

THE WTO AND ITS INSTITUTIONAL IMPEDIMENTS

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[The latest round of multilateral trade negotiations — the Doha Round — initiated a comprehensive negotiating round set out in a complex structure. At the same time, this Round focused attention on a ‘development agenda’, all as part of a ‘single undertaking’ with an ambitious three year deadline. The negotiations were troubled from the start and there are not many signs that agreement will be reached anytime soon. Given the long standing impasse, the time is now ripe to begin evaluating and understanding how the Doha Round negotiations became a seemingly endless charade and why the possibility of a substantial and workable agreement continues to elude WTO Members. This commentary attempts to address these questions by providing the background and timeline to the Doha Round before briefly discussing some of the differing negotiating positions and preferred outcomes of the major Members and negotiating coalitions. While the negotiating positions differ widely on a number of issues, this commentary concludes that more systemic institutional impediments exist, which not only hinder the successful conclusion of the Doha Round, but also prevent effective long-term institutional governance and vision.]

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I INTRODUCTION

In a spirit of cooperation in the wake of the September 11 terrorist attacks, the World Trade Organization met in the Qatari city of Doha and launched its latest round of trade negotiations (‘Doha Round’). The Doha Round initiated a comprehensive ‘negotiating round’, which set out a structure of eight negotiating groups comprising 21 subjects. At the same time, attention was also focused on a ‘development agenda’. This was all part of a ‘single undertaking’ with an ambitious three year deadline.¹ While many initially believed that the goodwill and conciliatory tone created in Doha would continue throughout the Round, in

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¹ *Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/1 (14 November 2001) (‘*Doha Declaration*’). The term ‘single undertaking’ has been defined as ‘[a] term, in *trade negotiations* ... for requiring participants to accept or reject the outcome of multiple negotiations in a single package, rather than selecting among them’: Alan Deardorff, *Terms of Trade: Glossary of International Economics* (2006) 247 (emphasis in original).

reality both quickly disappeared soon after negotiating began in earnest and certainly once the negotiations reached an impasse.² This should not have been an entirely unexpected development. The three year timeframe was always unrealistic,³ given the history of the *General Agreement on Tariffs and Trade* ('*GATT 1947*')⁴ and WTO negotiations;⁵ the use of unfavourable negotiating strategies such as holding back substantial offers until the last possible moment; and the sheer number of contentious negotiating topics included in the Doha Round's mandate.⁶

Almost five years after the launch of the Doha Round, and with Members making little progress on a number of critical issues, WTO Director-General Pascal Lamy officially 'suspended' the Round.⁷ Given the long standing impasse, the time is now ripe to begin evaluating and understanding how the Doha Round negotiations became a seemingly endless charade and why the possibility of a substantial and workable agreement continues to elude WTO Members.

² 'Under Attack — World Trade', *The Economist* (London, UK) 8 July 2006, 65–6.

³ The 2005 'deadline' seemed to be unachievable not only due to the nature of the negotiations and contentious issues but also (and perhaps just as importantly) due to the change in EC leadership, the 2004 US presidential elections, and the appointment of a new WTO Director-General in 2005. For the impact of the 2004 US presidential elections on the WTO, see, eg, Ashley Seager, 'WTO Chief Says Kerry Threats Are "Campaign Talk"', *Guardian* (London, UK) 17 September 2004, 22.

⁴ Opened for signature 30 October 1947, 55 UNTS 187 (entered into force 29 July 1948).

⁵ Extremely long rounds that continue to miss self-imposed deadlines are the norm, not the exception, in GATT and WTO negotiations. For instance, the Uruguay Round that created the WTO missed several critical deadlines, and took nine years to conclude successfully. Looking further back, two of the other eight rounds concluded under the *GATT 1947* — Tokyo (1973–79) and Kennedy (1962–67) — also extended for a number of years. It must not be forgotten that the rounds prior to Tokyo were largely concerned with reducing tariff rates (and later non-tariff barriers), whereas the later *GATT 1947* rounds and current Doha Round relate to a number of complex and controversial topics extending far beyond the realm of trade in goods and tariff barriers.

⁶ Encompassing, inter alia, agriculture, services, procedural and substantive rules on anti-dumping, subsidies and countervailing duties, special and differential treatment, the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1C (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) 1867 UNTS 299 ('*TRIPS Agreement*'). Issues also included in the Doha Round mandate are access to medicines, investment, competition, trade facilitation and public procurement: *Doha Declaration*, above n 1.

⁷ Pascal Lamy, *Time Out Needed to Review Options and Positions* (Speech delivered at informal TNC meeting at the level of Head of Delegation, Geneva, Switzerland, 24 July 2007), available from <<http://www.wto.org>> at 18 May 2007.

This commentary attempts to address these questions by providing the background and timeline to the Doha Round before briefly discussing some of the differing negotiating positions and preferred outcomes of the major Member and negotiating coalitions. While the negotiating positions differ widely on a number of issues, this commentary concludes that more systemic institutional impediments exist, which not only hinder the successful conclusion of the Doha Round, but also prevent effective long-term institutional governance and vision. The first impediment is consensus-based decision-making — where every Member must essentially agree on each issue before an agreement can be reached. This means that any Member, no matter how small, can block agreement in an increasingly politicised and highly visible organisation. The second impediment is the broadened mandate of the negotiations, coupled with the diversity of viewpoints in an expanding multilateral trading system. The third impediment is the lack of oversight of bilateral and regional free trade agreements — collectively termed preferential trade agreements (‘PTAs’) — within the multilateral trading system. The final impediment analysed in this commentary is the combination of ineffective governance and the effectiveness of the dispute settlement system. The result of this combination is that WTO Members are increasingly less willing to reach agreement on an issue and more likely to allow the matter to be resolved by the dispute settlement system. The commentary concludes with a brief analysis of the effects of the failure in the Doha Round and suggests ways in which the WTO can progress and remain a thriving and vital centrepiece of the international trading system.

II THE DOHA ROUND NEGOTIATIONS: A BRIEF OVERVIEW

Launched only seven years after the conclusion of the watershed Uruguay Round, the Doha Round again attempted to substantially revise the international trading system with an ambitious agenda including: a ‘market access’ component, a ‘regulatory’ component and an ‘implementation’ component (encompassing issues including special and differential treatment and preference erosion).⁸ With such a large mandate, including many contentious topics and issues, the negotiations quickly deteriorated. By the time of the Cancún Ministerial in September 2003, the only noteworthy success was the agreement relating to the issuing of compulsory licences and the importation of

⁸ The concept of special and differential treatment has been a part of the trading regime since the earliest days of the GATT and calls for the interests of developing countries to be given special consideration. This term has been defined as:

The *GATT* ... principle that developing countries be accorded special privileges, exempting them from some requirements of developed countries. It also permits *tariff preferences* ... among developing countries and by developed countries in favour of developing countries, as under the *GSP* ...

Deardorff, above n 1, 251 (emphasis in original). Essentially, this concept is designed to provide proportionality in the commitments undertaken between developed and developing countries in order to reflect their different levels of development and involvement in the trading system. For further discussion on the history of trade preferences for developing countries in the GATT, see Olivier Long, *Law and Its Limitations in the GATT Multilateral Trade System* (1985) 30.

pharmaceuticals to countries with no or insufficient manufacturing capabilities.⁹ Far from building on that success, the Cancún Ministerial saw the Doha Round take several steps backward when the week collapsed without agreement.¹⁰

While many journalists reported that the Cancún debacle would be the downfall of the WTO, the Doha Round again gained momentum, in large part due to the dedication and tireless work of the trade ministers, senior governmental officials and the WTO Secretariat. Even though some of the difficult issues were left unresolved, the Members were again at the table and productively communicating, discussing and negotiating.¹¹ In fact, Members reached preliminary agreement in several important areas, most notably their decision to streamline the Doha Round,¹² as well as the framework agreement on agricultural modalities (template agreements)¹³ and a preliminary decision to eliminate agricultural export subsidies and trade-distorting export support.¹⁴

Following on from the post-Cancún clean-up, the Hong Kong Ministerial in December 2005 accomplished its limited goals of furthering and continuing the Doha Round by reaching preliminary agreement on a number of key issues.¹⁵ This Ministerial saw Members preliminarily agree to: end agricultural export

⁹ *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/L/540 (30 August 2003) (General Council Decision). See generally Bryan Mercurio, 'TRIPS, Patents and Access to Life-Saving Drugs in the Developing World' (2004) 8 *Marquette Intellectual Property Law Review* 211, 213; Duncan Matthews, 'WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: A Solution to the Access to Essential Medicines Problem?' (2004) 7 *Journal of International Economic Law* 73, 76.

¹⁰ The collapse has been blamed on numerous actors: developed countries waiting too long before abandoning controversial positions; several developing country Members refusing to negotiate unless certain agricultural issues were discussed; the US and EC making vague declarations of intentions to offer agricultural concessions; and the EC agreeing to remove the Singapore issues (less trade facilitation) (see below n 33) from the Doha Round. Despite some concessions, the African-Caribbean-Pacific ('ACP') and least developing countries ('LDCs') steadfastly demanded significant movement on cotton protection, showed a fundamental lack of understanding of how smaller, weaker nations benefit most from a strong multilateral system and failed to appreciate that they would likely gain from the successful conclusion of the Doha Round. On the potential gains of developing countries, particularly in the area of agriculture, see, eg, Kym Anderson and Will Martin, 'Agricultural Trade Reform and the Doha Development Agenda' (Policy Research Working Paper No 3607, World Bank, 2005), available from <<http://econ.worldbank.org>> at 18 May 2007; Kym Anderson, Will Martin and Dominique van der Mensbrugge, 'Doha Merchandise Trade Reform: What's at Stake for Developing Countries?' (Policy Research Working Paper No 3848, World Bank, 2006), available from <<http://econ.worldbank.org>> at 18 May 2007.

¹¹ See, eg, WTO, *Day 2: Cambodia and Nepal Membership Sealed as Ministers Start Negotiations* (2003), available from <<http://www.wto.org>> at 18 May 2007.

¹² Department of Foreign Affairs and Trade ('DFAT'), Australia, *WTO Doha Round Bulletin: Week Ending 2 May 2003* (2003) <http://www.dfat.gov.au/trade/negotiations/wto_bulletin/wto_bulletin_030502.html> at 18 May 2007.

¹³ WTO, *June/July 2006 Modalities Meetings* (2006), available from <<http://www.wto.org>> at 18 May 2007.

¹⁴ *Doha Work Programme*, WTO Doc WT/MIN(05)/DEC (22 December 2005) (Ministerial Declaration) ('*Hong Kong Ministerial Declaration*').

¹⁵ WTO, *Day 6: Ministers Agree on Declaration that 'Puts Round Back on Track'* (2005), available from <<http://www.wto.org>> at 18 May 2007.

subsidies by the end of 2013;¹⁶ eliminate tariffs and quotas on 97 per cent of the tariff lines exports by least developed countries ('LDCs') by 2008;¹⁷ eliminate export subsidies in cotton by the end of 2006; remove all tariffs and quotas restricting LDC cotton exports by 2008; extend the implementation period for LDCs (allowing them to maintain measures inconsistent with the *Agreement on Trade-Related Investment Measures* ('TRIMS')¹⁸ for at least seven years and potentially until 2020); and extend the moratorium on e-commerce tariffs until at least the next Ministerial.¹⁹ On other issues, Members essentially committed themselves to agree on further particulars at a later stage.²⁰

Members failed to build on the achievements of the (limited) Hong Kong Ministerial. By mid-2006 it was clear that the negotiations had reached a stalemate.²¹ For this reason, Director-General Pascal Lamy 'suspended' the Round after more than five years of much discussion, little progress and no consensus on any major negotiating subject. The Director-General did not set a deadline for the resumption of the negotiations, but on 7 February 2007, he declared 'we have resumed negotiations fully across the board'.²² Despite this declaration, negotiating positions have not shifted and there is still much left to achieve before the Doha Round can successfully conclude.²³

¹⁶ This concession is of limited value due to the fact that export subsidies are a minimal distortion when compared with other domestic farm support. In fact, export subsidies account for less than US\$5 billion, while amber box subsidies account for US\$80 billion in applied terms. Moreover, in anticipation of this decision, all Members except the EU had already scheduled to end export subsidies well before 2013: see, eg, Risto Vaitinen, 'Liberalisation of Agricultural Trade — Global Implications and What It Means for the EU' (Discussion Paper, Government Institute for Economic Research, Helsinki, 2003).

¹⁷ This concession is also limited, as it is only a small step beyond the status quo — the US already allows duty-free and quota-free access for 83 per cent of LDC exports. More importantly, the 3 per cent leeway could cover the majority of key trade from LDCs and allow continued restriction of sugar, textiles, leather goods, ceramics and other goods in which LDCs are competitive: see, eg, Office of the US Trade Representative, *Update from Hong Kong: Duty-Free Quota-Free* (2005), available from <<http://www.ustr.gov>> at 18 May 2007.

¹⁸ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on Trade-Related Investment Measures*) 1868 UNTS 186.

¹⁹ *Hong Kong Ministerial Declaration*, above n 14.

²⁰ *Ibid.*

²¹ 'In the Twilight of Doha', *The Economist* (London, UK) 29 July 2006, 63–4.

²² Pascal Lamy, *We Have Resumed Negotiations Fully across the Board* (Report by the Chairman of the Trade Negotiations Committee, Geneva, Switzerland, 7 February 2007), available from <<http://www.wto.org>> at 18 May 2007.

