisheries. My suggestion then is to move the battle front for dealing with harmful subsidies to domestic fisheries to home countries, with the international and regional communities providing guidelines and incentives to help countries transition to harmful subsidies-free fisheries.

The battle front in dealing with harmful subsidies to international fisheries remains with the international community via institutions like the WTO. This is because of the asymmetry in the distribution of cost and benefits of providing subsidies. Focusing on international fisheries is attractive, particularly from an environmental perspective, but this does not mean that the international community should ignore what happens to harmful subsidies domestically.

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7 N Norse, E. and Brooke, S. et al. "Sustainability of Deep Sea Fisheries," *Marine Policy*, 36, (2012): 307-320.

8 Sumaila, U.R., Khan, A. et al. "A Bottom Up Re-Estimation Of Global Fisheries Subsidies," *Journal of Bioeconomics*, 12: (2010) 201-225.

From the environmental perspective, the international community should be interested in disciplining domestic subsidies if only for global food security reasons. In particular, the trade distorting aspects of subsidies to domestic fisheries should still make them a matter of concern to the global community. One way the world can help push countries to discipline harmful domestic subsidies is to provide carrots, and sometimes, sticks to motivate action.

To implement this proposal, more details need to be worked out. For instance, how would countries be able to distinguish among subsidy programmes to target only certain species? Is this feasible, e.g., in the context of groups of countries, such as those in the EU? Still, the principles behind my proposal are clear: in order to succeed in disciplining these subsidies, align the effort to disciplining harmful subsidies more to the interest of fishing nations, and take the battle to the right front - the home country in the case of domestic fisheries and the international arena in the case of international fisheries.

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## 6. BIOFUEL POLICIES AS A COMPLEMENT TO AND A SUBSTITUTE FOR AGRICULTURAL POLICIES

*Carlos Galperin*<sup>1</sup>

### 6.1 Introduction

Although some progress may be seen in WTO agricultural negotiations - though not in the short run - a group of measures having an important impact on the demand for agricultural products and on prices would fall out of the scope of these negotiations.

These measures are those related to biofuel promotion. Biofuels are currently using a growing proportion of oilseeds, corn, and sugar as inputs. As the biofuel market is mainly driven by government measures, the supply of some agricultural products is affected by measures that do not correspond to agricultural policies.

This is an example of how measures of different policies may be interrelated, acting as complements or substitutes. When acting as a complement, the effects of one measure are reinforced by the effects of others; and when acting as a substitute, the changes made in one measure are compensated by those made in other measures. This will give some kind of immunity to some agricultural products with respect to changes in agricultural policies; changes that are decided either unilaterally or multilaterally, as a result of multilateral negotiations.

This explains why responses to this challenge call for a number of policy options and negotiations in the fields of trade, agriculture, and energy. Options vary according to whether the country is “large” or “small” in the international biofuel and agricultural commodity markets.

### 6.2 The Effects of Biofuel Policies on Agriculture and Agricultural Policies

Biofuels are no longer minor determinants of the demand for agricultural products. In 2008-10 on average, 11 percent of corn, 11 percent of vegetable oils and 21 percent of sugar were used for biofuels.<sup>2</sup> OECD - FAO forecasts show that, by 2020, 21 percent, 29 percent and 68 percent of growing corn, vegetable oil, and sugar production, respectively, would be directed to biofuel production. Thus, since the development of biofuels has been driven to a great extent by government policies, these policies indirectly influence agricultural production.

Measures to promote biofuels combine a set of instruments from energy, agricultural, trade, and environmental policies. The most usual measures are: minimum use mandates, production subsidies, consumption subsidies, subsidies on factors of production and inputs (e.g., agricultural feedstock), tariff and non-tariff barriers, and environmental requirements. The development of new private standards could be added to this list.

The impact on resource allocation decisions is clear: i) minimum use mandates ensure a growing demand; ii) direct subsidies to production make it possible to reduce biofuel prices, thus making them competitive against fossil fuels; iii) support for agricultural commodities

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2 OECD and FAO. *Agricultural Outlook 2011-2020*. Paris: OECD and FAO, 2010.

reduces the price of biofuel inputs; iv) market access barriers make imported biofuels and raw materials more expensive and buttress the demand for domestic production. The same is true for environmental requirements in case their application results in a disguised trade barrier.

The interrelationship among these measures shows how different policies involved in the development of biofuels complement each other. In the first place, mandates would not ensure the demand for domestic production and domestic inputs if they were not supplemented by domestic subsidies and trade barriers. In the second place, consumption subsidies could be diverted to the demand for imported production if there were neither support for domestic producers nor tariffs or other trade barriers.

An indirect consequence of this is that the network of sectors that somehow benefit from policies that support agricultural production grows, and thus the future amendment of those policies becomes increasingly politically difficult, because the network of sectors now involves not only farmers, input providers, and landowners, but also agriculture-based biofuel producers and users.

In turn, an energy policy could also act - at least, partially - as a substitute for an agricultural policy, to meet the objective of sustaining farmers' income. Measures to promote biofuels sustain the demand for agricultural commodities, thus increasing commodity prices. In this way, as farmers' income increases, the agricultural policy support they need decreases, since part of this is inversely related to price: the higher the price, the lower the support. Moreover, this price increase also affects other agricultural products that are not used for biofuel production, but which, in food production, can act as substitutes for those used in biofuel production - like wheat with corn - or compete with them for land use.

In the case of the EU, trade barriers to biofuels are related to protection given to agricultural feedstock: protecting ethanol is an indirect way to continue protecting its raw material. For example, the MFN tariff on non-denatured ethanol is EUR 0.192 a litre (*ad valorem* equivalent of 45 percent), while it is EUR 0.102 a litre (*ad valorem* equivalent of 23 percent) on denatured ethanol. The tariff on biodiesel is 6.5 percent. These differences are also evident in tariffs on raw material. In the case of crops suitable for ethanol production, tariffs are higher than those on biodiesel: while the tariff on wheat is EUR 95 euros a tonne (*ad valorem* equivalent around 50 percent) and that on sugar is EUR 3.39 a tonne (*ad valorem* equivalent around 100 percent), it does not exceed 9 percent on vegetable oils, and oilseeds are duty free.

The link between agricultural and energy policies is also evident in what could be called the two-pronged channel of cross-subsidies for end products and raw materials. A good example is the case of ethanol in the US, where, by reason of its energy policy, the blender - that is, the one who mixes gasoline with ethanol - was subsidized until December 2011. Although this subsidy initially benefitted blenders, it could then favour ethanol producers as well as producers of maize purchased by ethanol producers. At the other end of the chain, agricultural support to producers of maize favours its supply, but it can indirectly benefit the first demander (the producer of ethanol, in this case) and then also the second demander (the blender).

Therefore, energy policy subsidies might benefit farmers and thus add to or substitute the support given by agricultural policy measures. If the proportion of this subsidy transferred to the farmer is proved to be an agricultural subsidy, it will be subject to the multilateral trade regulations that govern agricultural support. At the same time, if agricultural subsidies entail benefits for biofuel producers, their control at the multilateral level will imply reducing the amount of subsidies for the production of ethanol. These two aspects are detailed in the next section.

### 6.3 Policy Options for Large and Small Countries<sup>3</sup>

In the field of international relations, WTO rules entail a limit to governments' room for manoeuvre. In any case, national commitment to international rules and willingness to comply with them or the need to resort to them depend, in many cases, on the size of the economy, the specific weight of the states within the international community, and the ability of international agencies to ensure their enforcement.

By way of example, we will use "large country" to refer to a country that can influence the international market and multilateral trade negotiations, and "small country" to refer to a country that lacks such power.

In both cases, the decisions that should be revised are, on the one hand, those related to domestic production and support to industry - which imply deciding which biofuels to produce and which inputs to use - and, on the other hand, those related to foreign trade. Our analysis assumes that a "large country" which, regardless of its relative efficiency as agricultural producer, depends on imports to supplement its own domestic production, and a "small country" that is an efficient agricultural producer and that can compete in the biofuel market.

"Large countries" do not usually take the international context as given in order to make decisions at the domestic level. On the other hand, although multilateral rules impose a limit on their domestic policies, these may also be a limit to multilateral negotiations. In contrast, small countries' options are to take the international context as given in order to decide their domestic policies accordingly, and to try to (not always successfully) modify the international scenario. Some of these options are unilateral, but others are bilateral and multilateral.

#### 6.3.1 Options available to "large countries"

- I. Large countries' policies do not depend so much on what happens in other markets or on other countries' policies and, at the same time, they have an impact on them.

Choosing which product and input will be subsidized can affect both the international price of the end product and of its inputs. An example is the recently modified US biofuel policy that subsidizes corn-based ethanol and was one of the reasons for corn price increases.<sup>4</sup>

Also, a large importing country may have an influence on a large exporting country's biofuel policies. This has been the case with the US decision not to apply the biofuel tax benefit to foreign biodiesel that after a slight modification was re-exported to the EU after the EU had decided to apply countervailing duties against US biodiesel exports—known as the "splash and dash" case.