²³ On the lack of 'new' negotiating developments: see, eg, 'Doha: Members Sound More Optimistic, But Will It Lead to Anything?' (2007) 11(1) *Bridges Weekly Trade News Digest* 1, available from <<http://www.ictsd.org>> at 18 May 2007; Pascal Lamy, 'Lamy Urges Breakthrough in Trade Negotiations' (Speech delivered at International Monetary and Financial Committee Meeting, Washington DC, US, 15 April 2007), available from <<http://www.wto.org>> at 18 May 2007.

The disintegration of the negotiations and continued inability of the Members to reach agreement is worrying, as the creation of the WTO has been of great benefit to many nations. Its continued credibility and importance is prefaced upon it being able to function effectively to improve trading conditions and opportunities. The WTO has proved its importance through significantly expanding trading opportunities while at the same time creating an unprecedented, binding international dispute settlement mechanism to effectively enforce obligations and increase certainty and predictability to international traders and Members.²⁴ Further, liberalised trade through membership of the WTO has brought tangible benefits to many developing countries and the completion of the Doha Round is expected to deliver substantial benefits and assistance in economic development to the vast majority of developing nations and LDCs.²⁵ The inability of Members to conclude the Doha Round risks the Organization becoming marginalised as alternative arrangements — such as PTAs — are sought out.²⁶ Such marginalisation should not be celebrated.

The recent decline of the Doha Round negotiations is often viewed merely as a result of the major negotiating parties' failure to agree on the issues, particularly further modalities for agricultural trade.²⁷ Such an assessment is, of course, correct to a point. Developed Members such as the United States and the European Community, who are in virtual agreement on a number of issues, such as deepening the level of commitments in the services sector²⁸ as well as

²⁴ See Michael Trebilcock and John Howse, *The Regulation of International Trade* (3rd ed, 2005) 36–7, 118–53; Mike Moore, *A World without Walls* (2003) 101–4, 106–7.

²⁵ See, eg, Thomas Hertel, Roman Keeney and Alan Winters, 'Distributional Effects of WTO Agricultural Reforms in Rich and Poor Countries' (Policy Research Working Paper No 4060, World Bank, 2006) ii, available from <<http://econ.worldbank.org>> at 18 May 2007; Kym Anderson and Will Martin, 'Agricultural Trade Reform and the Doha Development Agenda' (2005) 28 *The World Economy* 1301, 1320–2; Alan Matthews and Keith Walsh, 'The Doha Development Agenda: Mixed Prospects for Developing Countries' (Discussion Paper No 157, Institute for International Integration Studies Discussion, Trinity College Dublin, 2006) 15 <<http://www.tcd.ie/iis/documents/discussion/pdfs/iisdp157.pdf>> at 18 May 2007. *Contra* the analysis of Dani Rodrik:

Imagine that the world's trade ministers simply walked away from their Hong Kong meeting with a simple declaration: 'We have failed to reach an agreement; we shall try to do better next time'. This would bring the so-called Doha 'Development' Round to an unsuccessful conclusion, but it would hardly be a disaster.

Dani Rodrik, *Failure in Trade Talks Would Be No Disaster* (2005), available from <<http://ksghome.harvard.edu/~drodrik/shortpieces.html>> at 18 May 2007.

²⁶ Colin Picker, 'Regional Trade Agreements v the WTO: A Proposal for Reform of Article XXIV to Counter This Institutional Threat' (2005) 26 *University of Pennsylvania Journal of International Economic Law* 267, 286–7.

²⁷ It should be noted that, as of late January 2007, consensus among the EU, Brazil and the US appears to be emerging on a number of agricultural and industrial issues: 'Expanding the Consensus?' (2007) 16(22) *Washington Trade Daily*, available from <<http://www.washingtontradedaily.com>> at 18 May 2007. For more on the developments throughout January 2007, see 'Doha Negotiations Set to Pick Up Despite Lack of New Offers' (2007) 11(3) *Bridges Weekly Trade News Digest* 1, available from <<http://www.ictsd.org>> at 18 May 2007.

²⁸ See, eg, Office of the US Trade Representative, 'United States is Active Participant in Coalition to Jump Start WTO Services Negotiations' (Press Release, 28 February 2006), available from <<http://www.ustr.gov>> at 18 May 2007; Peter Mandelson, EU Trade Commissioner, 'Ambition and Realism — Europe's Approach to the Doha Round' (Speech delivered at the European Commission Representation, Helsinki, Finland, 21 April 2006), available from <<http://ec.europa.eu/trade>> at 18 May 2007.

non-agricultural market access,²⁹ have deep-seated disagreements on numerous other contentious issues. Most importantly, their respective positions on agriculture are incongruous, with the US requesting deep tariff reductions while attempting to maintain some form of its own agricultural subsidies/support and insisting on strong reform of the EC Common Agricultural Policy ('CAP') and opposing most forms of 'sensitive' product exclusions.³⁰ The EC, for its part, is resisting deep tariff cuts in agriculture while also maintaining a strong preference for unlimited or soft regulations on 'sensitive' product exclusions.³¹ The US is also looking to curb oversight of domestic trade remedy decisions while at the same time demanding increased market access for its products.³² The EC strongly supported the inclusion of the Singapore issues and only belatedly agreed to unilaterally drop its demands when other Members made it clear that they would not trade meaningful agricultural reform in exchange for the Singapore issues.³³ Both of these Members, meanwhile, are also looking to maintain escalating tariffs on textile and manufactured products.³⁴

Large and powerful developing countries such as Brazil, China, South Africa and India — and, more generally the entire G-20³⁵ — are demanding increased market access to developed country markets while at the same time resisting demands to liberalise their own markets.³⁶ This is particularly the case with

²⁹ See, eg, Office of the US Trade Representative, *Industrial Market Access in the WTO*, available from <<http://www.ustr.gov>> at 18 May 2007; European Commission, Directorate-General for Trade, *Doha Development Agenda: Third Submission by the European Communities on Market Access for Non-Agricultural Products* (31 March 2003), available from <<http://ec.europa.eu/trade>> at 18 May 2007.

³⁰ The level of importance agriculture holds in both domestic politics and international relations is astounding given that it now accounts for only 8.4 per cent of world merchandise trade (thus, excluding services): WTO, *International Trade Statistics 2006* (2006) 107, 110, available from <<http://www.wto.org>> at 18 May 2007.

³¹ 'Major Differences Persist over Agricultural Chapter', *Agence Europe Newsfeed*, 27 February 2007.

³² The US administration is also now attempting to stave off political pressure from an increasingly protectionist Congress, while at the same time managing a burgeoning — and unsustainable — budget deficit: Leon Hadar, 'Will Congress Extend Bush's Trade Authority?', *The Business Times* (Singapore) 15 February 2007.

³³ The 'Singapore issues' refer to four working groups — investment protection, competition policy, transparency in government procurement and trade facilitation — set up during the Ministerial Conference held in Singapore in 1996: *Singapore Ministerial Declaration*, WTO Doc WT/MIN(96)/DEC (18 December 1996) [20]–[22].

³⁴ See, eg, 'The Great Stitch Up — The Textile Industry', *The Economist* (London, UK) 28 May 2005, 61–2; 'Where to on Trade? The President's Economic Team', *The Economist* (London, UK) 22 April 2006, 27–8.

³⁵ The '20' members include: Argentina, Bolivia, Brazil, Chile, China, Cuba, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Tanzania, Thailand, Uruguay, Venezuela and Zimbabwe: G-20, *Members* (2007) <<http://www.g-20.mre.gov.br/members.asp>> at 18 May 2007.

³⁶ China is the exception, as it made deep commitments when entering the WTO and now feels that while some of the others should move, it should be excluded from making any further commitments at this time: Moore, above n 24, 137–45. China has been making its presence felt in this area by, inter alia, calling for special terms which would allow it (and other newly acceded nations) to commit to lower cuts in farm tariffs and subsidies than other developing countries in order to provide it with more time to implement its commitments under a future Doha Round agriculture deal: see Daniel Pruzin, 'China, Other New WTO Members Seek Special Terms on Farm Tariff, Subsidy Cuts' (2007) 24(11) *International Trade Law Reporter* 369.

agricultural and industrial tariffs.³⁷ On other issues, such as services and trade remedies, the interests of these countries diverge. Another negotiating coalition, a group of developed nations including Japan, Switzerland and Norway (the G-10)³⁸ — has maintained a negative and defensive approach to the negotiations on agriculture and, due to their lack of competitiveness internationally, resisted most reforms while at the same time insisting on almost uncontrolled exclusions for ‘sensitive’ products. Finally, a group of mainly lower-income developing countries and LDCs with slow or stagnating growth have increasingly become significant players in the WTO negotiations. These nations, often referred to as the G-33,³⁹ generally consist of countries within Sub-Saharan Africa, the Caribbean, the Middle East and West Asia. The G-33 are net food importers and primarily concerned with three issues: special and differential treatment (including broadly defined and loosely regulated ‘special product’ exemptions);⁴⁰ increased market access to developed country markets (mainly but not exclusively for agricultural products);⁴¹ and preference erosion.⁴² In the main, the G-33 has engaged in negative negotiating by making numerous demands and rejecting proposals without offering substantive counter-proposals.⁴³

³⁷ See, eg, Goh Chien Yen, Third World Network, *NAMA Negotiations: Argentina, Brazil and India Argue Why Developing Countries Need to Use Industrial Tariffs* (Third World Network Report on the Negotiations of the Week 6–11 June 2005, 8 June 2005) <<http://www.twinside.org.sg/title2/twninfo222.htm>> at 18 May 2007.

³⁸ G-10 membership includes: Iceland, Israel, Japan, Korea, Liechtenstein, Mauritius, Norway, Switzerland and Chinese Taipei: WTO, *Countries, Alliances and Proposals* (2006), available from <<http://www.wto.org>> at 18 May 2007.

³⁹ G-33 membership includes: Antigua and Barbuda, Barbados, Belize, Benin, Bolivia, Botswana, China, Congo, Côte d’Ivoire, Cuba, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, Korea, Madagascar, Mauritius, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Zambia and Zimbabwe: *ibid.*

⁴⁰ ‘G-33 Outlines Special Safeguard Mechanism for Developing Countries’ (2005) 9(37) *Bridges Weekly Trade News Digest* 8–9, available from <<http://www.ictsd.org>> at 18 May 2007. As illustrated below, the issue of ‘sensitive’ products is contentious and a major stumbling block to consensus. Recently, however, Pakistan has submitted a proposal in an attempt to ‘narrow the gaps between the negotiating positions and also to operationalize the indicators as suggested in the G-33 Ministerial Communiqué Jakarta 2007’: Communication from the Delegation of Pakistan to the Committee on Agriculture Special Session, ‘Modalities for the Selection and Treatment of Special Products (‘SPs’) by Developing Countries’ (10 April 2007) <<http://www.tradeobservatory.org/library.cfm?refid=98075>> at 18 May 2007.

⁴¹ ‘G-33 Ministers Call on Developed Countries to Take First Step to Break Doha Deadlock’ (2007) 11(10) *Bridges Weekly Trade News Digest* 1, available from <<http://www.ictsd.org>> at 18 May 2007.

⁴² See generally Bernard Hoekman, Will Martin and Carlos A Primo Braga, ‘Preference Erosion: The Terms of the Debate’ in Richard Newfarmer (ed), *Trade, Doha, and Development: A Window into the Issues* (2006) 333; Joseph Francois, Bernard Hoekman and Miriam Manchin, ‘Preference Erosion and Multilateral Trade Liberalization’ (Policy Research Working Paper No 3730, World Bank, 2005), available from <<http://econ.worldbank.org>> at 18 May 2007.

⁴³ One example of this is the LDCs’ repeated calls for more special and differential treatment and rejection of developed country offers for not going far enough, but without actually producing a draft text of what it is they wish to achieve. The International Centre for Trade and Sustainable Development states that:

However, blaming the failure of the Doha Round entirely on the negotiating member states overlooks the underlying causes of their disagreements and unwillingness to compromise. While ‘blame’ can certainly be laid against the major players, the Organization itself and its institutional impediments must also bear some culpability.

III THE WTO AND ITS INSTITUTIONAL IMPEDIMENTS

Several institutional impediments exist which interfere with the fundamental operations of the WTO. These impediments go to the heart of the Organization, and, left unmodified, risk plummeting the WTO into irrelevance. These institutional impediments have as much, if not more, responsibility for bringing the Doha Round to a virtual standstill than the WTO Members themselves. This section focuses on some of the more important institutional impediments that have contributed to the lack of progress in the Doha Round and to the growing frustration with the multilateral trading system. The first impediment analysed is consensus-based decision-making in an increasingly politicised and highly visible WTO. The second impediment considered is the increased mandate of the negotiations coupled with the diversity of viewpoints associated with an expanding multilateral trading system. The third impediment discussed is the lack of oversight regarding the validity of regional free trade agreements with the multilateral rules. The final impediment assessed is the effectiveness of the dispute settlement system, the success of which has resulted in Members being less willing to reach agreement on an issue and more likely to allow the matter to be resolved by the dispute settlement system.

A *Highly Visible and Politicised Consensus-Based Decision-Making Processes*

For as long as one can remember, trade policy has been the exclusive purview of the few; a select group of diplomats who carried on their business behind closed doors and out of view of everyday society.⁴⁴ Not many individuals outside this group have paid much attention to the rules, commitments and exclusions coming from the negotiations, and those who did had a hard time

The Committee on Trade and Development Special (negotiating) Session (CTD-SS) adjourned after less than an hour on 12 October because least-developed countries (LDCs) and the African Group asked for more time to redraft their proposals for enhanced special and differential treatment ... Chair Faizel Ismail of South Africa expressed disappointment and concern that they were unable to table the modified proposals at the meeting, noting that formal meetings of the committee had already been postponed several times for the same reason.