- II. The size of its market enables a "large country" to choose its supply sources by granting trade preferences to certain countries and not to others, either based on raw material costs or geopolitical reasons.

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3 This section is partially based on Galperin, C. and Pérez Llana, C. "Desarrollo de los biocombustibles, interrelación de políticas y opciones de política comercial". *Revista Argentina de Economía Agraria XI* (1) (2010): 149 - 177.

4 Babcock, B. *The Impact of US Biofuel Policies on Agricultural Price Levels and Volatility*, ICTSD Programme on Agricultural Trade and Sustainable Development. Issue Paper 35. Geneva: International Centre for Trade and Sustainable Development, 2011.

biofuels from efficient countries are usually considered a “sensitive” product that is either totally or partially excluded by the US and the EU from the trade preferences of the free trade agreements they negotiate and from their unilateral GSP. In contrast, due to geopolitical considerations, preferences are given by the US to biofuels imported from Central America and the Caribbean, and by the EU to biofuels imported from least developed African, Caribbean and Pacific countries.

- III. WTO rules restrict what can be done in terms of granting subsidies and applying trade measures.

This is known as the national treatment principle, which is aimed at avoiding discrimination in the application of internal measures. But the small print in some biofuel technical standards and regulations relating to non-trade concerns may discriminate against imported products. For instance, there are two EU standards that discriminate against (imported) biodiesel produced from soybean oil and palm oil and benefit (local) biodiesel produced from rapeseed oil, namely, the iodine standard, thought to guarantee optimal engine performance; and the sustainability criteria according to which biofuels must show greenhouse gas emission savings of at least 35 percent<sup>5</sup>.

- IV. Domestic decisions are used as limits to what is being negotiated in the multilateral arena

The US and EU agricultural policies are presented by them as their limit to WTO agricultural negotiations, in order to avoid further reductions in their domestic support for biofuel feedstock, such as corn, oilseeds, and beet sugar.

- V. To influence international forum decisions for one’s own advantage

For example, the World Customs Organization is currently considering a change in the tariff classification of ethanol by which it could be excluded from the scope of application of the WTO Agreement on Agriculture (AoA), thus making it more difficult to challenge support for biofuels in the WTO, as is commented in section 3.2.v.

Besides, in the G-20 group of developed and developing nations, the US and the EU, among others, have proposed to phase-out inefficient fossil fuel subsidies that encourage wasteful consumption; but support to biofuels was excluded from the group of subsidies to be phased out.

### 6.3.2 Options available to “small countries”

- I. If they decide to export biofuels, production decisions will largely depend on large countries’ policies

If there is an intention to export part of their biofuel output, the decision as to which biofuel to produce (ethanol, biodiesel) and which input to use (maize, sugar, soybean, rapeseed, or sunflower oil) should take into account - besides comparative advantages - the possibilities to access the main markets as well as those measures that have an impact on domestic and external demand, such as minimum mandatory targets for the use of biofuels, domestic support, import duties, technical standards, trade agreements, and the domestic needs of each country. That is why the US is a market for ethanol - mainly from Central America - and the EU, for biodiesel.

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<sup>5</sup> According to the default values defined by the regulation, this standard is not met by soybean oil and palm oil-based biodiesel. The sustainability criteria also ban the use of feedstock grown on land with high biodiversity value and high carbon stock. These criteria are applied both to local and imported biofuels.

- II. Even when exporting is not a priority, large countries' policies influence small countries' production decisions.

If there is no intention to export, large countries' decisions will inevitably have an impact on prices of raw materials used in production and on the relative profitability of alternative products. Moreover, it will be possible to take advantage of the gap left in the raw material market either because these countries export less - e.g., the case of maize in the US<sup>6</sup> - or less raw material is directed to food production - e.g., the case of oilseeds and vegetable oils in the EU.

- III. To seek or maintain preferences to access the main markets.

An example of this is the MERCOSUR request to the EU for biofuels to have preferential market access within the framework of the MERCOSUR-EU FTA negotiations.

- IV. To take advantage of other countries' market access preferences in order to export to or invest in them, and thus sell biofuels to large countries.

The US has negotiated PTAs with Central American and Caribbean countries. One of these agreements, the Caribbean Basin Initiative (CBI) establishes that the ethanol produced in the region can enter the US duty free as long as 50 percent of its content is domestic. Hydrated ethanol produced in other countries, such as Brazil, could be sent to a dehydration plant in a CBI country to be reprocessed and then exported to the US market duty free, even if most of the production process took place in other countries. Moreover, some Brazilian companies are now investing in ethanol production plants located in CBI beneficiary countries.

- V. To discuss the legality of measures used to encourage the development of biofuels in the multilateral sphere, and to negotiate the reduction of support measures and the disciplines that rule them.

WTO rules and negotiations enable small countries to challenge and modify large countries' trade and agricultural policies. In this sense, it is worth noting that some of the measures applied by the US and the EU may not be compatible with WTO rules (Harmer, 2009).<sup>7</sup> Regarding US measures, some authors<sup>8</sup> argued that US subsidies for ethanol were support measures subject to the rules of the AoA, and it thus has to be included in the Aggregated Measurement of Support (AMS). This issue has been called into question in the Committee on Agriculture Special Session and in the Dispute Settlement Body. The differential tariff on ethanol might have also been challenged

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6 Since the US is the main maize exporter, the void left in the international market would be very important. At the same time, the growth of areas sown with maize would reduce soybean production and exports.

7 Harmer, T. *Biofuels Subsidies and the Law of the WTO*. ICTSD Programme on Agricultural Trade and Sustainable Development. Issue Paper 20. Geneva: International Centre for Trade and Sustainable Development, 2009.

8 See Pérez Llana, C., Chaves, M. and Galperín, C. "Desarrollo de los biocombustibles: ¿cuál es el lugar de la política comercial?". *Revista del CEI: Comercio Exterior e Integración* 9 (2007): 81-99. See also Orden, D. "Farm Policy Reform In The United States: Past Progress And Future Direction," in *Agricultural Subsidies In The WTO Green Box: Ensuring Coherence With Sustainable Development Goals*, eds. Ricardo Meléndez-Ortiz, Christophe Bellmann and Jonathan Hepburn (Cambridge: Cambridge University Press, 2009): 86-120. See also Earley, J. *US Trade Policies on Biofuels and Sustainable Development*, ICTSD Programme on Agricultural Trade and Sustainable Development. Issue Paper 18. Geneva: International Centre for Trade and Sustainable Development, 2009.

because it could be argued that it was above the bound rate.<sup>9</sup>

In relation to EU measures, Swinbank argues that it is not clear that EU subsidies might be considered as an agricultural support subject to the AoA, but the EU sustainability criteria may not comply with the GATT National Treatment provision.<sup>10</sup> Likewise, the EU technical standard on iodine content may be incompatible with the WTO Agreement on TBT.

On the other hand, Doha Round negotiations may affect, through two simultaneous channels, US and EU biofuel promotion policies. In the first place, one of the questions under discussion is the level of reduction in agricultural domestic support. Depending on the magnitude of the cut, effective support for maize, in the US, and for sugar, in the EU, could be lowered to reduce an indirect subsidy for biofuel production. Furthermore, this reduction would affect some direct subsidies for biofuels if they are included in the AMS. In the second place, negotiations on import duty reductions are underway for biofuels that may be considered either an agricultural good or an industrial good. Likewise, during the negotiations on environmental goods and services, Brazil proposed to reduce tariffs on ethanol.

## 6.4 Conclusions

The biofuel policies applied by the US and the EU - the two major biofuel markets - have an increasing direct and indirect impact on agricultural production and act both as a complement to and as a substitute for agricultural policies. Yet, most of these measures still fall out of the scope of agricultural negotiations.

If developed countries continue to protect their biofuel sector through measures of this kind - some of which cannot be easily justified - the options available to developing countries will be either to export raw materials to be processed in developed countries or to resort to trade negotiations. Although this issue could be approached bilaterally, the WTO is the appropriate forum to ultimately discuss it, so that multilateral rules are effectively enforced.

The reason for this is that multilateral institutions, like the WTO, play a crucial role in enabling “small countries” to reach their objectives. Without them, it would be extremely difficult for “small countries” to alter the trade policies applied by “large countries” in order to offset international trade distortions.

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9 Harmer, T. *Biofuels Subsidies and the Law of the WTO*. ICTSD Programme on Agricultural Trade and Sustainable Development. Issue Paper 20. Geneva: International Centre for Trade and Sustainable Development, 2009.

10 Swinbank, A. *EU Support for Biofuels and Bioenergy, Environmental Sustainability Criteria, and Trade Policy*. ICTSD Programme on Agricultural Trade and Sustainable Development. Issue Paper 17. Geneva: International Centre for Trade and Sustainable Development, 2009.