‘LDCs, Africans Ask for More Time to Revise S&D Proposals’ (2005) 9(34) *Bridges Weekly Trade News Digest* 9, available from <<http://www.ictsd.org>> at 18 May 2007.

⁴⁴ J H H Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’ (2001) 35 *Journal of World Trade* 191, 195–6; Moore, above n 24, 191–4.

convincing others of their importance.⁴⁵ The creation of the WTO has sparked interest in the happenings and goings-on of the multilateral trading system.⁴⁶ For whatever reason, trade policy and law have become 'sexy'. Perhaps this shift resulted from increased, faster and cheaper international communications and transportation, or maybe it was due to the increased level of coverage and commitments made during the Uruguay Round or perhaps it was simply because the name 'World Trade Organization' conjured up more feelings and angst than did the 'General Agreement on Tariffs and Trade'.⁴⁷ Whatever the reason, it is clear that the Uruguay Round not only created the WTO, but it also awakened the latent interest of 'civil society'.⁴⁸

Since 1995, individuals and non-state actors representing all sides of the political and economic spectrum have demanded increased access to the internal workings of international organisations.⁴⁹ In the context of the WTO, non-governmental organisations have demanded access to the drafting, interpretation, revision and dispute settlement phases of the process.⁵⁰ Well-financed NGOs have formed in almost every member state to monitor one aspect or another of the WTO and, if nothing else, these highly visible groups have succeeded in getting first the media, then governments and finally the WTO to take notice.⁵¹

⁴⁵ See Julio Lacarte, 'Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective' in Ernst-Ulrich Petersmann (ed), *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance* (2005) 447. Lacarte states: 'Indeed, there was little demand outside the governing sphere to know more [about trade negotiations] ... and public opinion as we know it today had little interest in becoming better acquainted with foreign affairs': at 447.

⁴⁶ Former Prime Minister of New Zealand and Director-General of the WTO, Mike Moore, recounts:

In New Zealand, we couldn't get the public interested in the Uruguay Round, and the legislation passed quickly at night. By contrast, the New Zealand Parliament recently passed legislation to ratify a Singapore/New Zealand free-trade agreement, which represented about half a per cent of nothing. All hell broke loose with petitions, protests, public hearings and coalition partners threatening to quit and collapse the government.

Moore, above n 24, 191.

⁴⁷ Numerous groups have come to see the WTO as a symbol of domination, power and subordination: see, eg, Walden Bello, 'Building an Iron Cage: The Bretton Woods Institutions, the WTO and the South' in Sarah Anderson (ed), *Views from the South: The Effects of Globalization and the WTO on the Third World* (2000) 54, 55; People's Weekly World, 'WTO's Third Try a Charm for Southern Nations', *People's Weekly World Newspaper Online* (Chicago, US) 27 April 2002 <<http://www.pww.org/article/view/1112/1/78>> at 18 May 2007.

⁴⁸ However, the *Tuna/Dolphin* dispute between the US and Mexico started the arousal process for environmentalists before the creation of the WTO: *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (1991) (Report of the Panel); *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) (Report of the Appellate Body).

⁴⁹ Moore, above n 24, 187–96.

⁵⁰ Razeen Sally, 'Rocky Road to Cancun', *The Financial Express*, (New Delhi, India) 3 March 2003, 1 <http://www.financialexpress.com/fe_archive_full_story.php?content_id=29257> at 18 May 2007.

⁵¹ 'Angry and Effective', *The Economist* (London, UK) 23 September 2000, 85–7.

As a result, every high level meeting, from a WTO Ministerial Conference to a mere informal meeting of several trade representatives, attracts the attention of the media spotlight.⁵² In this context, every statement by anyone acting in an official manner is analysed and debated by journalists, academics and activists alike. Such a system resembles the United Nations General Assembly floor and is a far cry from the traditional GATT negotiations.⁵³ The low key and cordial diplomatic negotiations of the past have now been replaced by public spectacles fuelled by the public's increasing appetite for knowledge of and even participation in the decision-making process.

The nature of the negotiations has changed, and the pace of progress within the Organization has slowed,⁵⁴ as a result of heightened interest in trade negotiations, coupled with the fact that the GATT began with 23 signatories and the WTO has, in a space of only a decade, grown from 123 to 150 Members⁵⁵ representing all levels of development. Increasingly, trade representatives, government officials and parliamentarians are making public statements which feed into public sentiment and increase tensions at the negotiating table. Razeen Sally has explained the situation by stating that these officials have become, 'distracted by rhetoric and political grandstanding'.⁵⁶ Sally is fearful that if the trend towards the 'UN-isation' of the WTO — where officials are more interested in 'windbag speechifying', 'political point-scoring', 'procedural circles' and political 'appointments made according to informal developing country quotas and not on merit' than in actually progressing the trade agenda — continues the WTO's functional capabilities will be decreased and the Organization would become nothing more than a 'marginalised talking shop'.⁵⁷

While Sally may be taking the argument a bit too far, the broader point that the nature of the Organization is shifting from one based on negotiation and action to one based on public statements and political advantage is valid. To some degree, grandstanding and showmanship have replaced useful bargaining, thus contributing to the shift of meaningful progress from the WTO to another forum — a disparate collection of regional and bilateral PTAs.

⁵² Pascal Lamy, 'A Life Dedicated to a More Open and Fair World Trading System' (Speech delivered at the Ceremony in Memory of Arthur Dunkel, Geneva, Switzerland, 2 November 2005), available from <<http://www.wto.org>> at 18 May 2007.

⁵³ Moore, above n 24, 191–4.

⁵⁴ See also Sally, 'Rocky Road to Cancun', above n 50; Jeffrey J Schott and Jayashree Watal, 'Decision Making in the WTO' in Jeffrey J Schott (ed), *The WTO after Seattle* (2000) 283, 284–5; Razeen Sally, *What Future for the WTO in a Changing International Order?* (2003) 2, available from <<http://www.lse.ac.uk/collections/internationalTradePolicyUnit>> at 18 May 2007.

⁵⁵ WTO, *Understanding the WTO: The Organization* (2007), available from <<http://www.wto.org>> at 18 May 2007.

⁵⁶ Razeen Sally, *Whither the World Trading System? Trade Policy Reform, the WTO and Prospects for the New Round* (2002) [31] <<http://www.timbro.se/pdf/whither.pdf>> at 18 May 2007.

⁵⁷ *Ibid.*

Such grandiose politicisation of the process can be seen at every Ministerial Conference of the WTO. In his book, *A World without Walls*, former Director-General Mike Moore recounts several examples of ministers or governmental representatives at both the Seattle and Doha Rounds openly criticising the Organization (particularly the process) in public, while at the same time engaging in meaningful negotiations and influencing the process behind closed doors.⁵⁸ More recently, at the Hong Kong Ministerial in December 2005, trade ministers and governmental officials also used the public spotlight to issue divisive and inflammatory statements. For instance, the Brazilian Minister for External Relations, Celso Amorim, publicly stated:

We had hoped that our partners would feel the importance of the hour and make at least some gestures that would provide the necessary impetus for continuing the negotiations. We have not seen such gestures yet. The text marginally improves the original draft, it should have gone farther.⁵⁹

Another example can be seen in a public statement by India's Commerce Minister, Kamal Nath:

We have been seeing an amazing development in the discussions in Hong Kong whereby the developed countries talk in the plenary halls of a Round for Free for developing countries. Then they move into the Green Room and continue to ask for a Round for Free, this time for themselves.⁶⁰

European Union Trade Commissioner Peter Mandelson also took to speaking freely in public and, when answering questions relating to the low level of ambition of the EC offer on agriculture, replied: 'I'm sorry for the brinkmanship of the large agricultural exporters, who are standing away from serious dialogue with us'.⁶¹ Even more inflammatory language can be seen in the statement of a group of 15 African parliamentarians at the Ministerial, who called the Ministerial Declaration 'deplorable, depressing and a slap in the face of developing countries and LDCs'.⁶²

Looking more broadly, such behaviour has also been exhibited throughout the Doha Round. This can be illustrated by the negotiations on agriculture, where inflammatory and/or inflexible public statements have become the norm. For instance, in reply to the EC statement in late July 2006 publicly blaming the US for the stalled agricultural negotiations, the US Trade Representative issued the

⁵⁸ See Moore, above n 24.

⁵⁹ 'What the Ministers Said: Quotable Quotes from Hong Kong', 6 *Third World Network: Hong Kong News Update* 8 (18 December 2005) <<http://www.twinside.org.sg/title2/hongkongnews/hknews06.doc>> at 18 May 2007.

⁶⁰ Martin Khor, 'No Light at End of HK Tunnel, but a New South Alliance is Born', *Third World Network Information Service on WTO and Trade Issues* (16 December 2005) <<http://www.twinside.org.sg/title2/twninfo333.htm>> at 18 May 2007.

⁶¹ Martin Khor, 'More Finger Pointing, Less Negotiation, as Ministerial Gets under Way', *Third World Network Information Service on WTO and Trade Issues* (14 December 2005) <<http://www.twinside.org.sg/title2/twninfo325.htm>> at 18 May 2007.

⁶² 'MPs and NGOs Slam WTO Ministerial Text', 6 *Third World Network: Hong Kong News Update* 4 (18 December 2005) <<http://www.twinside.org.sg/title2/hongkongnews/hknews06.doc>> at 18 May 2007.

following press release:

In the interest of trying to preserve prospects for reviving the Doha Round and salvaging the progress that has been made to date, the United States refrained from responding to the finger pointing by some that greeted the WTO Director-General Lamy's decision to suspend the talks. However, yesterday's statement by the European Union alleging that the United States failed to show flexibility in the Doha agriculture negotiations and attempting to divert blame for the stalemate is false and misleading. It cannot stand uncorrected. ...

We came to Geneva ready to make a good deal that achieved an ambitious outcome — in agriculture, industrial goods, and services — if the EU and others showed flexibility by putting real market access on the table for the first time. Unfortunately, they did not. Indeed, during recent discussions it became clear that the EU was in fact offering even less market access than originally thought, through their intended use of loopholes. And then, to compound the irony, yesterday the EU simultaneously waived around their 'improved' offer and announced it was removing the offer from the table.

The United States took the Leaders' mandates for flexibility in St Petersburg seriously. But the US cannot, and will not, negotiate with itself. In view of the EU's lack of movement at the G6, the United States reluctantly had to agree with Director-General Lamy's assessment that the differences among G-6 members remained unbridgeable.

The United States has sought to conduct this negotiation without resorting to blamesmanship and finger pointing. We are deeply disappointed that the European Union failed to exhibit similar restraint and hope that this will not jeopardize the few chances we have left to save the Doha Round. For our part, we will focus our efforts on working with other WTO Members to put the negotiations back on track.⁶³

While grandstanding and showmanship exist to some degree at every level of open and democratic governance, the effect of such activities on the WTO is unlike that of any other forum due to the manner in which the institution takes decisions and essentially governs itself — by consensus.⁶⁴ Under consensus-based decision-making, any WTO Member, no matter how large or small, has the ability to block any decision by explicitly objecting to the proposal. Under these circumstances, one recalcitrant Member can object to and block, or veto, any measure or action, even if it is favoured by every other

⁶³ Office of the US Trade Representative, 'Statement by Office of the US Trade Representative' (Press Release, 25 July 2006), available from <<http://www.ustr.gov>> at 18 May 2007.

⁶⁴ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) art IX:1 ('*Marrakesh Agreement*'). Footnote 1 to art IX:1 states that the standard of decision-making, whereby consensus is deemed to have been reached if 'no Member, present at the meeting when the decision is taken, formally objects to the proposed decision'. This standard is similar, but not the same, as requiring unanimous affirmative consent. If consensus cannot be reached, art IX:1 provides for voting on a one-Member, one-vote system. In addition to the normal decision-making standard, the WTO also provides for special procedures in certain situations, including interpretations, waivers and amendments. In practice, no voting or decision has ever been taken without consensus.

Member.⁶⁵ The ever-present threat of a veto creates an environment where only decisions likely to garner consensus are generally brought forward. Decisions, therefore, resemble a 'least common denominator' or, in other words, are often 'watered down' to appeal to — or not offend — other Members.⁶⁶ In addition, consensus-based decision-making inevitably means that progress is slow, and sometimes stalled, due to the necessity of getting all 150 Members to agree on the proposed decision. Consensus decision-making in an atmosphere of a highly visible and politicised international trading system has had a large impact upon the length and contentiousness, and ultimately on the lack of progress, of the Doha Round.⁶⁷

B *Expanded Mandate, Diversity of Views*

Despite assertions to the contrary, the GATT was never about, nor designed to achieve, 'free trade'.⁶⁸ Nor was the GATT designed to achieve 'fair trade'.⁶⁹ Instead, the GATT was formed to add certainty and predictability to international trade through bound tariff rates and, to a lesser extent, quotas.⁷⁰ Thus, the major success of the GATT was the agreement of nations to agree to respect their 'bindings' while continuously negotiating to gradually lower those barriers to trade.⁷¹ Moreover, the framers of the *GATT 1947* gave themselves several avenues to insulate domestic industries where political space was needed through, inter alia, weak provisions regulating the sensitive agriculture and textile sectors, the right to counteract dumping,⁷² subsidies and even fairly traded goods in the form of safeguards, and decision-making and dispute settlement reliant on the 'consensus' of all the contracting parties.⁷³

⁶⁵ For the US' withdrawal of its four year veto on Iran's WTO membership, see, eg, John Zarocostas and David Sands, 'US Withdraws Veto on Iran Quest to Join WTO', *The Washington Times* (Washington DC, US) 27 May 2005, A01. For the US' withdrawal of its veto on Libya's WTO membership: see, eg, David Black, 'World Trade Ministers Struggle to Break Down North-South Divide', *The Scotsman* (Edinburgh, Scotland) 28 July 2004, 23.