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## 7. HARNESSING TRADE AND MARKETS FOR SUSTAINABLE ENERGY: A CASE FOR A SUSTAINABLE ENERGY TRADE INITIATIVE

*Mahesh Sugathan<sup>1</sup>*

A much faster and more effective scale-up of innovation, use, and diffusion of non-fossil fuel energy technologies is an imperative of the international community. The challenge to de-carbonize production and economic activity comes at a time of rapid expansion in energy demand, and in a context in which half of the world's population currently has no access to modern forms of energy. Globally, as the Intergovernmental Panel on Climate Change (IPCC) has noted, fossil-fuel based energy supply is the largest single source of greenhouse gas (GHG) emissions.

In 2004 conventional energy supply and its related use in the building, industry, and transport sectors were responsible for about 70 percent of global GHG emissions. More recent estimates from the International Energy Agency (IEA) placed such emissions at a record high of 30.6 gigatonnes (Gt.) in 2010 alone, making the targets set by the international community to limit climate temperature rise to a maximum of 2 degrees centigrade (36 degrees Fahrenheit) extremely difficult to meet.

Indeed, for the “pathway to be achieved, global energy-related emissions in 2020 must not be greater than 32 Gt. This means that over the next ten years, emissions must rise less in total than they did between 2009 and 2010, the IEA notes. Non-clean energy sources - i.e. fossil fuels - currently account for about 80 percent of emissions worldwide, and existing infrastructure and projects in construction are estimated to already lock-in to 2020 approximately 20 percent of those emissions. The geographical distribution of GHG emissions is highly heterogeneous, as is energy consumption. While they only host one-fifth of the world's population, 40 percent of emissions continue to be generated in OECD countries, and 40 percent of energy demand is located there.

However, as many parts of the world experience rapid economic growth and the energy needs of millions in the developing world still remain unmet, the use as well as reliance of many countries on imported fossil-fuels is set to grow further.

From an environmental, energy-security, and economic perspective, a shift to sustainable energy use - low-carbon sources of energy as well as greater energy-efficiency - is therefore desirable. Low carbon sources of energy include solar, wind, biomass, and small-hydro power (that avoids negative environmental impacts associated with large-hydro). They could also include relatively lower carbon biofuels used for transport if produced under the right conditions.

### 7.1 The Challenge of Deploying and Scaling-up Sustainable Energy

While decoupling economic growth from fossil-fuel use and a replacement with sustainable energy sources is desirable, it is far from easy. A deep de-carbonization of the power sector required for halving energy-related emissions by 2050 and boosting the share of renewable energy from current levels of about 13 percent to 30-40 percent by 2050 would entail enormous effort according to the World Bank's 2010 World Development Report. It would imply, deploying every year for the next 40 years, an additional 17,000 wind-turbines (producing 4 megawattseach hence 68000 MW annually); 215 million square metres of

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solar photovoltaic panels, 80 concentrated solar power plants (producing 250 megawatts each); and 32 nuclear plants (producing 1000 megawatts each). Despite increasing levels of investments in recent years in sustainable energy the world it is still short of the levels of scale-up required. As an example of comparison for wind, the biggest capacity addition in wind energy since 1995 happened during 2008-2009 when close to 40000 megawatts was added, according to the World Wind Energy Association.

A major challenge associated with deploying sustainable energy is its high price relative to conventional fossil fuels. This is partly due to the non-pricing of negative environmental externalities associated with fossil-fuel use. The playing field in favour of sustainable energy is further tilted by the subsidies that are often provided to fossil-fuels. While fuel costs - except in the case of biomass - are low or zero for sustainable energy, they are characterized by high upfront costs, owing mainly to high equipment and capital-related costs. While costs continue to decline over time for established technologies, such as solar, universal “grid-parity” or equivalence of renewable electricity with that generated by fossil-fuels may require further significant cost declines in sustainable energy deployment. An easier weapon in the armoury to fight climate change will be deploying energy-efficient measures that will lower energy intensity for economies, enable similar energy output to serve a larger number of people and uses and also help reduce expensive fossil-fuel imports for many countries. The UN has declared 2012 the International Year of Sustainable Energy for All, and its Advisory Group on Energy and Climate Change - composed of major energy companies and UN agencies - has recommended universal access and a 40 percent increase in energy efficiency in the next 20 years. If these recommendations are implemented, this could reduce global energy intensity by 2.5 percent per year, approximately double the historical rate.

## **7.2 The Role Of Domestic Sustainable Energy Policies and Their Interface With Trade**

The high upfront costs entailed in the deployment of sustainable energy means that domestic policy intervention is required to create a more level playing field between sustainable and conventional energy sources and foster an “enabling environment” for investments into sustainable power generation. In addition to domestic sustainable energy policies, trade policies also help in enabling sustainable power producers to access equipment and services of the desired quality at competitive world market prices. In a sector that is sensitive to high upfront equipment costs, enabling power producers to buy equipment at the most competitive prices will contribute to bringing down costs of sustainable energy generation. A wide variety of sustainable policy instruments can be deployed in this regard. They usually focus on regulatory and fiscal measures, such as renewable portfolio standards, or on fiscal incentives, such as tax credits. Such measures reduce both investment and production-related costs for renewable energy producers. Domestic sustainable energy promotion policies also work to increase consumer demand, either through a system of incentives such as tax reduction on solar home equipment or regulations such as mandatory purchase requirements. A similar set of policies can also influence the supply of, and demand for, sustainable transport fuels and technologies.

However, countries often introduce these policies with a view not only to deploying sustainable energy, but also to create domestic jobs and foster the growth of new “green” sectors and technologies. While synergies between these various objectives are possible, these policies may also be designed or applied in a manner that restricts trade or discriminates against foreign sustainable energy goods and services (SEGS) suppliers in order to meet domestic employment and industrial policy objectives. Direct trade policies, such as higher customs duties on imported equipment, or restrictions on the entry of foreign

services suppliers may also be deployed in this regard. This can prevent sustainable energy equipment manufacturers who operate through a complex network of supply chains from sourcing components and services from their most efficient production/supply location. Thus, both trade policies (directly) and domestic sustainable energy policies (through the way they are designed and implemented) can create barriers for supply chain optimization in the sustainable energy sector.

Non-tariff trade-related barriers to SEGs are diverse and may range from domestic support measures for biofuels to export restrictions of critical raw materials and various modes of services supply. Local content requirements are one policy that many countries use to create domestic jobs in sustainable energy manufacturing, specifically by mandating the use of locally made components or technologies in sustainable energy projects. Countries may also link incentives or subsidies to power producers to the use of local equipment. Such measures have already triggered trade disputes at the WTO and, should their use spread, may generate further trade friction.

Other trade and market barriers could be sparked by domestic laws and measures linked to investment, government procurement, competition policy, and trade facilitation, or possibly by their absence. A great diversity of product-related standards or, on the contrary, an absence of standards could also hamper trade and diffusion of renewable energy equipment as well as energy efficient products.

Countries that are high GHG emitters and those relying on fossil-fuel imports could benefit from an environmental and energy-security perspective in addressing these barriers and fostering greater trade in SEGs. From an economic perspective, many of these are countries that are also major producers as well as traders of SEGs along various points in the value-chain.

### **7.3 Addressing Trade and Market Barriers: The Relevance of Sustainable Energy Trade Initiatives**

It may be possible to address some of these barriers by taking recourse to existing rules and disciplines in the WTO. However WTO rules in many areas of the energy sector (including sustainable energy) are ambiguous. The WTO's Doha Round negotiations are presently stalled, including negotiations on environmental goods and services that could otherwise have addressed some of these barriers. Other venues outside the WTO may not have a proper mandate to address trade-related barriers. Some, such as the Energy Charter Treaty, do address issues of investment and transit, but do not offer Members the scope of reflecting or binding trade-related concessions. And despite their importance from the perspective of SEGs trade, they do not include the US and major emerging economies, such as Brazil, China, India, Mexico, and South Africa, as full-fledged members. Under these conditions, countries can explore a variety of ways to address trade-related issues that may stand in the way of further scaling-up sustainable energy as well as ensuring economic benefits to all countries, particularly developing ones.