⁶⁶ Moore, above n 24, 105, 110–11.

⁶⁷ Consensus-based decision-making has also been criticised for a number of other reasons. For instance, Charnovitz lists consensus decision-making as one of two barriers to greater external transparency and NGO participation in the WTO (the other being the large number of governments that are not democratic and therefore 'may not share the values of transparency and participation'): Steve Charnovitz, 'The WTO and Cosmopolitics' in Ernst-Ulrich Petersmann (ed), *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance* (2005) 437, 444.

⁶⁸ Robert Hudec, *Enforcing International Economic Law: The Evolution of the Modern GATT Legal System* (1993) 19.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* 4–6.

⁷¹ *Ibid.* See also Trebilcock and Howse, above n 24, 27.

⁷² Hudec, above n 68, 6.

⁷³ Moore, above n 24, 105; Hudec, above n 68, 8.

While the GATT was imperfect and may have been dominated by certain high-income developed nations,⁷⁴ the purpose of the *GATT 1947* was never in doubt: the agreement existed to facilitate and liberalise trade, predominantly through binding tariff rates and gradually reducing the rates through subsequent negotiation.⁷⁵ The WTO, on the other hand, does not clearly exemplify a unified membership. Instead, quite the opposite is true and Members are attempting to pull the Organization in differing directions.⁷⁶ Thus, another institutional impediment to progress in the WTO is the expanded nature of the trading regime brought about by the Uruguay Round, coupled with the fact that Members themselves do not agree on the very purpose of the Organization.

Many nations still view the WTO as a forum for facilitating and liberalising international trade.⁷⁷ These nations — the US, Brazil, Canada, Chile, New Zealand, Australia and most industrialised Asian nations (including Singapore, South Korea, Hong Kong SAR and to some extent China) — believe that the Organization's main role is to bring certainty and security to international trade relationships. They hope to achieve this by first 'binding' trade barriers to a certain level and then gradually reducing and removing tariff and non-tariff barriers to trade in a transparent, non-discriminatory manner in order to increase competitiveness and market access opportunities. The nations which favour this approach see the principle of non-discrimination built through most-favoured-nation status⁷⁸, national treatment⁷⁹ and transparent binding commitments⁸⁰ as the key to the success of the Organization. In this regard, these nations are not necessarily inimical to 'behind the border' controls, such as regulatory and health standards⁸¹ and trade remedies,⁸² as long as the measures

⁷⁴ To some extent, this domination was logical as developing countries were excluded from most commitments and tariff reductions, nor did they sign on to the Tokyo Round of plurilateral agreements and as such, were not involved in negotiating the tariff commitments or substantive portions of plurilateral codes. As most developing countries now undertake commitments and obligations, their participation has increased. For instance, the majority of small group meetings (sometimes broadly referred to as 'Green Room meetings') contain representatives from developing nations. Former Director-General Mike Moore recounts that at key meetings in Doha, 27 per cent of representatives came from developed countries and 73 per cent from developing countries (Africa, 32 per cent; Asia, 23 per cent; and Latin America, 18 per cent): Moore, above n 24, 129.

⁷⁵ Hudec, above n 68, 19.

⁷⁶ See, eg, Jagdish Bhagwati, *The World Trading System at Risk* (2001) 51–7 (discussing the recent shift in the position of the US closer to unilateralism and regionalism).

⁷⁷ Hudec, above n 68, 4–6.

⁷⁸ *GATT 1947*, above n 4, art 1.

⁷⁹ *Ibid* art 3.

⁸⁰ *Ibid* art 2.

⁸¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on the Application of Sanitary and Phytosanitary Measures*) 1867 UNTS 493 ('*SPS Agreement*'); *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on Technical Barriers to Trade*) 1868 UNTS 120 ('*TBT Agreement*').

relate to barriers directly affecting trade. This is a complex and multi-faceted issue, as ‘behind the border’ measures take the WTO away from its traditional roots but are seen as necessary to monitor and regulate those gains to ensure they are not eroded by unnecessary and/or discriminatory measures. Thus, these ‘behind the border’ measures were created to protect the intent of the other covered agreements.

Even as the coverage of the multilateral trading regime expands widely under the WTO to fully encompass such topics as textiles and agriculture, agreements in services and intellectual property as well as the so called ‘behind the border’ measures, these nations still believe there is significant scope for traditional-style negotiations aimed at removing barriers to trade. In this regard, even with the broader governance and increased responsibilities, nations can still protect sensitive markets, special and differential treatment in the form of lower commitments would continue to exist and organisational standards would be minimised, leaving scope for deeper commitments if a nation so desired. In essence, this system operates in a manner similar to the GATT, where gradual liberalisation would occur while sufficient protections would remain to enable countries to proceed more slowly if they economically, socially or politically do not feel they can liberalise any further for the time being. Such a system allows for a maximum of national sovereignty to reside in the individual Member government, but is susceptible to a wave of protectionism either by a change of government or persuasive lobbying efforts, ending all further liberalisation. In the long-term, such a system may no longer be feasible due to ‘single undertaking’ and consensus decision-making essentially allowing one nation to block all further liberalisation.⁸³

Other Members favour expanding the topical coverage of the covered agreements and increasing the ‘behind the border’ regulatory aspects of the WTO to encompass harmonised standards.⁸⁴ Members of this coalition strongly supported the expansion of the Standards Code into its present form of the *SPS Agreement* and *TBT Agreement*, and robustly support the inclusion of the Singapore issues as well as labour and environmental issues in the

⁸² *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1876 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*) 1868 UNTS 201; *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1876 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on Subsidies and Countervailing Measures*) 1869 UNTS 14; *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1876 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*) 1868 UNTS 279 (15 April 1994); *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1876 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on Import Licensing Procedures*) 1868 UNTS 436.

⁸³ See, eg. Schott and Watal, above n 54, 284–5; Philip Levy, ‘Do We Need an Undertaker for the Single Undertaking?: Considering the Angles of Variable Geometry’ (Research Paper, Global Trade and Financial Architecture, Yale Center for the Study of Globalization, Yale University, 2004) 6 <http://www.ycsg.yale.edu/focus/gta/do_we_need.pdf> at 18 May 2007.

⁸⁴ See, eg. Trade Policy Review Body, *Trade Policy Review — Australia*, WTO Doc T/TPR/G/178 (29 January 2007) (Government Report); Trade Policy Review Body, *Trade Policy Review — Japan*, WTO Doc WT/TPR/G/175 (31 January 2007) (Government Report).

Organization's mandate.⁸⁵ Additionally, these Members support the eventual inclusion of other topics, such as food safety and product labelling, under the auspices of the WTO. The EC is the main proponent of this position.⁸⁶

Increased topical coverage coupled with a stringent, one size fits all regulatory approach would be a major shift in the organisational mantra but it would not be unprecedented. The inclusion of the *TRIPS Agreement* in the Uruguay Round opened the door for future agreements on topics which require Members to set binding minimal levels of standards and positive commitments.⁸⁷ This style of agreement was a radical departure from the *GATT 1947* — and is even different from the *General Agreement on Trade in Services* ('*GATS*')⁸⁸ — where Members merely make binding commitments on certain products and commit to further reductions. Such an approach inevitably leads to deeper and more complex commitments from Members and changes the nature of the Organization from one that promotes liberalisation to one that promotes regulatory standards. This shift of focus could hamper liberalisation while promoting protectionism through regulation. In fact, this is exactly how opponents view the regulatory approach: as a protectionist movement aimed at taking away the comparative advantage of developing countries, namely inexpensive labour.⁸⁹ For this reason, coupled with the fact that developing countries are already having trouble meeting their existing Uruguay Round commitments, it is no surprise that developing countries collectively and strongly oppose the regulatory movement. Reverting to GATT-era plurilateral agreements could be a potential solution, enabling countries willing to progress the agenda to do so, while simultaneously not forcing *all* Members to agree to be bound by the additional obligations. It is, however, uncertain whether such a system would be suitable in the long term and whether plurilateral agreements would be enough to stem the tide of bilateral and regional PTAs. Plurilateral agreements may not

⁸⁵ Labour is not included in Doha's mandate and trade and environment is barely on the Doha Agenda. This is because the Declaration merely requires that the Committee on Trade and Environment report to the Fifth Ministerial Conference

and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations. The outcome of this work ... shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the *Agreement on the Application of Sanitary and Phytosanitary Measures*, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.

Doha Declaration, above n 1, 7. While the EC assumed the issue would be negotiated in good faith, others (most notably India) used the above language to effectively curtail advancement of this issue.

⁸⁶ See, eg, David Byrne, European Commissioner for Health and Consumer Protection, 'How Governments Can Meet Consumer Concerns on the Trade Agenda' (Speech delivered at the Opening Plenary Meeting of the Transatlantic Consumer Dialogue, Washington DC, US, 10 February 2000) <http://ec.europa.eu/dgs/health_consumer/library/speeches/speech38_en.html> at 18 May 2007.

⁸⁷ Trebilcock and Howse, above n 24, 409–17; Duncan Matthews, *Globalising Intellectual Property Rights: The TRIPS Agreement* (2002) 1–3.

⁸⁸ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1B (*General Agreements on Trade in Services*) 1869 UNTS 183.

⁸⁹ Jagdish Bhagwati, *Free Trade Today* (2002) 51–2. It should be noted that Bhagwati is also an ardent opponent of including such regulatory provisions in PTAs, and of PTAs more generally: at 53–4, 106–119.

even be feasible, as any potential additional agreement can only be approved by consensus of all Members.⁹⁰ Therefore, it is questionable whether a nation opposing the expansion of the multilateral agenda — such as the addition of an investment agreement — would even consent to a plurilateral agreement for fear that opening the door may subsequently evolve to increasing demands for its conversion to a mandatory agreement.

Still yet, other Members appear to view the WTO as a development Organization for assisting developing countries and LDCs to increase growth and improve their living standards.⁹¹ These Members also appear to view the role of the WTO as a forum for expressing their views on the nature of trading relationships and the world. In this sense, these Members recognise that disparity of membership and consensus-based decision-making has transformed the Organization from one of action to one of bitter divisions marred by a lack of meaningful progress. These Members now seem to take the view that while some liberalisation should occur through the WTO, deep liberalisation should be made only by the developed nations or through PTAs, while the WTO should concentrate on providing technical assistance and special and differential treatment to developing countries. These nations strongly oppose the inclusion of regulatory standards into the WTO.⁹² Membership of this coalition is diverse, and the level of commitment to this view differs greatly. For instance, several LDCs — including most African and Caribbean nations — strongly support this position.⁹³ India, at times, also appears to strongly favour this approach and rejects any notion of increasing commitments from developing countries, regardless of their level of development.⁹⁴ Brazil accepts that developing countries must make commitments not only to increase their own growth and development but also to facilitate an agreement.⁹⁵ China, despite viewing the

⁹⁰ *Marrakesh Agreement*, above n 64, art IX:1.

⁹¹ Prominent examples of these members include those in the G-20 (including Brazil, India and South Africa): see G-20, *Two Years of Activities of the G-20: Moving Forward the Doha Round* (2005) 5 <http://www.g-20.mre.gov.br/conteudo/19082005_Breviario.pdf> at 18 May 2007.

⁹² These nations are joined by several prominent economists: see, eg, Jagdish Bhagwati, *In Defense of Globalization* (2004) 246–9.

⁹³ Additionally, if the issue of preference erosion is not sufficiently addressed, further liberalisation among developed countries will not be in the economic interests of these nations, as these nations currently receive preferences and any further liberalisation will reduce the value of the preferences.

⁹⁴ For example, the Indian agricultural ministry has reportedly requested that over 12 per cent of its tariff lines be deemed ‘sensitive’, including most of its agricultural imports; rice, wheat, maize, sorghum, millet, soybean, rapeseed, onions, garlic, several spices, dairy products, poultry, coffee, tea and castor oil were also present on the list. Moreover, in what seems to make a mockery of the system, India has also requested that both whisky and wines be deemed ‘sensitive’ products, ‘despite tenuous links to livelihood security and rural development’: ‘Indian Govt Denies Reports of Internal Disagreement on Special Products’ (2007) 11(10) *Bridges Weekly Trade News Digest* 5, available from <<http://www.ictsd.org>> at 18 May 2007.

⁹⁵ ‘WTO Talks in “Crisis” as High-Level Meeting Fails; Lamy to Try to Facilitate Consensus’ (2006) 10(Special Update) *Bridges Weekly Trade News Digest* 1, 2, available from <<http://www.ictsd.org>> at 18 May 2007.