Sustainable Energy Trade Initiatives (SETIs) can be conceived as one way to provide enabling governance where it doesn't exist, and to do so in a focused manner. They could provide enabling frameworks at the international level with the widest possible participation and a common set of disciplines (with due consideration for development levels) that are necessary to speed and scale-up further introduction of renewable forms of energy. They can establish international cooperation to address climate change, longer-term energy security, and enable a transition to a low-carbon economy. It would be focused on ensuring robust markets for SEGs by tackling trade-related barriers and providing a global framework for sustainable energy trade (comprising technologies and components

necessary for sustainable power generation through solar-PV, wind, small-hydro, and biomass as well as those required to achieve greater energy efficiency in end-use sectors (buildings, industry, and transport). Eventually, it could also comprise cross-border trade in sustainable energy. They could ensure that policies are implemented in a manner that is fair and non-discriminatory to trading partners

They could be pursued either within the WTO framework, including agreements among like-minded countries, or outside of the WTO. They could comprise, depending on what countries decide may be the best approach, either legally binding agreements or voluntary approaches. The non-binding nature for instance of venues, such as APEC, , enables ambitious initiatives, although it may provide less than the desired amount of predictability. SETIs could also be developed as ‘templates’ that, depending on various conditions and circumstances, could be integrated into RTAs or other bilateral trade agreements as well. Thus, SETIs could enable a fresh approach that takes a holistic and integrated view of the sustainable energy sector, while simultaneously addressing a variety of market and trade-related barriers. They could be a way to bring together countries interested in addressing climate change and longer-term energy security, while maintaining open markets. Numerous possible pathways could be conceived for such initiatives in terms of structure, as well as the scope of issues and market barriers to be addressed, timelines for addressing issues as well as their implementation, whether legally binding or voluntary agreements etc

If countries decide to transform any SETI into a formal SETA they could consider a stand-alone plurilateral agreement similar to the GPA at the WTO. Alternatively, they could extend concessions on a MFN basis to all WTO Members, similar to the ITA, with such an extension made conditional on the accession of a “critical mass” of Members based on various trade, climate, or energy-related criteria.

Certain countries may also wish to conceive of a SETI as a stand-alone plurilateral agreement outside of the WTO. The advantage, in this case, would be that membership would also be open to other countries that are not WTO Members. There could also be a possibility of eventually incorporating such an agreement into the WTO framework in the future. If concluded outside the WTO, members would need to clarify the agreement’s relationship with existing WTO rules and agreements, including with respect to any dispute settlement mechanisms.

Each of these approaches for a SETI has its own advantages and disadvantages. It may be difficult to obtain traction for a legally binding agreement among certain groups of countries. However, effective implementation as well as predictability could be concerns as far as ‘softer’ approaches are concerned, although more contentious issues could be discussed and more countries may be willing to sign on. Whatever the approach adopted, negotiators should ensure that the “development dimension” is reflected in the modalities, including S&D treatment for developing countries as well as meaningful provisions on facilitating access to climate-related technologies, technical assistance, and capacity building. For instance, a special fund to enable developing countries to purchase licenses for certain technology sectors could be created either within SETIs or as part of the UNFCCC “Green Fund”. Alternatively, there could be provisions on financing renewable energy infrastructure projects within SETI developing country members at concessional rates by international financial institutions or development banks.

While not a “silver bullet” remedy for all the trade-related issues and challenges on sustainable energy, a SETA might facilitate alternative or innovative approaches to liberalizing sustainable energy goods and services. It could provide an environment conducive to assessing the linkages between sustainable energy goods and energy services,

and serve as an ideal “laboratory,” where rules and disciplines pertaining to sustainable energy could be clarified and take shape.

In addition to its catalysing effect on world trade in a sector of huge importance to global climate mitigation efforts, such an agreement could constructively inform, and perhaps even shape the course of future negotiations and work at the WTO as well as the UNFCCC.

## 8. FOOD SECURITY AND THE MULTILATERAL TRADING SYSTEM

*Jonathan Hepburn*<sup>1</sup>

### 8.1 Introduction

Since 2006, unusually high and volatile food prices have catapulted hunger and malnutrition back into news headlines and to the top of world leaders' priority lists. While often dubbed the "food crisis" by commentators and analysts, a June 2011 report by a group of UN agencies points out that "a significant proportion of humanity (about 16 percent) remains chronically under-nourished, even during periods of relatively normal prices and low volatility."<sup>2</sup> For these people, the food crisis was not something that started when prices began rising in 2006 - although the price spikes are estimated to have pushed approximately 180 million more people into poverty and hunger.

Does the multilateral trading system have a role to play in tackling hunger and malnutrition? Governments have repeatedly raised the issue of food security at the WTO since the latest round of trade negotiations began under the DDA in 2001.<sup>3</sup> However, trade ministers recognized that the talks had reached an "impasse" when they met in December 2011 at the organization's eighth ministerial conference in Geneva. Furthermore, the global trading system and the challenges faced by poor and hungry people around the world have changed substantially since the talks began.

### 8.2 Progress to date

Talks on agriculture at the WTO have focused on three main areas: market access improvements, reducing domestic support, and phasing out export subsidies (along with tackling other types of export competition). Governments have argued that food security is relevant to the negotiations in all three areas, but have focused on particular problems in each.<sup>4</sup>

For example, on market access, many developing countries have argued that they should be granted greater flexibility on tariff commitments, as well as a new "safeguard" that would allow them to shield farmers from sudden import surges or a drop in prices.<sup>5</sup> On

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2 FAO, IFAD, IMF, OECD, UNCTAD, WFP, World Bank, WTO, IFPRI and the UN HLTF. *Interagency Report to G-20 on Price Volatility in Food and Agricultural Markets: Policy Responses*, 2 June 2011. Available at <http://www.oecd.org/dataoecd/40/34/48152638.pdf>.

3 At the FAO's 1996 World Food Summit, food security was defined as existing "when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life". Other relevant international agreements concerning food include the 1948 Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the 1996 Rome Declaration on World Food Security; the 2000 Millennium Declaration; and the 2009 Declaration of the World Summit on Food Security.

4 For further details see Bellmann, C; Hepburn, J; and Wilke, M. *The Challenges Facing the Multilateral Trading System in Addressing Global Public Policy Objectives*. International Development Policy, Palgrave MacMillan, 2012 edition. (forthcoming, 2012).

5 For an interesting discussion of some of the complex issues in this area, see Matthews, A. *The Impact of WTO Agricultural Trade Rules On Food Security and Development: An Examination of Proposed*

domestic support, while the role of trade-distorting support has been much debated, governments at the WTO have also devoted particular attention to the food security implications of the rules on green box subsidies - those that are ostensibly decoupled from trade or production<sup>6</sup> - as well as to debating the flexibilities that allow developing countries to provide input and investment support to poor farmers.<sup>7</sup> Food security has also been raised in negotiations over proposed new disciplines on food aid, as well as in the debate on export credits and similar policy tools. Finally, importing countries in particular have raised growing concern over how food security could be affected by export restrictions (including export bans and export taxes) on food.

In each area, different country groupings and alliances have argued that different trade policy outcomes would best support the achievement of food security goals - for example, in the debate over whether slower and gentler liberalization for developing countries' "special products" could help address food insecurity. Broadly speaking, countries with competitive agricultural sectors have tended to argue that freer trade in farm products would help reduce hunger, while those with large populations of small farmers have tended to favour maintaining some protection for their producers, at least in the short term. However, the different relationships between various urban and rural constituencies in each country at the national level and the complex landscape of agriculture at the global level mean that the picture is considerably more nuanced. Coalitions that favour slower tariff cuts for special products do not overlap in any direct or obvious way either with those concerned about reforming rules on domestic support in the green box or with the country groupings that have been most active in the debate over food aid. The situation is complicated further by the fact that, at the WTO, governments can link each negotiating issue with another one, and often do so.

Most recently, Russian and Ukrainian wheat export bans, and similar measures imposed by countries, such as Argentina and India, have prompted growing debate over whether increased disciplines on export restrictions are desirable. Importing countries have argued that tighter controls are needed to prevent export restrictions from exacerbating global shortages, contributing to panic buying and worsening food insecurity among vulnerable populations - an argument that was reinforced by the conclusions of the inter-agency report to the G-20.<sup>8</sup> Countries that have made use of these measures have however resisted any such move, arguing that they need to maintain the policy space required to protect domestic populations from shortages and to help support domestic production in related sectors. They have also argued that food security issues need to be seen holistically—effectively linking progress on this question to the wider stalemate in the Doha talks.

Biofuel policies - subsidies, tariffs, and blending mandates - have also been criticized for exacerbating recent food shortages by introducing new distortions into global markets for food and agricultural goods.<sup>9</sup> Despite evidence suggesting that, for some feedstocks in

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*Additional Flexibilities For Developing Countries*, IIS Discussion Paper no. 371, August 2011. .

6 Hepburn, J; and Bellmann, C, "Doha Round Negotiations On The Green Box And Beyond," in *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals*. eds. Meléndez-Ortiz, R, Bellmann, C, and Hepburn, J. (Cambridge: Cambridge University Press, 2009).

7 Art. 6.2 Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 33 (1999), 1867 U.N.T.S. 410.

8 FAO, IFAD, IMF, OECD, UNCTAD, WFP, World Bank, WTO, IFPRI and the UN HLTF. *Interagency Report to G-20 on Price Volatility in Food and Agricultural Markets: Policy Responses*, 2 June 2011. Available at <http://www.oecd.org/dataoecd/40/34/48152638.pdf>.