WTO as a forum for facilitating and liberalising international trade, also appears to support this view to varying degrees at varying times.⁹⁶

Put simply, WTO Members cannot agree on the WTO's purpose. As a result, the *Doha Declaration* attempted to accommodate all Members' interests by including market access, regulatory issues as well as implementation issues relating to special and differential treatment for developing countries. For instance, the *Doha Declaration* broadly recognised the role that international trade opportunities play in advancing economic development and explained that the 21 subjects for negotiation were designed to progress the multilateral trading agenda and assist developing countries, particularly LDCs, in better realising the benefits of liberalised trade. According to the *Doha Declaration*, the latter goal is to be accomplished through a number of negotiating topics which form part of the Round including: improved market access for goods and services; a re-thinking of the balance the Organization has reached in terms of systemic rules in favour of developing countries and LDCs (including but not limited to more effective special and differential treatment); and more targeted and improved technical and capacity-building assistance.⁹⁷ The *Doha Declaration* also included such regulatory aspects as the Singapore issues, trade and environment, and trade remedies.⁹⁸

While the negotiating subjects and above principles were agreed to with relative ease,⁹⁹ continuing disagreement over the appropriate objectives and priorities of the Doha Round have hampered progress and brought the process to a standstill.¹⁰⁰ It is clear that even though the Round has been referred to as a 'Development Agenda',¹⁰¹ the Round was not designed to be 'free' for all self-proclaimed developing countries. In addition to the term 'Development Agenda' seemingly being dropped from official WTO vernacular, the *Doha Declaration* itself contains several areas where deeper commitments are contemplated, including the sensitive areas of agriculture and services. Furthermore, the *Doha Declaration* is ambitious in its inclusion of the Singapore issues as well as in mentioning such topics as trade, the environment and e-commerce. But developed countries have perhaps pushed their ambitions too far and failed to appreciate the fact that even the most willing developing countries were already having a hard time implementing existing disciplines mandated by the Uruguay Round.¹⁰² Thus, while developed countries were pushing to expand the topical coverage of the multilateral trading system,

⁹⁶ Jiangyu Wang, 'China's Regional Trade Agreements: The Law, Geopolitics, and Impact on the Multilateral Trading System' (2004) 8 *Singapore Year Book of International Law* 119, 142–7.

⁹⁷ *Doha Declaration*, above n 1, 1–2, 8–9.

⁹⁸ *Ibid* 1–6.

⁹⁹ 'Vital Signs — The Outlook for the Doha Round of Trade Talks', *The Economist* (London, UK) 16 August 2003, 11.

¹⁰⁰ Christian Bjørnskov and Kim Martin Lind, 'Progress or Retreat in the Doha Round? Analysing Underlying Policies in the WTO and the Harbinson Proposal' (Draft Paper, 2003) 1–3 <<http://www.ictsd.org/ministerial/cancun/docs/Doha-2.pdf>> at 18 May 2007.

¹⁰¹ WTO, *Doha Development Agenda: Negotiations, Implementation and Development* (2007), available from <<http://www.wto.org>> at 18 May 2007.

¹⁰² These countries include Senegal, Tanzania and generally 'South' countries: see J Michael Finger, 'Implementing the Uruguay Round Agreements: Problems for Developing Countries' (2001) 24 *The World Economy* 1097.

developing countries were still seeking further implementation delays for existing obligations.¹⁰³

Clearly stated, developed countries failed to appreciate the fact that their proposals were made too quickly after the Uruguay Round and were too demanding in their scope. It appears that developed countries truly did not anticipate the battle that would ensue over some of the issues on the negotiating agenda. This is particularly true in the case of some of the Singapore issues, such as trade facilitation, where developing countries resisted the commitments even though their inclusion would unquestionably assist in the development of those nations.¹⁰⁴ It is also clear that developed countries must offer developing countries flexibility in the form of a major revision to special and differential treatment and other preferential arrangements, as 'sensitive' products are often excluded from developed country Generalized System of Preferences ('GSP') programs.¹⁰⁵ More importantly, the opt-outs provided by the WTO rules have simply served to stymie progress and structural adjustments to the point that many nations are not prepared to meet their liberalisation commitments at the completion of the (somewhat arbitrary) transition periods.

C Regional Free Trade Agreements

With multilateral negotiations at a stalemate and the major players thus far refusing to significantly shift their positions on important issues such as agriculture, services, market access for industrial goods and non-tariff barriers, WTO Members are increasingly turning to PTAs to progress their agenda and solidify trading relationships.¹⁰⁶ This trend can be traced back to the failure of the 1999 Seattle Ministerial and the collapse of the 2003 Cancún Ministerial where negative negotiating, in concert with the consensus-based decision-making requirements of the WTO, caused several Members to rethink and ultimately diversify their trade strategies.¹⁰⁷

The link between the troubles of the Seattle Ministerial and the Doha Round and the shift to bilateralism/regionalism is easily identifiable. Prior to 2000, most countries eschewed PTAs in favour of concentrating almost exclusively on the multilateral trading regime.¹⁰⁸ In fact, according to the WTO, a total of 102 notifications were in force at the end of 1998: 78 agreements covering trade in

¹⁰³ Ibid.

¹⁰⁴ See, eg. Amrita Narlikar and Diana Tussie, 'The G20 at the Cancun Ministerial: Developing Countries and Their Evolving Coalitions in the WTO' (2004) 27 *The World Economy* 947, 950; Schott and Watal, above n 54, 78; Steve Woolcock, 'The Singapore Issues in Cancun: A Failed Negotiation Ploy or a Litmus Test for Global Governance?' 3, 13, available from <<http://www.lse.ac.uk/collections/internationalTradePolicyUnit>> at 18 May 2007.

¹⁰⁵ UN Conference on Trade and Development, 'New Market Access Initiatives in Favour of LDCs by the European Union, Canada and Japan' (2002) 5 *UNCTAD Generalised System of Preferences Newsletter* 2 <<http://www.unctad.org/en/docs/poitcdtsbm65.en.pdf>> at 18 May 2004.

¹⁰⁶ Jo-Ann Crawford and Roberto Fiorentino, 'The Changing Landscape of Regional Trade Agreements' (Discussion Paper No 8, WTO, 2005) 1 <http://www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf> at 18 May 2007. For the classic definition of a free trade area, custom union, common market and complete economic integration: see Bela Balassa, *The Theory of Economic Integration* (1961) 1–3.

¹⁰⁷ See, eg. Crawford and Fiorentino, above n 106, 16.

¹⁰⁸ Ibid.

goods notified under art XXIV of *GATT 1947*; 13 goods agreements between developing countries notified under the *Enabling Clause*;¹⁰⁹ and 11 agreements covering trade in services notified under the *GATS*.¹¹⁰ The majority of those agreements were negotiated and notified in the 1990s. This is unsurprising given the break-up of the Soviet Union and the plethora of trade agreements negotiated by the former Eastern bloc states as they transitioned towards a market economy.

However, the pattern of behaviour and seeming opposition to bilateralism/regionalism dramatically shifted following the Seattle Ministerial in 1999. Since that time, most countries have been and are still negotiating multiple PTAs with counterparts of varying size, power and economic development.¹¹¹ For instance, in the succeeding period (1999–present), the WTO has received almost 90 notifications involving every Member State except Mongolia.¹¹² Thus, Member countries that had few or no PTAs prior to 1999 are now negotiating and implementing multiple agreements. For instance, while the US had only negotiated PTAs with Israel (1985),¹¹³ Canada (1989)¹¹⁴ and Mexico (through the expansion of the *Canada-US Agreement* which became the *NAFTA*),¹¹⁵ it has since completed full scale agreements with Australia,¹¹⁶ Bahrain,¹¹⁷ Chile, CAFTA-DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua),¹¹⁸ Jordan,¹¹⁹ Morocco,¹²⁰ Oman¹²¹ and Singapore.¹²²

¹⁰⁹ *Differential and More Favourable Treatment: Reciprocity and Fuller Participation of Developing Countries*, GATT BISD, 26th Supp, 203, GATT Doc L/4903 (3 December 1979) (Multilateral Trade Negotiations Decision, adopted on 28 November 1979) ('*Enabling Clause*').

¹¹⁰ Committee on Regional Trade Agreements, *Mapping of Regional Trade Agreements Background Note by the Secretariat*, WTO Doc WT/REG/W/41 (11 October 2000) (Note by the Secretariat). In total, there were 124 PTAs during the GATT years, while in the succeeding ten years the WTO received 196 notifications: Crawford and Fiorentino, above n 106, 2–3.

¹¹¹ See John Whalley, 'Recent Regional Agreements: Why So Many, Who So Much Variance in Form, Why Coming So Fast, and Where Are They Headed?' (Working Paper No 1790, CESIFO, 2006), available from <<http://www.cesifo-group.de>> at 18 May 2007.

¹¹² WTO, *Regional Trade Agreements: Facts and Figures*, available from <<http://www.wto.org>> at 18 May 2007.

¹¹³ *United States–Israel Free Trade Agreement*, signed 22 April 1985 (entered into force 19 August 1985), available from <http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html> at 18 May 2007.

¹¹⁴ *Canada–United States Free Trade Agreement*, signed 2 January 1988 (entered into force 1 January 1989), available from <<http://www.agr.gc.ca>> at 18 May 2007.

¹¹⁵ *North American Free Trade Agreement*, opened for signature 17 December 1992, 32 ILM 289 (1993) (entered into force 1 January 1994) ('*NAFTA*').

¹¹⁶ *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).

¹¹⁷ *Bahrain–United States Free Trade Agreement*, signed 14 September 2004 (entered into force 1 August 2006), available from <http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html> at 18 May 2007.

¹¹⁸ *Central America–Dominican Republic–United States Free Trade Agreement*, signed 2 August 2005 (entered into force 30 June 2006), available from <http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html> at 18 May 2007.

¹¹⁹ *Jordan–United States Free Trade Agreement*, signed 24 October 2001 (entered into force 7 December 2001), available from <http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html> at 18 May 2007.

¹²⁰ *Morocco–United States Free Trade Agreement*, signed 15 June 2004 (entered into force 1 January 2006), available from <http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html> at 18 May 2007.

Further, the US is currently negotiating with South Korea,¹²³ Malaysia,¹²⁴ Panama,¹²⁵ the Southern Africa Customs Union (Botswana, Lesotho, Namibia, South Africa and Swaziland),¹²⁶ Thailand¹²⁷ and the United Arab Emirates ('UAE').¹²⁸

In addition, while Singapore's only PTA pre-1999 was the ASEAN Asian Free Trade Area ('AFTA') (1992),¹²⁹ it has signed agreements since that time with a range of nations, including China and Korea (as part of ASEAN agreements) as well as Jordan, India, Japan, Korea, New Zealand, Panama, Switzerland, Liechtenstein, Norway, Iceland, Brunei, Chile, Singapore and the US.¹³⁰ Singapore is also involved in ongoing negotiations with China, Canada, Gulf Cooperation Council ('GCC') (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE), Mexico, Pakistan and Peru.¹³¹ Having only negotiated one full scale PTA prior to 1999, the *Australia New Zealand Closer Economic Relations Trade Agreement*,¹³² Australia is another country to embrace regionalism. Australia has recently concluded agreements with Singapore,¹³³ Thailand¹³⁴ and the US,¹³⁵ and is currently negotiating/considering PTAs with

¹²¹ *Oman–United States Free Trade Agreement*, signed 19 January 2006 (entered into force 26 September 2006), available from <http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html> at 18 May 2007.

¹²² *Singapore–United States Free Trade Agreement*, signed 6 May 2003 (entered into force 1 January 2004), available from <http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html> at 18 May 2007.

¹²³ Office of the US Trade Representative, 'United States, South Korea Announce Intention to Negotiate Free Trade Agreement: Agreement Would Be Largest US FTA in 15 Years' (Press Release, 2 February 2006), available from <<http://www.ustr.gov>> at 18 May 2007.

¹²⁴ Office of the US Trade Representative, 'United States, Malaysia Announce Intention to Negotiate Free Trade Agreement' (Press Release, 8 March 2006), available from <<http://www.ustr.gov>> at 18 May 2007.

¹²⁵ Office of the US Trade Representative, 'US and Panama Complete Trade Promotion Agreement Negotiations' (Press Release, 19 December 2006), available from <<http://www.ustr.gov>> at 18 May 2007.

¹²⁶ Office of the US Trade Representative, 'USTR Zoellick to Discuss Regional Free Trade Agreement on Visit to South Africa' (Press Release, 10 January 2003), available from <<http://www.ustr.gov>> at 18 May 2007.

¹²⁷ Office of the US Trade Representative, *Thailand Free Trade Agreement* (2006), available from <http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html> at 18 May 2007.

¹²⁸ Office of the US Trade Representative, 'United States to Begin Free Trade Negotiations This Week with the United Arab Emirates and Oman' (Press Release, 8 March 2005), available from <<http://www.ustr.gov>> at 18 May 2007.

¹²⁹ *Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area*, signed 28 January 1992 (entered into force 28 January 1992) <<http://www.aseansec.org/12375.htm>> at 18 May 2007.

¹³⁰ See International Enterprise Singapore, *Singapore's FTA Network* (2007) <<http://www.iesingapore.gov.sg/wps/portal/FTA>> at 18 May 2007.

¹³¹ *Ibid.*

¹³² Signed 28 March 1983, [1983] ATS 2 (deemed to have entered into force 1 January 1983).

¹³³ *Singapore–Australia Free Trade Agreement*, signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003).

¹³⁴ *Thailand–Australia Free Trade Agreement*, signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005).

¹³⁵ *Australia–United States Free Trade Agreement*, above n 116.

ASEAN,¹³⁶ Chile,¹³⁷ China,¹³⁸ South Korea,¹³⁹ Malaysia,¹⁴⁰ GCC¹⁴¹ and Japan.¹⁴²

Most notable in this explosion of PTAs are the Southeast Asian nations, who have historically avoided PTAs in favour of a solely multilateral approach.¹⁴³ For instance, while neither Japan nor South Korea had negotiated any agreements prior to 1999, Japan has now completed agreements with Singapore¹⁴⁴ and Mexico,¹⁴⁵ while South Korea has signed agreements with Singapore and Chile. Japan is currently negotiating/considering agreements with Australia, Chile, India, Indonesia, South Korea, Malaysia, the Philippines, Thailand and ASEAN.¹⁴⁶ South Korea is negotiating/considering agreements with ASEAN, Canada, India, MERCOSUR (Brazil, Argentina, Uruguay, Venezuela, and Paraguay), EC and the US.¹⁴⁷

To date, the evidence on whether PTAs are economically beneficial or detrimental to the world economy is contradictory and/or inconclusive.¹⁴⁸ Even if PTAs are not meaningfully shifting trade patterns or otherwise influencing trade data, their rise has diverted the attention and resources of trade ministries

¹³⁶ DFAT, Australia, *The Australia–ASEAN–New Zealand Free Trade Agreement* <<http://www.dfat.gov.au/trade/fta/asean/index.html>> at 18 May 2007.