9 Babcock, B. *The Impact of US Biofuel Policies on Agricultural Price Levels and Volatility*. International Centre

particular, these policies incentivize suboptimal environmental outcomes, a substantial and sophisticated infrastructure has been set up to deliver them. While budgetary pressures have recently prompted the US to remove subsidies and tariffs on ethanol, the mandate requiring gasoline to be blended with a fixed proportion of ethanol remains unchanged, while, at the WTO, governments have had difficulty even agreeing on whether these fuels should be subject to rules on agricultural or industrial goods.

The crisis in the Doha trade talks is arguably mirrored by a broader crisis in global governance, whose effects are equally evident in the troubled discussion over climate change under the United Nations Framework Convention on Climate Change process. On trade, developed countries such as the US and EU have argued that large developing countries, such as China and India, ought to provide greater access to their markets,<sup>10</sup> in view of the size of their economies and enviable economic growth rates, while developing countries have argued that these demands are unacceptable given the continuing differences in the level of economic development and the persistence of extreme poverty that continues to undermine their prospects for future progress. Similarly, on climate change, developed countries have argued that the substantial carbon emissions of the larger developing countries justifies them shouldering a greater share of responsibility, while the countries concerned continue to emphasize the challenges they are likely to face in adapting to a changing climate and the historical responsibility of the developed world in contributing to current levels of atmospheric carbon. Ultimately, profound differences in perceptions over the proper balance of rights and responsibilities in rich and poor countries can be seen to underlie the current breakdown in progress in several separate but related areas of global public policy.

### 8.3 The Challenge Ahead

Governments and commentators alike continue to fret over whether the Doha Round should be declared dead, and, if not, what else could be done. At the eighth ministerial conference, both developing and developed countries reiterated their unwillingness to abandon the talks after having invested a decade of negotiations and considerable resources, and after having reached a draft text that is widely seen as being close to conclusion. On the other hand, the US in particular has clearly indicated that it is unable to accept a deal on the basis of the current draft accord. However, the debate over whether the round is dead, alive or “between intensive care and the crematorium” (as Indian Commerce Minister Kamal Nath characterized it in 2006) somewhat misses the point.<sup>11</sup> If the talks are not concluded, they will leave a large “Doha-shaped hole” that, almost inevitably, will have to be filled at some point in the future: countries will be unwilling to leave current domestic farm support undisciplined, market access ceilings inherited from the early 1990s unaltered, or rules on issues such as export competition and food aid unchanged, despite the passage of what will soon be two decades of rapid if unequal economic development, growth, and evolution.

Similarly, however, WTO Members are likely to need to address important aspects of

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for Trade and Sustainable Development (ICTSD), Geneva, 2011. Available at <http://ictsd.org/i/publications/108947>

10 Schwab, S. “After Doha: Why the Negotiations Are Doomed and What We Should Do About It,” *Foreign Affairs*, 90:3 (May/June 2011): 104-117.

See also European Commission. “Trade, growth and development: Tailoring trade and investment policy for those countries most in need”. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, COM(2012) 22 final, 27 January 2012. Available at [http://trade.ec.europa.eu/doclib/docs/2012/january/tradoc\\_148992.pdf](http://trade.ec.europa.eu/doclib/docs/2012/january/tradoc_148992.pdf).

11 ICTSD. “Doha Round Suspended Indefinitely After G-6 Talks Collapse.” *Bridges Weekly*, 10: 27, 26 July 2006. Available at <http://ictsd.org/i/news/bridgesweekly/6354>.

the evolving global agricultural trading system if they are to make a meaningful and sustainable contribution toward addressing food insecurity in developing countries. While the organization's rule book includes fairly extensive requirements on subsidies and market access barriers, it sets out far fewer disciplines on countries' exports. If we are moving toward a world in which demand continues to outstrip supply at a global level, as is widely predicted, this issue can be expected to become increasingly important. Trade distortions arising from current biofuel policies are also likely to be a growing focus of attention. In that case, we can probably anticipate that recent debate over these issues will be followed by more extensive discussions in the years to come, as a larger number of countries perceive a growing interest in establishing greater stability in global markets for food and agriculture.

This does not mean that Doha is irrelevant, however, in moving toward an agricultural trading system that can help support food security goals. Reducing trade-distorting support and improving farmers' access to markets can still play an important role in ensuring that food and agricultural products can be produced competitively in some of the poorest parts of the world. West African cotton farmers need not be discouraged from growing a product that could help them to earn a living and feed their families simply because producers in the US receive generous subsidies for doing the same thing. Similarly, Vietnamese rice growers ought not be shut out of the lucrative Japanese market through high tariff barriers that discriminate in favour of domestic producers; and EU export subsidies should not make it easier to ship milk powder to poor countries where it undercuts domestic producers. Agreeing new rules in these areas could lead to a more equitable world as well as a more efficient global allocation of scarce resources.

A trade agreement will not, in and of itself, contribute to achieving food security and rural development for the world's poorest people, even though it might be able to make a small contribution to doing so. Far more important would be the measures that developing countries themselves can take to boost productivity in domestic agriculture,<sup>12</sup> through supporting infrastructure programmes, extension work, research into locally adapted seed varieties, and similar initiatives that can boost domestic yields without distorting trade. The different experiences that China and India have had with green box support programmes are illuminating in this regard.<sup>13</sup> Similarly, countries will need to ensure that the poorest consumers are able to afford to purchase the food they need: targeted consumer subsidies, such as food stamps, and possibly even a global mechanism to provide these, could provide one way forward for doing so.<sup>14</sup>

However, if governments at the WTO are to succeed in making progress in future trade talks, it is likely that they will have to take a far more nuanced approach to the enduring issues of poverty and inequality among the organization's membership. Clearly, some of the larger developing countries, such as China and India, face different and separate challenges from the poorest countries in the world - classed as "least-developed" at the WTO. At the same time, the large developing countries continue to enjoy a far lower average standard of living and consume a smaller share per capita of the world's resources

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12 Oduro, A. "African Countries And The Green Box". In *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals*. eds. Meléndez-Ortiz, R; Bellmann, C; and Hepburn, J. (Cambridge: Cambridge University Press, 2009).

13 ICTSD. "Chinese Farm Support Doubles, New Data Shows." *Bridges Weekly*, 15:, 19 October 2011. <http://ictsd.org/i/news/bridgesweekly/116613>. See also ICTSD. "Indian Farm Subsidy Regime Sees Growth." *Bridges Weekly*, 15: 22, 15 June 2011. Available at <http://ictsd.org/i/news/bridgesweekly/108698>.

14 Josling, T. *Global Food Stamps: An Idea Worth Considering?* International Centre for Trade and Sustainable Development (ICTSD). Geneva, Switzerland, 2011. Available at <http://ictsd.org/i/publications/111809>.



than developed countries; they also remain home to millions of the poorest people in the world, including the most food insecure. While the category of LDCs is based on objective criteria established by the UN, the developing country designation is chosen (or not) by WTO Members themselves, sometimes leading to some peculiar anomalies.

To a great extent, the draft Doha agriculture accord takes these differences into consideration. After many years of negotiation, the text includes a remarkable degree of differentiation in the commitments to be taken by different country groups. It not only provides for different responsibilities and commitments for the LDCs, but also includes special measures that apply for “small, vulnerable economies,” as well as for “recently acceded members,” for a sub-group of “very recently acceded members” and for a multitude of other categories and country groups. It contains footnotes and exceptions to clauses providing explicit opt-outs for countries, country groups, and product categories - including for developed countries, and the products of importance to them.

Negotiations on industrial support may, ultimately, be at the root of the current stand-off over Doha - with all the repercussions this has for agricultural trade and food security. While developed countries perceive the current round of talks as possibly the last opportunity they have in a generation to reduce current tariff levels shielding developing country manufacturing sectors, developing countries have resisted efforts to bring down market access barriers for these industries. Vigorous economic growth rates in major developing countries mean that their governments perhaps perceive relatively few major incentives to coming to an agreement soon - especially if doing so would mean making concessions that would prove unpalatable to domestic constituencies and possibly set back economic growth.

## 8.4 The Way Forward

No trade accord is agreed solely at the multilateral level. Indeed, the US Trade Representative, Ron Kirk, recently told an international meeting that part of the problem he faced was that “more and more Americans... believe that we have swapped jobs for cheaper T-shirts and iPads.”<sup>15</sup> More than any particular problem with the negotiating machinery at the WTO itself, it is arguably these domestic tensions that underlie the ongoing stalemate in the trade talks and the resulting paralysis in the multilateral trading system. The US is of course not the only country in which different domestic constituencies have strong views on the appropriate outcome of trade negotiations under Doha. Other countries face similar issues related to pursuing progress in the WTO and its implications for specific groups that may benefit from current trade policy, or which fear - rightly or wrongly - change in the *status quo*.

The consequences of failing to foster this debate are patently evident in meetings of the WTO's Committee on Agriculture, and arguably risk becoming evident in other more consequential parts of the multilateral trading system. In the absence of a negotiating dynamic, and a shared sense of a common purpose among trade officials, there is a real possibility that discussions quickly degenerate to procedural debates over how WTO rules might constrain Members from raising various substantive points - with negotiators fearful that doing so even in a non-negotiating setting could create a process or momentum that might have subsequent implications for policy, concessions, or rules. Such a development is potentially dangerous: in the absence of a forum where members feel comfortable raising and discussing new issues, there is a risk that the dispute settlement process is seen as the only viable alternative avenue for addressing controversial questions.

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<sup>15</sup> BBC News, 28 January 2012, “Davos: US Trade Chief Issues Jobs Fear Warning.” Available at <http://www.bbc.co.uk/news/business-16776555>

However, the relationships between agricultural trade and other aspects of public policy - on the environment, aid, poverty, or climate - are becoming more important rather than less as economies, societies and environmental conditions in different world regions become more closely connected. Opportunities to address these relationships can be found in processes, such as the US Farm Bill, the EU's reform of the Common Agricultural Policy, India's proposed Food Security Bill or its planned free trade agreement with the EU. Only if domestic constituencies in both rich and poor countries engage in an active debate with their governments over the relationship between trade policy and other public policy goals can progress be made toward a multilateral trading system that can contribute to overcoming food insecurity.

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## 9. TRADE POLICIES FOR RESOURCE SECURITY: RETHINKING EXPORT RESTRICTIONS

*Christophe Bellmann and Marie Wilke<sup>1</sup>*

### 9.1 Introduction

Export taxes and restrictions have always been part of the trade policy toolbox that governments use to achieve a variety of policy goals. In recent years, though, the trade distorting and “beggar-thy-neighbour” effects of these policies applied in sectors such as food, minerals, or energy have raised increased concerns in the trade policy community.

During the 2007-11 food crisis, export restrictions imposed by major food exporters to bring down domestic prices have exacerbated volatility in international markets, amplifying the upward price movement, ultimately causing scarcity of food staples.<sup>2</sup> This prompted WTO Director-General Pascal Lamy to argue that export restrictions “can be none other than starve-thy-neighbour policies, bringing importing countries on their knees to plead for food security. In particularly thin international markets, like the rice market, where only 7 percent of global production gets traded, such restrictions can prove catastrophic.” Similarly, Russia’s restrictions on timber and energy exports have long caused tensions with the EU. Since 2004, Russia has been granting an export monopoly to state-owned Gazprom, which is free to charge profit-maximizing export prices coupled with a 39 percent export duty. Domestic prices, on the other hand, are set by the government with the aim of ensuring affordable supply.

Trade in strategic minerals facing extraction limits is another sector in which trade is increasingly affected by export restrictions. Rare earth metals are the most well-known of this type, but they are far from the only ones. For example, India placed export taxes on chromium in 2007 to keep more supply for domestic producers making ferrochrome.<sup>3</sup> This caused significant price disruption, brought a new influx of Chinese importers from South Africa, and almost resulted in South Africa imposing similar restrictions to protect its own downstream ferrochrome industry. According to the OECD, of 128 WTO Members, 65 applied export duties during the period 2003 to 2009 compared with only 39 countries in the previous five years.<sup>4</sup>

Finally, the recent tensions between China and some of its largest trading partners over its export regime for mineral raw materials, including rare earths also illustrates the increasing importance of the subject and the growing attention by some of the most powerful

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2 According to a FAO study, 33 countries out of a sample of 105 resorted to one or more export restrictive measures on foodstuff to ensure domestic availability of their own produced grain as a response to the effect of world price increases on consumers. See, Sharma, R. *Food Export Restrictions: Review of Experiences and Considerations for Disciplining Restrictive Measures*. FAO Commodity and Trade Policy Research Working Paper No 32, May 2011.

3 Ninety percent of the world’s chromium is converted into ferrochrome, which is used to produce stainless steel. See Korinek, J. and Kim J. “Export Restrictions on Strategic Raw Materials and Their Impact on Trade,” *OECD Trade Policy Working Papers*, No. 95, 2010. Available at <http://dx.doi.org/10.1787/5kmh8pk441g8-en>

4 Kim, J. “Recent Trends in Export Restrictions,” *OECD Trade Policy Working Papers*, No. 101, OECD Publishing, 2010. Available at <http://dx.doi.org/10.1787/5kmbjx63sl27-en>

policymakers. With the formal *China-Raw Materials*<sup>5</sup> WTO dispute, the issue has reached the halls of the WTO, resulting in the first Appellate Body ruling on the circumstances that can justify export restrictions under current WTO rules. Following the Appellate Body's finding that China's regime was indeed a violation of WTO rules, the EU, Japan, and US have now brought a second case by requesting consultations (the first step of formal WTO dispute settlement) over China's rare earths regime. A panel to hear the case *China-Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*<sup>6</sup> could be established as early as spring 2012.

Whether these episodes are just isolated cases or should be seen as symptomatic of a longer-term trend is open for debate. There is, however, growing evidence suggesting that export restrictions are here to stay. As population and income growth keep exceeding productivity and area growth, food prices are expected to continuously increase in the coming years. Given the thinness of international markets and the imperative for governments to secure availability of domestic food at affordable prices, further cases of export restrictions are bound to happen. Sustained and rapid economic growth in emerging economies has also generated greater demand for finite raw materials and energy products, putting international supplies under pressure. As countries compete to secure sufficient supply for their domestic markets, the welfare effects of export restrictions are likely to generate further tensions between resource-endowed countries and those that depend on reliable and predictable markets, in particular where essential commodities such as food and energy are concerned.

This interdependence calls for international cooperation. WTO disciplines, however, remain weak and underdeveloped in this area. While quantitative restrictions are prohibited, exceptions to this general provision are fairly ambiguous. On the other hand, export duties are not specifically addressed in the GATT.<sup>7</sup> Finally, existing disciplines tend to address export restrictions as a homogenous group of measures rather than making important sectoral differences and differences based on underlying policy objectives. While the use of export restrictions in natural resources trade is not yet alarming *per se*, the lack of appropriate international rules governing export restrictions for resource exporting and importing countries in the current multilateral trading regime is a growing concern.

This paper explores possible options to help bridge the divide between resource exporting and importing countries. In doing so, it first discusses the different kinds of export restrictions that currently exist and the policy rationale for imposing them. It then assesses various options available at the WTO and at the regional level.

## 9.2 What are Export Restrictions and Why Do Countries Apply Them?

Governments have used export restrictions for a variety of purposes. Understanding the policy rationale behind such measures is a necessary prerequisite for any constructive discussion on export restrictions. Depending on the sector, the pursued objectives have ranged from generating fiscal revenues to promoting raw material transformation, ensuring food security and protecting the environment. When natural resources are vital to the basic needs of a country's population export restrictions might be initiated to ensure affordability or to prevent shortages. In the timber, fisheries, commodities, and leather sectors, limits

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5 WTO. *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, (JULY 5, 2011).

6 WTO. *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum - Request for consultations* WT/DS431 (US); WT/DS432 (EU); and 433 (Japan) (March 2012).

7 GATT 1994: General Agreement on Tariffs and Trade 1994 Article I (1), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999) 33 I.L.M. 1153 (1994).

on the exportation of unprocessed resources have been imposed to promote downstream industries and avoid the “raw material trap.” Cote d’Ivoire, for example, has made use of export restrictions to promote transformation in the cacao industry, while Malaysia has used such measures in the palm oil and petroleum sectors for the same purpose. In other cases, the extraction or refinement of natural resources might result in significant environmental degradation, as illustrated by the rare earth extraction process. In this context, export restrictions may serve to mitigate pollution, particularly if combined with other environmental measures. Another scenario could involve the rapid depletion of a resource and the use of export restrictions to stave off exhaustion and allow for technological advances that will allow more efficient production.