¹³⁷ DFAT, Australia, *Towards a Chile–Australia Free Trade Agreement* <<http://www.dfat.gov.au/geo/chile/fta/index.html>> at 18 May 2007.

¹³⁸ DFAT, Australia, *Australia–China Free Trade Agreement Negotiations* <<http://www.dfat.gov.au/geo/china/fta/>> at 18 May 2007.

¹³⁹ Warren Truss, Minister for Trade, ‘Australia–Korea FTA Study’ (Press Release, 6 December 2006) <http://www.trademinister.gov.au/releases/2006/wtt026_06.html> at 18 May 2007.

¹⁴⁰ DFAT, Australia, *Australia–Malaysia Free Trade Agreement Negotiations* <<http://www.dfat.gov.au/geo/malaysia/fta/index.html>> at 18 May 2007.

¹⁴¹ DFAT, Australia, *Australia–Gulf Cooperation Council (GCC) FTA* <<http://www.dfat.gov.au/trade/fta/gcc/index.html>> at 18 May 2007.

¹⁴² DFAT, Australia, *Australia–Japan Free Trade Agreement Negotiations* <<http://www.dfat.gov.au/geo/japan/fta/index.html>> at 18 May 2007.

¹⁴³ Michael Ewing-Chow, ‘Southeast Asia and Free Trade Agreements: WTO Plus or Bust?’ (2004) 8 *Singapore Year Book of International Law* 193, 196.

¹⁴⁴ See International Enterprise Singapore, above n 130.

¹⁴⁵ Ministry of Foreign Affairs, Japan, *Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership* (2006) <<http://www.mofa.go.jp/region/latin/mexico/agreement/epa0606.pdf>> at 18 May 2007.

¹⁴⁶ Ministry of Foreign Affairs, Japan, *Free Trade Agreement (FTA) and Economic Partnership Agreement (EPA)* (2007) <<http://www.mofa.go.jp/policy/economy/fta/index.html>> at 18 May 2007.

¹⁴⁷ Ministry of Foreign Affairs and Trade, Republic of Korea, *Economy and Trade: FTA* (2007) <http://www.mofat.go.kr/me/me_a005/me_b022/me05_04.jsp> at 18 May 2007.

¹⁴⁸ For findings that PTAs are net-welfare enhancing, see Asian Development Bank, *Asian Development Outlook 2002: Special Chapter: Preferential Trade Agreements in Asia and the Pacific* (2002) 175–6, available from <<http://www.adb.org>> at 18 May 2007; World Bank, *Global Economic Prospects: 2005* (2005) 57–65, available from <<http://www.worldbank.org>> at 18 May 2007; Dean A DeRosa, ‘The Trade Effects of Preferential Arrangements: New Evidence from the Australia Productivity Commission’ (Working Paper No 07-01, Peterson Institute for International Economics, 2007), available from <<http://www.petersoninstitute.org>> at 18 May 2007. For findings that PTAs decrease net-welfare, see Bhagwati, *The World Trading System at Risk*, above n 76, 66–79; Bhagwati, *Free Trade Today*, above n 89, 53–4. For findings that PTAs have little or no economic effect on trading patterns and the world economy, see Richard Pomfret, ‘Is Regionalism an Increasing Feature of the World Economy?’ (Institute for International Integration Studies Discussion Paper No 164, May 2006) 1, available from <<http://www.tcd.ie>> at 18 May 2007.

and governmental officials away from multilateral trade negotiations.¹⁴⁹ This is not to suggest that governments have ignored or given up on the WTO negotiations and the Doha Round. Instead, the point is simply that governments have now developed a parallel trade strategy and are investing a significant amount of monetary, technical and professional resources into studying, initiating, negotiating, finalising and implementing PTAs.

The development and exploitation of a bilateral/regional trade strategy in parallel with a multilateral strategy has obvious merits. For instance, due to the fact that PTAs are normally negotiated between a small number of countries all willing to bargain in good faith and achieve results, PTAs can be negotiated more quickly and entail more meaningful liberalisation than multilateral negotiations.¹⁵⁰ Such results can take a number of different forms, including: increased market access through deeper tariff commitments and reductions; increased quotas or the reduction of non-tariff barriers; deeper commitments (for example, services or government procurement); or increased efficiencies through greater cooperation between member governments.¹⁵¹ Moreover, PTAs can serve as a testing ground for issues lacking multilateral consensus, such as investment, competition policies and labour and environmental issues.¹⁵² PTAs can also be used to raise minimum standards, such as the *TRIPS-Plus* provisions which raise intellectual property protection and enforcement standards in many agreements.¹⁵³ Additionally, PTA members can use the agreements to gain a competitive advantage over non-member competitors, diversify trading patterns or to develop a 'hub and spoke' strategy.¹⁵⁴ Further, not all PTAs are negotiated for economic reasons; numerous PTAs are negotiated for regional peace and security or for geopolitical reasons, to name but a few.¹⁵⁵

PTAs also have significant limitations. First, PTAs are inimical to the most favoured nation principle, as they discriminate by treating members more favourably than non-members.¹⁵⁶ The long term effects of the rise in PTAs and increased standards they embrace, without corresponding codification into the multilateral system, could threaten the survival of the WTO as a strong, credible forum.¹⁵⁷ Second, while PTAs are designed to create trade, they might merely reward inefficiencies by diverting trade to a bilateral partner due to the lower tariff rates and/or increased market access available under the PTA at the

¹⁴⁹ Director-General Lamy recently estimated that the number of PTAs could be 'around 400' by 2010: Pascal Lamy, 'Regional Agreements: The "Pepper" in the Multilateral "Curry"' (Speech delivered at the Confederation of Indian Industries Partnership Summit, Bangalore, India, 17 January 2007), available from <<http://www.wto.org>> at 18 May 2007.

¹⁵⁰ Ewing-Chow, above n 143, 196.

¹⁵¹ *Ibid* 196–7.

¹⁵² Picker, above n 26, 277.

¹⁵³ See, eg, Bryan Mercurio, 'TRIPS-Plus Provisions in FTAs: Recent Trends' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (2006) 215, 215–6, 219.

¹⁵⁴ Picker, above n 26, 275; Richard Baldwin, 'A Domino Theory of Regionalism' in Richard Baldwin, Pertti Haaparnata and Jaakko Kiander (eds), *Expanding Membership of the European Union* (1995) 25, 27–31.

¹⁵⁵ See, eg, Picker, above n 26, 272, 278–9.

¹⁵⁶ Moore, above n 24, 104.

¹⁵⁷ *Ibid*.

expense of a more efficient producer in a non-member country.¹⁵⁸ In such circumstances, the more efficient producer from a third country loses out as buyers purchase goods from the less efficient, but now cheaper, producer with whom an agreement has been reached.¹⁵⁹ Third, the gains from PTAs can prove ephemeral as others conclude agreements which erode the gains reached in prior agreements.¹⁶⁰ Fourth, the increasing number of PTAs has resulted in multiple sets of rules, some of which overlap and/or contradict one another — commonly called a ‘spaghetti bowl’ of rules.¹⁶¹ This creates confusion and adds to the costs of international trade. Fifth, while PTAs allow for deeper, more meaningful integration and market access in some areas, they are not a suitable forum to reform some of the more controversial issues, such as agriculture, fishery subsidies and trade remedies.¹⁶² Sixth, while developing countries can certainly benefit from PTAs, they have also proven the ability to influence the multilateral trading system by forming coalitions and using strength in numbers to counter pressure from the larger, more developed nations.¹⁶³ Such an approach cannot be utilised bilaterally/regionally.

Thus, while PTAs may have the beneficial effect of opening up economies, especially in Southeast Asia and Sub-Saharan Africa, and providing deeper, more meaningful liberalisation than that which can be accomplished multilaterally, the fact remains that they are incapable of replacing a strong multilateral forum.¹⁶⁴ In addition, not only is the rapid rise of PTAs undermining one of the basic principles of the multilateral system, they are doing so by exploiting another institutional impediment — the WTO rules regulating their compatibility with the multilateral system.

Article XXIV:4 of *GATT 1947* (and similarly art V of *GATS*) provide the basis for PTAs. Article XXIV:4 states:

The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between

¹⁵⁸ Bhagwati, *Free Trade Today*, above n 89, 107–11.

¹⁵⁹ Arvind Panagariya, ‘Preferential Trade Liberalization: The Traditional Theory and New Developments’ (2000) 38 *Journal of Economic Literature* 287, 290.

¹⁶⁰ This reasoning is commonly called the ‘domino effect’: the more nations that join FTAs, the greater the need for non-members to negotiate FTAs just to keep their goods on competitive terms. For more on the domino effect, see Baldwin, above n 154, 25, 32–46.

¹⁶¹ The term ‘spaghetti bowl’ was first used by Jagdish Bhagwati: ‘US Trade Policy: The Infatuation with Free Trade Areas’ in Jagdish Bhagwati and Anne O Krueger, *The Dangerous Drift to Preferential Trade Agreements* (1995) 2. Bhagwati normally uses the example of differing rules of origin in PTAs to explain the harm caused by the spaghetti bowl effect: see, eg, US House of Representatives, Committee on Financial Services, *Testimony to Subcommittee on Domestic and International Monetary Policy, Trade and Technology*, 1 April 2003, 5 (Jagdish Bhagwati, University Professor (Economics) Columbia University).

¹⁶² In the case of agriculture, a nation may reduce tariff rates or increase quotas, thus increasing market access for its PTA partner(s) and reducing the competitiveness of non-member nations, but PTAs cannot resolve other troublesome issues, most notably subsidies. If a PTA member reduces its agricultural subsidies, the competitiveness of PTA partners may increase, but the competitiveness of non-members that maintain their subsidies is also consolidated in both PTA and non-PTA markets. Therefore, for both practical and political reasons, one cannot expect that a nation will agree to cut subsidies in a bilateral framework.

¹⁶³ Moore, above n 24, 107–9; See Meredith Kolsky Lewis, ‘The Free Trade Agreement Paradox’ (2005) 21(4) *New Zealand Universities Law Review* 554, 558–9.

¹⁶⁴ Ewing-Chow, above n 143, 195–7, 203–6.

the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to *facilitate trade* between the constituent territories and *not to raise barriers* to the trade of other contracting parties with such territories.¹⁶⁵

Article XXIV of *GATT 1947* also provides three basic rules that WTO members must comply with in order to establish a PTA covering trade in goods:

- 1 An obligation to notify the WTO of the PTA;¹⁶⁶
- 2 An obligation not to raise the overall level of protection and make access to products from third party members not participating in the PTA more onerous ('the external trade requirement');¹⁶⁷ and
- 3 An obligation to liberalize substantially all trade among members of the PTA ('the internal trade requirement').¹⁶⁸

However, due to consensus-based decision-making, the Committee on Regional Trade Agreements ('CRTA'), which examines PTAs for their compatibility with WTO rules, does not in practice have the ability to declare that a PTA fails to meet the requirements of art XXIV of *GATT 1947*. Prior to the implementation of the WTO, art XXIV of *GATT 1947* working parties, for political and theoretical reasons, often disagreed on the compatibility of proposed PTAs and simply declined to make a formal decision. In fact, empirical evidence suggests that only five working parties ever agreed by consensus on the consistency of a PTA with art XXIV of *GATT 1947*.¹⁶⁹ For the other 50-plus agreements, the working parties simply did not reach consensus and no further action was taken.¹⁷⁰ Moreover, throughout the GATT years and into the WTO, the CRTA (and its predecessor) could not and cannot even agree on issues fundamental to their mandate, such as whether the task is an *ex ante* or *ex post* review¹⁷¹ or what exactly comprises 'substantially all trade'.¹⁷²

¹⁶⁵ *GATT 1997*, above n 4, art XXIV:4 (emphases added).

¹⁶⁶ *Ibid* art XXIV:7(a).

¹⁶⁷ *Ibid* art XXIV:5.

¹⁶⁸ *Ibid* art XXIV:8. For preferential arrangements granted from developed country Members to developing country Members or between developing country Members, the so-called *Enabling Clause*, above n 109, applies. See also Lorand Bartels, 'The WTO *Enabling Clause* and Positive Conditionality in the European Community's GSP Program' (2003) 6 *Journal of International Economic Law* 507. For commentary on the dispute settlement decision and its long term effects, see Peter M Gerhart and Archana Seema Kella, 'Power and Preferences: Developing Countries and the Role of the WTO Appellate Body' (2004) 30 *North Carolina Journal of International Law and Commercial Regulation* 515, 531; *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R, AB-2004-1 (7 April 2004) (Report of the Appellate Body).

¹⁶⁹ See, eg, Jeffrey J Schott, 'More Free Trade Areas?' in Jeffrey J Schott (ed), *Free Trade Areas and US Trade Policy* (1989) 3, 25; *Working Party on the Customs Union between the Czech Republic and the Slovak Republic*, GATT Doc L/7501 (15 July 1994).

¹⁷⁰ Pascal Lamy, 'Lamy Welcomes WTO Agreement on Regional Trade Agreements' (News Item, 10 July 2006), available from <<http://www.wto.org>> at 18 May 2007.

¹⁷¹ For instance, *GATT 1947*, above n 4, art XXIV:7(a) contemplates the notification of a PTA prior to the completion of the agreement, requiring that:

Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area shall promptly notify the CONTRACTING PARTIES and shall make available to [the working party] such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

The rules regulating PTAs are ambiguous and are not designed to facilitate the work of the CRTA. While the dispute settlement system of the WTO has begun to weigh in on the issue,¹⁷³ Members are reticent to challenge PTAs for fear that their own PTAs will subsequently be questioned. In addition, as detailed below, the effective control of PTAs — an exception to WTO commitments — should be regulated and monitored through the negotiated commitments of Members, not through subsequent interpretation by a Panel or the Appellate Body.

D *Ineffective Governance Combined with Binding and Enforceable Dispute Settlement*

The legalistic, mandatory dispute settlement mechanism of the WTO has often been referred to as the ‘crown jewel’ of the Uruguay Round.¹⁷⁴ Its success stems, in large part, from the fact that it is the only international system capable of enforcing the commitments of member states through binding dispute settlement and the power to authorise sanctions (retaliatory measures). The effectiveness of the *Understanding on Rules and Procedures Governing the*

However, in practice, the GATT/WTO has been notified of the majority of PTAs after their successful completion. Nevertheless, art XXIV:7(a) does not require working party/CRTA approval to join a PTA. Therefore, as long as the requirements of art XXIV are met, Members are free to enter into PTAs. Members did, however, recently agree to early notification procedures, though the new procedures do not provide consequences or penalties for the failure to abide by them: *Negotiating Group on Rules*, WTO Doc TN/RL/18 (13 July 2006) (Report of the Chairman to the Trade Negotiations Committee).

¹⁷² For instance, DFAT has pointed out that an ‘agreed understanding of the meaning of “substantially all the trade” has so far eluded the WTO Membership’: *Submission on Regional Trade Agreements by Australia*, WTO Doc TN/RL/W/15 (9 July 2002) [1] (Submission to Negotiating Group on Rules). Further, an EEC working party report wrote ‘it was ... inappropriate to fix a general figure of the percentage of trade which could be subjected to internal barriers’: *Report on the Treaty Establishing the European Economic Community*, GATT Doc L/778 (20 December 1957) 29 (Report Submitted by the Committee on the *Rome Treaty*). Moreover, in 1957, the EEC proposed that ‘a free-trade area should be considered as having been achieved for substantially all the trade when the volume of liberalized trade reached 80 per cent of total trade’: *Report on the Treaty Establishing the European Economic Community*, GATT Doc L/778 (20 December 1957) 28–9 (Report Submitted by the Committee on the *Rome Treaty*). The working party, however, did not accept the recommendation. Another working party expressed the view that even if the volume of liberalised trade reached 90 per cent of total trade, it would not be ‘considered to be the only factor to be taken into account’: *Report of the Working Party on the European Free Trade Association*, GATT Doc L/1235 (4 June 1960) [48]. Yet other working parties expressed the view that a PTA could never meet the ‘substantially all trade’ obligation if it excluded a whole sector from its terms: *Report of the Working Party on the Free-Trade Agreement between Canada and the United States*, GATT Doc L/6927 (31 October 1991) 73. More recently, the Appellate Body stated: ‘It is clear, though, that “substantially all the trade” is not the same as *all* the trade, and also that “substantially all the trade” is something considerably more than merely *some* of the trade’: *Turkey — Restrictions on Imports of Textile and Clothing Products*, WTO Doc WT/DS34/AB/R, AB-1999-5 (22 October 1999) [48] (Report of the Appellate Body) (*‘Turkey — Textiles’*) (emphases in original).

¹⁷³ *Turkey — Textiles*, WTO Doc WT/DS34/AB/R, AB-1999-5 (22 October 1999) [48] (Report of the Appellate Body); *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WTO Doc WT/DS202/AB/R, AB-2001-9 (15 February 2002) (Report of the Appellate Body).

¹⁷⁴ See, eg, Heinz Hauser and Thomas Zimmermann, ‘The Challenge of Reforming the WTO Dispute Settlement Understanding’ (2003) 38 *Intereconomics — Review of European Economic Policy* 241.

Settlement of Disputes ('DSU')¹⁷⁵ in resolving disputes and gaining Member compliance has only added to the importance of the Organization as a whole.¹⁷⁶ Overall, the dispute settlement system has functioned exceedingly well.¹⁷⁷ The system is used by both developed and developing countries and, in contradistinction to the GATT, the compliance rate with decisions of the Dispute Settlement Body ('DSB') has been extraordinary when compared to other international organisations.¹⁷⁸

While almost all international agreements, and domestic legislation, contain vaguely worded provisions and textual ambiguities requiring judicial interpretation, the *DSU* is becoming a victim of its own success. The achievements of the *DSU*, coupled with the stagnation of organisational progress at the 'legislative' level, created a situation whereby Members have begun placing increased expectations on the dispute settlement process not only to adjudicate disputes but also to resolve contentious issues where consensus cannot be reached through negotiations. Therefore, it must be stressed that dispute settlement in and of itself is not an impediment to progress in the WTO; however, the success of the dispute settlement mechanism has become an impediment due to ineffective governance, most notably in the form of the inability to reach consensus.

Given the failure of Members to reach decisions and effectively govern, instead of resolving issues through diplomatic channels and negotiation, Members are now relying more on the dispute settlement process to decide contentious issues. This trend can be seen in numerous instances, such as: the linkage between extraterritorial environmental measures and trade (the product/process debate);¹⁷⁹ *amici curiae*;¹⁸⁰ open hearings;¹⁸¹ trade remedies¹⁸² (both in substance and procedurally); and, perhaps most importantly, agricultural

¹⁷⁵ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401 ('*DSU*').

¹⁷⁶ Trebilcock and Howse, above n 24, 153–4.

¹⁷⁷ Peter Sutherland et al, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium — Report by the Consultative Board to the Director-General Supachai Panitchpakdi* (2004) 50 ('Sutherland Report').

¹⁷⁸ Although the number of panel requests has decreased in recent years, the number of complaints proceeding to the panel stage has remained relatively constant. When controlled for the spurt of disputes immediately following the creation of the WTO as well as for the last year when Members were occupied with Doha Round negotiations, this point is even more illustrative. For statistics, see *Facts and Figures on WTO Dispute Settlement* <<http://www.worldtradelaw.net/dsc/stats.htm>> at 18 May 2007.

¹⁷⁹ *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) (Report of the Appellate Body).

¹⁸⁰ *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc WT/DS138/AB/R, AB-2000-1 (10 May 2000) (Report of the Appellate Body); *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) (Report of the Appellate Body).

¹⁸¹ *European Communities — Measures concerning Meat and Meat Products (Hormones)*, WTO Docs WT/DS26/AB/R, WT/DS48/AB/R, AB-2000-11 (16 January 1998) (Report of the Appellate Body) ('*EC — Hormones*').

¹⁸² *United States — Continued Dumping and Subsidy Offset Act of 2000*, WTO Docs WT/DS217/AB/R, WT/DS234/AB/R, AB-2002-7 (16 January 2003) (Report of the Appellate Body).

subsidies.¹⁸³ Put simply, Members seem to believe that it is easier and perhaps less costly to litigate a dispute and hopefully receive a favourable decision rather than utilise the excruciatingly slow process of garnering consensus on a particular issue.

While the phenomenon of parties seeking to place more of a ‘lawmaking’ role onto the judiciary is not unheard of in the domestic context, the consequences are very different internationally. Unlike the domestic context, the legitimacy of the DSB — much like other international organisations and tribunals — is granted by the member states themselves. There is no inherent right for the ‘judicial’ branch to exist and Members were careful to draft the *DSU* in such a manner to preserve the rights of Members and limit the ability of the DSB to ‘add to or diminish the rights and obligations provided in the covered agreements’.¹⁸⁴ Such carefully crafted language was designed to curtail judicial activism so that Members would not be forced to abide by obligations for which they did not negotiate or acquiesce. Most importantly, governments and the citizenry in both developed and developing countries are not ready to accept decisions which impact upon domestic regulations proclaimed by an ‘unelected foreign judiciary’ with questionable legal authority to make such a decision. As previously discussed, the WTO is a member-driven organisation with every decision taken on the basis of consensus. In this regard, no government is faced with the situation of abiding by a rule or obligation to which it has not agreed.

Given the above, the trend of forcing ‘consensus’ by lacing controversial issues onto the dispute settlement system is dangerous, as repeated decisions on issues lacking true consensus among WTO Members has the potential to erode the legitimacy not only of the DSB but also of the Organization as a whole.¹⁸⁵ To date, the DSB is attempting to manage this situation by utilising judicial restraint to avoid contentious issues when they need not be decided in order to resolve the dispute and, when it must rule on such issues, issuing sensible and practical decisions so as not to overstep their mandate. In the main, Panels and the Appellate Body have recognised the need to balance their mandate under art 11 of the *DSU* to make ‘an objective assessment of the matter before it’ with the political sensibilities of Member states.¹⁸⁶ Nevertheless, they have been accused of overstepping their authority and even encroaching upon the sovereignty of Members.

However, the interests and motives of some critics may be questioned. The Sutherland Report warned of such ‘interested’ criticism when it pointed out that many of the ‘harshest critics’ have ‘advocacy roles related to a variety of special interests’ and likely do not have ‘the best interests of the overall WTO system in

¹⁸³ *United States — Subsidies on Upland Cotton*, WTO Doc WT/DS267/AB/R, AB-2004-5 (3 March 2005) (Report of the Appellate Body); *European Communities — Export Subsidies on Sugar*, WTO Docs WT/DS265/AB/R; WT/DS266/AB/R; WT/DS283/AB/R, AB-2005-2 (28 April 2005) (Report of the Appellate Body).

¹⁸⁴ *DSU*, above n 175. For commentary on the articles and the dispute settlement process of the WTO: see Yang Guohua, Bryan Mercurio and Li Yongjie, *WTO Dispute Settlement Understanding: A Detailed Interpretation* (2005) 13–35, 223–9.

¹⁸⁵ See Yang, Mercurio and Li, above n 184, 226–7.

¹⁸⁶ See, eg, *Japan — Taxes on Alcoholic Beverages*, WTO Docs WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, AB-1996-2 (4 October 1996) (Report of the Appellate Body); *EC — Hormones*, WTO Docs WT/DS26/AB/R; WT/DS48/AB/R, AB-1997-4 (16 January 1998) (Report of the Appellate Body).

mind'.¹⁸⁷ One example of such 'interested' criticism can be demonstrated by the recent assertions by Robert Lighthizer, partner of the law firm, Skadden, Arps, Slate, Meagher & Flom, that:

WTO jurists have engaged in an all-out assault on trade remedy measures. Even legal experts hostile to these laws, as well as the Bush Administration, have expressed astonishment at the level to which panels are simply writing new requirements into the WTO agreements. In this same vein, the *Safeguard Agreement* has become a virtual dead letter — with every measure brought before the WTO struck down, and the legal hurdle set so high that few view the judicially established standard as achievable.¹⁸⁸

It must be remembered that Lighthizer is a private lawyer heavily involved in domestic trade remedy disputes who has an interest in advocating for his clients.¹⁸⁹ These interests do not necessarily coincide with the interests of the WTO or the long-term stability and success of the dispute settlement mechanism. Regardless, such public criticism does sometimes lead to discontent from not only other commentators, but also government officials and WTO Member governments.¹⁹⁰

The Sutherland Report recommended an additional form of oversight on Panels or the Appellate Body in an attempt to refute critics and improve the system by

occasionally select[ing] particular findings for in-depth analysis by a reasonably impartial special expert group of the DSB, so as to provide a measured report of constructive criticism for the information of the WTO system, including the Appellate Body and panels.¹⁹¹

Moreover, the Sutherland Report goes so far as to propose that 'in an extreme case', the report of the expert group could 'perhaps' recommend that the DSB and General Council 'take measures under Article IX of the *Agreement Establishing the WTO*, for a "definitive interpretation" of the treaty text'.¹⁹²

¹⁸⁷ Sutherland Report, above n 177, 55.

¹⁸⁸ Robert Lighthizer, Council on Foreign Relations, *Is the WTO Dispute Settlement System Fair?* (20 February 2007) <<http://www.cfr.org/publication/12665>> at 18 May 2007.

¹⁸⁹ The Sutherland Report further noted that trade remedies account for 53 per cent of recent WTO disputes, which is potentially dangerous for the DSB. This is due to its role as an appellate review of domestic investigating authorities, which takes into account domestic law and broad national interests. While the DSB is usually careful to simply enforce the procedural requirements of the various agreements, the Sutherland Report points out the need to balance the rigor of procedural certainty with the national goals of the trade remedy: above n 177, 55–6. Such a warning, however, is extraordinary (even if it is true that the level of scrutiny in trade remedies has exceeded normal boundaries) given that the WTO tribunals must enforce agreed-upon standards and procedural requirements listed in the covered agreements. Any alternative method of interpretation opens the door to trade remedies being used for even more protectionist or political purposes.

¹⁹⁰ For discussion highlighting and countering several criticisms, including loss of sovereignty and strict adherence to the rule of law: see Robert Lawrence, Council on Foreign Relations, *The United States and the WTO Dispute Settlement System* (Council Special Report No 25, The Bernard and Irene Schwartz Series on American Competitiveness, March 2007), available from <<http://www.cfr.org>> at 18 May 2007; James Smith, 'Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement' (2004) 11 *Review of International Political Economy* 542.

¹⁹¹ Sutherland Report, above n 177, 56.