Some of the objectives behind export restrictions are recognized and endorsed by international agreements. The Convention on International Trade in Endangered Species (CITES), for instance, prohibits the exportation of endangered species listed in Annex I to the agreement. The “Kimberley Process” - a joint government, industry, and civil society initiative - on the other hand, prohibits the trade in conflict diamonds. The Kimberley Process Certification Scheme requires members to certify their shipments as conflict-free. Both systems have been recognized as in accordance with WTO rules despite the general prohibition of export bans. While the Kimberley process is officially exempt from WTO rules through a specialized waiver, CITES is understood to fall within the GATT general exception for policies related to resource conservation.<sup>8</sup>

In most of these cases, export restrictions are implemented as one element of a larger resource management strategy, with other internal policies disciplining domestic production and consumption, local distribution, and pricing policies. Advancing those policy objectives is the prerogative of any government and questioning their legitimacy would be counterproductive. However, the extent to which export restrictions are the most efficient and cost-effective tool to achieve those goals is an empirical question. Surprisingly, analysis assessing the experience of countries in achieving certain policy goals through the use of export retractions is scarce, and this area remains largely under-researched. Similarly, while a lot of studies have looked at the economic impact of export restriction, very little work has been undertaken on possible alternative measures to achieve similar public policy goals.<sup>9</sup>

It is equally important to understand the impact of different kinds of export restrictions and the context in which they are applied. In this respect, a first distinction needs to be made between small exporters, where the effects of restrictions are limited to the country imposing the measure, and large exporters, which - by definition - have an influence on world prices. Export restrictions themselves can also take a variety of forms. These can include export prohibitions, export quotas, export licensing, export duties and levies, minimum export prices and trade restrictive measures applied by state trading enterprises (STE) or in the context of government-to-government sales.<sup>10</sup> Each of these measures tends to have different impacts on societies. To further complicate the matter, countries tend to combine various instruments, both sequentially and concurrently, particularly when governments try to address critical shortages.<sup>11</sup>

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8 Kuijper, P.J. *Conflicting Rules and Clashing Courts*. ICTSD Dispute Settlement Series, Issue Paper No. 10, 2010.

9 A notable exception is the work currently undertaken by the OECD reviewing the experience of selected countries such as Chile or South Africa.

10 See Kim, J. “Recent Trends in Export Restrictions,” *OECD Trade Policy Working Papers*, No. 101, OECD Publishing, 2010. Available at <http://dx.doi.org/10.1787/5kmbjx63s127-en>.

11 Sharma, R. *Food Export Restrictions: Review of Experiences and Considerations for Disciplining Restrictive Measures*. FAO Commodity and Trade Policy Research Working Paper No 32, May 2011.

### 9.3 Identifying Options to Regulate the Use of Export Restrictions

As highlighted above, understanding domestic realities, the rationale for imposing export restrictions, and the likely impact of different measures should be the starting point of any constructive international debate. The next step consists of identifying where and how such a discussion should take place. This section suggests several possible pathways to address current concerns about export restrictions. The different options suggested below are not mutually exclusive or exhaustive.

#### Option 1: Making use of opportunities at the bilateral level

While existing WTO disciplines on export restrictions are only embryonic, developments at the bilateral and plurilateral level continue to shape the rules landscape, often by making use of innovative arrangements among public and private stakeholders. The EU, for instance, in November 2008, adopted a raw materials trade strategy that pledges to integrate disciplines on export restrictions in all relevant bilateral and multilateral negotiations. Notably, this also extends to export duties where the EU seeks a prohibition informed by important exceptions, for instance for environmental or development reasons. The strategy's impacts are particularly noticeable in the EU FTA with South Korea as well as the EU's bilateral agreements with Russia as part of Russia's WTO accession deal. Similar developments can also be observed in FTAs negotiated by the European Free Trade Agreement (EFTA) countries and Canada.

Countries further seek to advance their interests at the bilateral level through less formal and more specialized agreements. For instance, individual European countries have tried to secure access to essential raw materials through bilateral cooperation agreements with resource-rich countries. These agreements are often limited in scope, focusing on the individual trading relationship of the countries concerned and addressing particular concerns, such as development cooperation and technical assistance. For instance, Germany recently signed a bilateral agreement with Kazakhstan that grants German companies the right to mine raw materials, including rare earth minerals in exchange for technology and investment. Such trade-off agreements that guarantee unlimited exportation in exchange for newer and cleaner technologies can help to meet environmental protection objectives while increasing domestic investment and thereby promoting downstream industries.

Overall, bilateral deals appear to be a suitable solution for regulating bilateral trade in energy and raw materials with the aim of achieving resource security for both partners while improving the extraction and production realities in the exporting country. Moreover, FTAs can inform the application of multilateral disciplines by establishing new guidelines and understandings and by serving as an important "testing-ground" for novel approaches, for instance in the area of transparency or exception approval.

The downside of such an approach is that it is - by definition - limited to matters affecting the bilateral relationship of the negotiating countries. External effects of export restrictions, such as resulting market shocks and price volatility, on the other hand, can hardly be addressed. Moreover, the detrimental effects of export restrictions implemented by large commodity exporting countries in the agriculture sector are unlikely to be addressed in bilateral deals. Finally, bilateral approaches tend to exclude the most marginalized countries, such as LDCs or low-income, food-deficit countries, which are often most directly impacted by export restrictions.

#### Option 2: Enhancing transparency and information sharing

Information on the actual use of export restrictions is neither regularly available nor stored in a centralized place. This complicates research on the trade-distorting effects as

well as on positive experiences with the use of export restrictions, which induces policy positions in either direction. Likewise, where the implementation of export restrictions is likely to have far-reaching market effects, due to the size of the implementing country, for instance, negative effects could be mitigated if exporting countries were made aware of the intentions. Transparency is therefore of utmost importance in this area. This can be achieved in different ways.

A first possibility consists in compiling data and information through an independent or intergovernmental process. The OECD has begun work in this area by establishing databases on available information for certain mineral and agricultural resources. Another option consists in strengthening transparency in the WTO itself. In this respect, Japan and Switzerland have suggested, in an informal paper circulated in April 2008, to further tighten requirements on notifications and consultations. Another point of entry is WTO trade policy review reports, though these are more reactive in nature. Discussion on establishing clear working procedures in this area could help address the negative effects of export restrictions for natural resources in the short term while paving the way through analysis and understanding in the long term.

This approach is unlikely to have a significant impact on addressing the perverse effects of export restriction policies, but in the current heated environment of multilateral policymaking, transparency might be a suitable way to initiate a discussion at the international level.

### Option 3: Clarifying existing WTO disciplines

A third option would consist of clarifying existing provisions under the WTO. GATT Article XI provides that exports should not be prohibited or restricted with any instrument other than ordinary duties and taxes. However, Article XI makes an exception in paragraph 2(a), which refers to restrictions “temporarily applied” to “prevent or relieve critical shortages” of “foodstuffs” or other “products essential to the economy” of the exporting country. The exact meaning of these terms remains disputed as does the meaning of Article 12 of the AoA, which mandates that countries “shall give due consideration to the effects on importing member’s food security.” Clarifying the scope of these provisions for their applicability with respect to foodstuffs as well as other products would be essential to increase the predictability and impact of these rules. The recent Appellate Body in *China-Raw Materials*<sup>12</sup> has taken an important step in that direction. However, adjudicative bodies are critically limited in their means, as they have to limit their analysis to the existing text. A collective interpretation or guidelines prepared by Member states, on the other hand, could reflect recent developments, new understandings as to the functioning of commodity markets, and common development objectives.

Such guidelines could be developed in a binding or non-binding manner with varying scopes. Either Members could chose to simply define the terms and conditions or they could develop applicable mechanisms to inform the use of one of the exceptions under Article XI:2(a). A major challenge would be to ensure that the discussions are not immediately perceived as negotiations. The recent Appellate Body ruling on these issues could facilitate such efforts as members might prefer jointly developed guidance on the matter over an adjudicative decision. Leaving things to the lawyers is often not seen as the most viable path - and with the recent consultation request by the EU, Japan, and the US over China’s rare earths export restriction regime a second WTO ruling seems to be approaching.

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12 See WTO. *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, (JULY 5, 2011).



## Option 4: Defining opportunities for trade-offs

A more ambitious approach would be to address the issue at the sectoral level with the aim of negotiating new disciplines. In the course of the Doha Round negotiations, several countries - e.g. Japan, Korea, Switzerland, and the US - have proposed enhanced disciplines on exports restrictions, essentially focusing on the tariffication and binding of export restrictions.<sup>13</sup> Interestingly, in December 2000 the Cairns tabled a proposal linking tariff escalation to the need for further disciplines on export restrictions and taxes.<sup>14</sup> This might be an avenue worth exploring, particularly given the fact that in many instances, countries seek to maintain unprocessed natural resources in the domestic market in order to incentivize downstream industries and to overcome disincentives created by higher duties on processed products in export markets.

However, given the current impasse in the Doha Round, negotiating new disciplines on export restrictions might not be realistic. A more modest option could be to envisage incremental progress as part of an “early harvest” process. In this respect, Josling and Mitra<sup>15</sup> have suggested an “exporters’ code” that would include “the ending of export subsidies, both direct and through food aid, export credit guarantees and state-trading entities, as well as a ban on export embargoes and a limit on export taxes. This could be offered as a stand-alone component of the final Doha modalities.” As export restrictions are only one of the export policies that countries are concerned about, such an export code might be a suitable option. This is particularly so as the *demandeurs* differ depending on the type of export policy. While developing countries for a long time have complained about the highly trade-distorting export subsidies maintained by a number of OECD countries, major food-exporting developing countries, such as Argentina or Russia, are in the spotlight of current export restriction criticism. Similar approaches might be envisaged in other sectors, including on tropical products and commodities focusing on possible trade-offs between tariff escalation and export restrictions to promote downstream industries.