¹⁹² *Ibid.*

Such a special expert group would be dangerous and encroach upon the separation of powers of the Organization. Unnecessary oversight has the ability to potentially unsettle and destabilise the entire dispute settlement mechanism. For instance, why would a Member abide by the rulings of the Appellate Body if the select group find that a legal issue in the dispute was wrongly decided? There now exists a healthy body of academics and observers, based outside the system, that provide constant commentary, criticism and recommendations. In fact, it would be hard to find any legal cases in any domestic judicial system subject to more commentary than any WTO dispute. Furthermore, the suggestion that expert report be taken, in an undefined 'extreme case', to the General Council, an inherently political body, risks turning the system from one based on the rule of law into one based in the political arena where 'special interests' can interject and interfere.¹⁹³

The dispute settlement system continues to be one of the major success stories of the WTO. However, its success, coupled with a failure of effective governance and the corresponding rise in the number of political or governance issues appearing in disputes, threatens to overload the system and undermine the legitimacy of the entire Organization. Such a result can perhaps only be avoided through reform of the governance procedures in the WTO. The Sutherland Report notes that

[i]mprovement in the various decision-making processes of the WTO to avoid what sometimes appears to be stalemate situations or other inability to act (sometimes attributed to the consensus rule), would considerably diminish the incentive to bring situations to the dispute settlement system, rather than work out agreed solutions though [sic] the diplomatic process.¹⁹⁴

IV CONCLUDING ANALYSIS

The WTO fundamentally changed the nature, structure and purpose of the multilateral trading system. Not only did Members provide the WTO with broader governance powers and responsibility than previously existed under the GATT, the WTO also mandated a previously unseen quantity of legal and regulatory harmonisation.¹⁹⁵ Moreover, the WTO created a powerful, binding system of dispute settlement with real enforcement capabilities. Perhaps most importantly, in terms of curtailing progress and further legal development, the WTO has become a visible target of civil society and domestic lobbyist efforts and it has correspondingly become a highly politicised organisation.¹⁹⁶ The combination of the above factors has contributed to a lack of identity within the WTO. In short, WTO Member States simply do not agree on the nature, scope and direction of the WTO. In combination, these factors have made a significant contribution to a decline in the effective functioning of the multilateral trading system. Thus progress, further liberalisation or even seemingly benign amendments of any kind face an uncertain future of compromise, delay and

¹⁹³ Mitsuo Matsushita, 'The Sutherland Report and Its Discussion of Dispute Settlement Reforms' (2005) 8 *Journal of International Economic Law* 623, 626.

¹⁹⁴ Sutherland Report, above n 177, 55.

¹⁹⁵ Moore, above n 24, 103.

¹⁹⁶ Charnovitz, above n 67, 438–40; Moore, above n 24, 101–9.

frustration. In such a circumstance, PTAs have proliferated at an unprecedented rate.¹⁹⁷

This is not to downplay the WTO Members' various negotiating positions; substantial differences over a number of key issues do exist. In addition, and perhaps just as importantly, considerable political realities continue to limit productive bargaining. Moreover, contradictions among the more significant developed countries, who over the years have demanded strict observance of the rules from others, while sometimes diverging from the rules when it is beneficial to their own interests, has led to growing resentment among developing countries. One example of this type of behaviour can be seen in the area of trade and pharmaceuticals: the US had long insisted upon strict intellectual property protection from developing countries¹⁹⁸ including strict compliance — with the exceptions for compulsory licences from nations with widespread HIV/AIDS, malaria, TB and other major public health crises. But the US quickly threatened to issue a compulsory licence for the Bayer Corporation's antibiotic Ciprofloxacin after four deaths from anthrax occurred in the weeks following the September 11 terrorist attacks.¹⁹⁹

On the other hand, the larger developing countries have also presented a contradictory case by strongly demanding equal status in certain situations, such as at the bargaining table, but only when equality suits. In other situations, these nations strongly oppose equal status, such as by advocating the strengthening of special and differential treatment from being largely hortatory in nature to mandatory and enforceable, while at the same time refusing to differentiate themselves from less developed Members.²⁰⁰ Such a strong stance towards special and differential treatment is understandable for poorer, less developed nations but is no longer feasible for larger, more powerful developing nations. Therefore, despite protestations, one size does not fit all and developing countries must accept that the substantial economic differences *between*

¹⁹⁷ See, eg. Whalley, above n 111, 28.

¹⁹⁸ Matthews, above n 87, 31–2.

¹⁹⁹ For more on this issue: see Consumer Project on Technology, *Ciprofloxacin: The Dispute over Compulsory Licenses* <<http://www.cptech.org/ip/health/cl/cipro>> at 18 May 2007.

²⁰⁰ It is important to remember that special and differential treatment is available to all developing nations, and that qualifying as a developing country is a matter of self-declaration. Under such a system, self-declared developing countries vastly differ in both economic development as well as economic potential. For instance, both Singapore and South Korea remain classified as developing countries, as do the Malawi and Zambia. As part of the Doha Round, developed countries have resisted making more substantial special and differential treatment offers until a system based upon graduated development according to a Member's ability to accept WTO obligations is developed. This resistance can be shown in many negotiating areas but is especially the case with special and differential treatment as it relates to agriculture, as Brazil, China and other developing nations are among the leaders in many agricultural exports, while other nations (such as those in Sub-Saharan Africa, the Caribbean and the Pacific Islands) are struggling to cope in the international marketplace. Thus far, developing countries as a whole continue to reject any suggestion and every proposal for greater differentiation. See Jones Kasteng, Anne Karlsson and Carina Lindberg, *Differentiating between Developing Countries in the WTO* (International Affairs Division Report, Swedish Board of Agriculture, 2004) 41 <http://www.sjv.se/webdav/files/SJV/trucksaker/Pdf_rapporter/ra04_14E.pdf> at 18 May 2007.

‘developing’ countries themselves must lead to varying levels of commitment and preferential treatment.²⁰¹

In some ways, WTO Members have no choice but to reach a compromise and complete the Doha Round.²⁰² A marginalised, or worse yet, an unstable and undependable multilateral system, is certainly not desirable.²⁰³ While a system dominated by increased regional integration can be a positive development in the short term, particularly in regions with high levels of protection, long-term effects include: a fragmented system with less overall liberalisation; lower levels of growth; less poverty reduction; and an increased presence of domestic lobbyist forces.²⁰⁴ The multilateral system may be imperfect but it is needed; amongst other things, the WTO locks in negotiated gains,²⁰⁵ re-enforces good governance,²⁰⁶ provides a forum for dispute settlement²⁰⁷ and strengthens the hand of national governments in dealing with domestic lobbyist or political forces.²⁰⁸ Without an effective WTO, inefficiencies would burden the world economy, individual traders would see their administrative difficulties increase and profits decrease and consumers would suffer from less choice, higher prices and a lower standard of living.²⁰⁹ Moreover, larger, developed countries would dominate and conquer, as they would be subject to no rules or controls on, inter alia, tariffs, subsidies or procedural and substantive rules relating to trade remedies. In short, all security and predictability brought about by the WTO would quickly evaporate.

In order for the Doha Round to succeed and the WTO to continue its progress, WTO Members must reach an agreement which includes significant market access gains, some regulatory consolidation and a meaningful development platform which addresses both preference erosion and special and differential treatment. This would be a difficult challenge at any time, but will be particularly arduous in the coming year due to numerous extenuating circumstances. Of these circumstances, none is more important than the expiration of US President Bush’s Trade Promotion Authority in July 2007. This is due to the protectionist

²⁰¹ Ibid. See, eg, WTO, Constantine Michalopoulos, *The Participation of the Developing Countries in the WTO* (1990) 9–13 <<http://www.worldbank.org/html/dec/Publications/Workpapers/WPS1900series/wps1906/wps1906.pdf>> at 18 May 2007. Michalopoulos discusses how mission sizes, representations and institutional capacities vary widely among developing countries, creating substantial disparities in power and influence between developing countries. See also Alexander Keck and Patrick Low, ‘Special and Differential Treatment in the WTO: Why, When and How?’ (Staff Working Paper ERSD-2004-03, Economic Research and Statistics Division, 2004) <http://www.wto.org/english/res_e/reser_e/ersd200403_e.doc> at 18 May 2007.

²⁰² See, eg, Fiona MacMillan, ‘If Not This World Trade Organisation, Then What?’ (2004) 2 *International Company and Commercial Law Review* 75, 81.

²⁰³ Even credible critics of the WTO acknowledge this point: see, eg, *ibid.*

²⁰⁴ See, eg, Sutherland Report, above n 177, 22–3, 19–20, 26–7, 79; Sally, ‘Rocky Road to Cancun’, above n 50, 1.

²⁰⁵ Moore, above n 24, 110.

²⁰⁶ *Ibid* 104, 151, 157–9.

²⁰⁷ *Ibid* 106.

²⁰⁸ *Ibid* 104, 135.

²⁰⁹ *Ibid* 101–9.

wave that has recently overcome Congress and Democratic Party control of both Houses of Congress as a result of the November 2006 election.²¹⁰

In the longer term, Members — and therefore the WTO — must focus on the essentials and understand what it is the Organization does and what is achievable and within its capacity, in order to progress the agenda. This will take political will, commitment and compromise from all the major developed and developing countries.

Members strongly and repeatedly assert that the WTO is a member-driven organisation and that consensus-based decision-making will not be abandoned. For this reason, it is doubtful that the regulatory model advanced by the EC will prevail as a viable long-term option.²¹¹ It is also doubtful that Members will allow the WTO to descend into the marginalised, UN-style talking shop described by Sally.²¹²

The WTO, however, cannot continue to operate under the current climate without structural adjustment. Several options for reforming the governance of the WTO have been proposed. However, the majority of the proposals can be easily dismissed as unfeasible. For instance, consensus-based decision-making will not be abandoned in favour of any form of formal voting; whether one vote, one value or weighted voting. It also seems fairly obvious that abandoning most, if not all, forms of small group negotiations in favour of governance exclusively by formal meetings will lead to less consensus, not more. Moreover, the idea of regional negotiating blocks fails to recognise the easily observable fact that nations in a region sometimes have conflicting interests. While the idea of an executive board to advance the agenda and make recommendations to WTO Members has some merit, the fact remains that the composition of the board will always be controversial and in the end, Members will end up in the same position and the recommendations will likely not shift their negotiating positions or assist in garnering consensus.

One option, however, allows WTO Members to retain consensus-based decision-making and the member-driven nature of the WTO while also allowing further liberalisation and progress. This option, a slight withdrawal from the focus of the WTO as a 'single undertaking' and a reversion to a GATT-era two-tiered system — sometimes referred to as variable geometry — utilises

²¹⁰ Renewal was unlikely even prior to the Democratic Party taking control of Congress: see Alan Beattie, 'Waning Expectations: Agreement on Trade Remains Remote as Time Trickles Away', *The Financial Times* (London, UK) 18 July 2005, 13.

²¹¹ Since the Uruguay Round, developing countries have successfully resisted the addition of most regulatory requirements, as can be demonstrated by comparing the demands of the EC and other nations in Seattle with the working agenda of the Doha Round. That said, the EC and others continue to push the regulatory agenda. The fact that Director-General Lamy, the former EU Trade Commissioner, decided to advocate for specific trade and environmental links in the days leading to the official relaunch of the Doha Round, only weeks after Members met to discuss the relationship between the secretariats of multilateral environmental agreements and the WTO and 'sources report that the politically contentious discussions did not go far', is a potentially destabilizing sign. See Pascal Lamy, 'Globalization and the Environment in a Reformed UN: Charting a Sustainable Development Path' (Speech delivered at 24th session of the Governing Council/Global Ministerial Environment Forum, Nairobi, Kenya, 5 February 2007), available from <<http://www.wto.org>> at 18 May 2007; 'WTO Members Discuss Information Exchange with MEAs' 7(2) *Bridges Trade BioRes*, available from <<http://www.ictsd.org>> at 18 May 2007.

²¹² See Moore, above n 24, 101–9.

plurilateral agreements to allow further liberalisation among willing Members without imposing obligations on those unwilling to proceed.²¹³ While the EC has recently favoured this approach,²¹⁴ as mentioned earlier, the option will face opposition by developing countries either not wishing to develop a two-tiered system or not wanting to allow controversial (and regulatory) issues to come into the WTO in any form whatsoever. However, this option remains feasible as Members wishing to utilise a plurilateral approach could attempt to negotiate their inclusion in exchange for equal concessions, such as increased special and differential treatment. In addition, and in combination with the above, Members must strengthen the language and oversight of *GATT 1947* art XXIV in an effort to curtail the negative effects of PTAs and to force Members to focus on the multilateral trading system.²¹⁵ This is not to suggest that progress on either issue will be easy, or that either option will be studied or adopted in the Doha Round, but that the long-term survival of the Organization as a thriving, vital forum depends upon the Members' willingness to address the institutional impediments curtailing the progress and growth of the WTO.

²¹³ It must be stressed that this is a second best option. The best option is, of course, Members reaching agreement on the purpose of the Organization and allowing further liberalisation, progress and institutional stability to continue and flourish: see Moore, above n 24, 101–9.

²¹⁴ Both before and after Cancún Ministerial, the EC proposed plurilateral agreements for the Singapore issues. The WTO Consultative Board also favoured allowing Members to take on varying levels of commitments: see ActionAid International, *Beyond Cancun: Key Issues Facing the Multilateral Trading System* (2003) 16–17, available from <<http://www.wto.org>> at 18 May 2007.

²¹⁵ It is beyond the scope of this commentary to design or propose amendments, but such proposals have been made: see, eg, Picker, above n 26, 267.