The obvious advantages of such an approach would be its multilateral and binding character and potentially broad scope. However, the fragmentation of the issue among different negotiations groups and deals could also prejudice the informed and harmonious nature of the disciplines. Moreover, as the stalling Doha Round casts doubt as to whether any agreement is feasible in the foreseeable future, one would want to avoid that these issues are equally captured by those negative dynamics. Against that background, the challenge would be to introduce the issues in a manner that would allow countries to truly treat them as “trade-off” opportunities, overcoming the Doha deadlock while producing meaningful new rules.

## Option 5: A WTO work programme on natural resources

Given the fact that export restrictions represent only one policy tool among a wide range

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13 See WTO. Agriculture Negotiations: Backgrounder Phase 1: Domestic Support - Amber, Blue And Green Boxes. Proposals G/AG/NG/W/91 (Japan), G/AG/NG/W/94 (Switzerland), G/AG/NG/W/98 (Korea), G/AG/NG/W/15, (US). Available at [http://www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgrnd08\\_domestic\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd08_domestic_e.htm).

14 According to the Cairns Group, “Tariff escalation in third markets hinders the capacity of exporting countries to develop processing industries. In particular it prevents developing countries from adding value to their exports. As a response to tariff escalation in third markets, some developing countries have taken recourse to restricting or taxing their raw material exports. Further substantial agricultural liberalization, including the elimination of tariff escalation, would therefore contribute to developing more effective disciplines on export restrictions and taxes.” (G/AG/NG/W/93)

15 Mitra, S. and Josling, T. *Agricultural Export Restrictions: Welfare Implications and Trade Disciplines*. IPC Position Paper Agricultural and Rural Development Policy Series. International Food & Agriculture Trade Policy Council, January 2009.

of instruments, a more holistic approach to natural resources might be required. More specifically, countries could explore the idea of a work programme on natural resources. This would allow for a wider discussion on the effects of, and linkages among, various trade policies - e.g. tariff escalation, trade distorting subsidies, non-tariff measures - without singling out one specific measure. Such an open-ended discussion would be independent from ongoing negotiations and could lead to a variety of outcomes, ranging from a simple exchange of information through the development of guidelines for interpreting existing WTO provisions, to the identification of areas where the WTO rule book might be updated. This would allow the necessary flexibility as to the scope of talks, while the broad character of the topic would allow sufficient linkages for trade-offs.

Precedents exist in the multilateral trading system. During the Uruguay Round, a specific Negotiating Group on Natural Resource Based Products (NRBPs) was established to look at long-standing issues, such as tariffs, non-tariff barriers, and subsidies. The group even attempted - unsuccessfully - to bring energy issues and export restrictions into the scope of its work.<sup>16</sup> More recently, the WTO Secretariat dedicated its 2010 World Trade Report to the trade and natural resource interface.

Discussions on scope could prove difficult as past experiences have shown.<sup>17</sup> A stumbling block in this respect could be agricultural and energy resources, as these have always been considered somewhat “special.” While agricultural products are already subject to a specialized agreement, energy trade is often considered as only partially covered by WTO disciplines, owing to the particular production modes of oil, gas, and electricity. This is also reflected in the types of export restricting policies that countries turn to in the energy sector.<sup>18</sup> Another challenge would be to ensure that the process is not seen as either an alternative to Doha or as suggesting sectoral or plurilateral approaches. Thus, for the beginning, Members might want to stick to an open discussion on challenges, experiences, and outlooks for trade in natural resources without aiming for negotiations.

Such a discussion could take place within the existing institutional structure. One could also envisage the adoption of a work programme under the auspices of the General Council or the Council for Trade in Goods. This would follow the approach suggested by Egypt in late 2011 to create a work programme on food security. In addition to raising the political profile, having this discussion under the General Council would allow for input from already existing councils and committees, some of which already address relevant aspects of the trade and natural resource interface, such as the Agriculture Committee or the Committee on Trade and Environment.

## 9.4 Conclusions

With the world population and the demand for food, energy, and raw materials steadily growing, countries increasingly compete for scarce natural resources. These new dynamics often prompt countries to apply export restrictions as part of a wider set of policy tools to secure sufficient amounts of nationally available resources at affordable costs. Such export restrictions can be motivated by various policy objectives, ranging from promoting domestic industrial transformation through supporting environmental protection to ensuring food security. While these represent legitimate policy goals, limitations on exports may also

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16 Stewart, T. P. *The GATT Uruguay Round: A Negotiating History 1986-1992*. The Hague: Kluwer Law International, 1993.

17 Due to disagreements as to which resources should be considered ‘natural resources’, the work of the NRBPs never made any progress.

18 These include dual-pricing and production limitations; policies that touch upon other sensitive areas, including for instance the role of state-owned and state-trading enterprises.

impact global supply chains and world market prices, thereby potentially affecting other countries. Yet, no single economy in the world is completely self-sufficient in all categories of natural resources.

Existing WTO disciplines on export restrictions remain - by and large - weak and arguably ill-suited in an environment characterized by emerging challenges, such as the depletion of natural resources or high and volatile food prices. This think piece highlights the need to understand better the rationale for imposing export restrictions and the likely impact of different measures as a starting point for a constructive international debate in this area. It also highlights possible pathways to initiate such a debate in the WTO, based on the assumption that, as for any intergovernmental institution, change must come, and be agreed to, from the inside.

Willingness to do so has already been expressed by cross-cutting segments of the WTO membership, but as a first step it might be more realistic to address these issues in a non-negotiating setting as suggested in some of the options highlighted above. Such an approach would enable the system to address one of the most critical challenges of the 21st century and prepare the ground for future multilateral cooperation when and if the political situation is ripe.

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Mr. Lamy is Director-General of the World Trade Organisation (WTO) since September 2005. Between 1999 and 2004, he was Commissioner for Trade at the European Commission under Romano Prodi. From 1985 to 1994, he was Chief of staff for the President of the European Commission, Jacques Delors, and his representative as Sherpa in the G7. In November 1994, he joined the team in charge of rescuing Credit Lyonnais, and later became CEO of the bank until its privatisation in 1999. He holds degrees from the Paris based Ecole des Hautes Études Commerciales (HEC), from the Institut d'Études Politiques (IEP) and from the Ecole Nationale d'Administration (ENA).

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Mr. Mehta is the founder and Secretary General of the Jaipur-based Consumer Unity & Trust Society (CUTS International). His name has been included in the high level Panel of the World Trade Organisation (WTO) formed to identify 21st century Trade challenges. Mr. Mehta serves/has served on several policy making bodies of the Government of India and serves on several advisory boards, such as for the Centre Advisory & Review Group of the Research Centre on Regulation and Competition with the Institute for Development Policy and Management, at Manchester University; Institute for Consumer Antitrust, at Loyola College, Chicago; American Antitrust Institute in Washington D.C.; Brains Trust of the Evian Group, Lausanne; OECD's Advisory Committee for Investment in Africa, Paris; and Advisory Committee of the Central Electricity Regulatory Commission in New Delhi.

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Mr. Roffe's work has focused on international aspects of transfer of technology, intellectual property and foreign direct investment. He joined the UNCTAD in 1973 and is currently Senior Associate at ICTSD. He has performed as advisor and consultant for a number of governments, international organizations, and private corporations with particular attention to trade and related negotiations. In his various capacities he has published articles and books and has been responsible for a number of collective publications. Most recently, his published contributions include: The TRIPS Agreement and Developing Countries; International Technology Transfer: The Origins and Aftermath of the United Nations Negotiations on a Draft Code of Conduct; Bilateral Agreements and a TRIPS-Plus World: the Chile-USA Free Trade Agreement; Resource Book on TRIPS and Development.

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Ms. Shahin is the Director of the Prince Alwaleed American Studies Center at the School of Global Affairs and Public Policy (GAPP) at the American University in Cairo. Ambassador Shahin's primary career has been in diplomacy. She held a number of distinguished posts with the Egyptian Foreign Ministry, namely as First Secretary in Bonn, as Counselor in New York, as Deputy Chief of Mission in Geneva, and lastly as an Ambassador in Athens. She held twice the position of Assistant Minister of Foreign Affairs for International Economics. Furthermore she has just completed five years as Executive Director of the USAID Project "Trade Advisory Program to the Private Sector" in the American Chamber of Commerce in Egypt.

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#### ABOUT ICTSD

Founded in 1996, the International Centre for Trade and Sustainable Development (ICTSD) is an independent non-profit and non-governmental organisation based in Geneva. By empowering stakeholders in trade policy through information, networking, dialogue, well targeted research and capacity building, the Centre aims to influence the international trade system such that it advances the goal of sustainable development.

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