

## COMMENTARY

# DEVELOPING COUNTRIES AND THEIR ENGAGEMENT IN THE WORLD TRADE ORGANIZATION: AN ASSESSMENT OF THE CANCÚN MINISTERIAL

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*[This commentary considers the implications of the failure of the 2003 Cancún Ministerial of the World Trade Organization. In particular, it contests the blunt perspective that the failure of the Ministerial was the result of developing country intransigence. It begins by tracing the growing dissatisfaction of developing countries with the skewed results of the last major negotiating round in Uruguay from 1986 to 1994 which led to the formation of the WTO. Much of that dissatisfaction has centred around the positive harmonisation obligations and contested welfare effects of the minimum level of intellectual property protection mandated by the TRIPS Agreement. This then allows for a contextual analysis of the negotiating agenda finalised at the 2001 Doha Ministerial. On the whole, that agenda clearly prioritised issues of interest to developing countries such as agricultural policy and implementation of existing commitments. The commentary argues that, despite the delicate trade-offs within the Doha negotiating agenda, the 2003 Cancún Ministerial prioritised the so-called Singapore issues of investment, competition policy, government procurement and trade facilitation. Developing country opposition in turn was hardly unexpected as these contentious issues raise legitimate welfare and resource concerns as they represent a further extension of the WTO agenda into behind-the-border regulatory measures. The commentary concludes by considering the implications of the formation and growing assertiveness of the G-20 group of developing countries. It is cautiously optimistic of this development but warns of the implications for developing countries of a shift in trade policy emphasis away from the multilateral to regional and bilateral arenas.]*

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## I INTRODUCTION

The recent failure of the 2003 Cancún Ministerial Meeting offers a useful prism through which to examine many of the major challenges facing the World Trade Organization.<sup>1</sup> Indeed, Cancún represents the latest and perhaps most definite sign of a paradigm shift away from a narrow focus on liberalisation of trade barriers to a greater emphasis on development concerns. The United States

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<sup>1</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) (‘*Marrakesh Agreement*’).

and the European Union have blamed the immediate failure of the Ministerial on the perceived intransigence of developing countries within the new 'Group of 20' ('G-20').<sup>2</sup> Yet the opposition of developing countries to parts of the Cancún agenda, particularly the four so-called Singapore issues — investment, competition policy, transparency in government procurement, and trade facilitation — was never unexpected.<sup>3</sup> There are clearly legitimate concerns for developing countries in the extension of the WTO's agenda into behind-the-border regulatory measures such as investment and competition policy. Furthermore, Cancún represents something of a high-stakes game for developing countries. Both the US and the EU have promised to now pursue their liberalisation goals through bilateral and regional initiatives. It is by no means clear that bilateral and regional initiatives are better mechanisms to reflect development concerns in sensitive issues such as agriculture than the multilateral corridor of the WTO.

This commentary seeks to assess the outcomes of Cancún and particularly aims to challenge the perception that the failure in Cancún is largely a result of developing country intransigence. The commentary is in seven parts. Part II will put the Cancún Ministerial in context by first considering the exact parameters of the negotiating agenda agreed to at the Doha Ministerial in 2001.<sup>4</sup> Development concerns — especially on implementation and agriculture — lie at the heart of the Doha negotiating mandate. Despite this emphasis, most of the Cancún Ministerial was spent debating the controversial Singapore issues which — especially with regard to full liberalisation of foreign investment regulation — have long been of concern to developing countries as inimical to their developmental priorities. The resultant developing country opposition was hardly unexpected given the seeming disregard of the delicate trade-offs within the Doha mandate. Part II will also highlight the relation between developing country assertiveness at Cancún on the Singapore issues, and dissatisfaction with the one-sided nature of much of the WTO compact — especially the *Agreement on Trade-Related Aspects of Intellectual Property Rights*<sup>5</sup> — to result from the Uruguay Round of trade negotiations.

In Parts III and IV, the strong push on the Singapore issues is contrasted with the treatment of agriculture at the Cancún Ministerial. Negotiations on this issue, vital to most developing countries, never formally commenced at Cancún. Instead, agricultural negotiations took place largely outside the framework of the

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<sup>2</sup> Gary Yerkey, 'Public, Private US Groups Blame G-20' (2003) 20 *Bureau of National Affairs International Trade Reporter*, 1534 1534-5; Rossella Brevetti, 'US Trade Official Says Trade Liberalisation Will be Harder for US after Cancun Collapse' (2003) 20 *Bureau of National Affairs International Trade Reporter* 1610, 1610-11. Membership of the G-20 has fluctuated since the Cancún Ministerial. These changes are detailed in Part V of this commentary.

<sup>3</sup> These four topics have been dubbed the Singapore issues as a result of their treatment at the WTO Ministerial Meeting in Singapore in 1996. In the lead up to that Ministerial, developed countries pushed for the commencement of negotiations on each of these topics. The resistance of developing countries led to a compromise whereby Ministers only agreed to establish working groups to study the issues surrounding these four topics. See *Singapore Ministerial Declaration*, WTO Doc WT/MIN(96)/DEC (18 December 1996), [20]-[22].

<sup>4</sup> *Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/1 (14 November 2001) ('*Doha Declaration*').

<sup>5</sup> *Marrakesh Agreement*, above n 1, annex 1C (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) 1869 UNTS 299 ('*TRIPS Agreement*').

Cancún Ministerial. Yet, even in these tentative negotiations, a joint proposal by the US and EU seemed to depart from the hard sought gains made by developing countries on agriculture within the Doha mandate. The marginalisation of agricultural policy at Cancún — exemplified by the abrupt dismissal of a highly symbolic plea by four African countries to deal with the destructive practice of cotton subsidisation — increased resentment at the emphasis on Singapore issues.

Part V then assesses the implications of the creation of the G-20 group of developing countries at Cancún. Again, there is clear evidence that this group was willing to negotiate despite public pronouncements to the contrary. Whilst the G-20 is to be generally welcomed as an increased sign of assertiveness within the WTO, Part V considers the danger in the perception of an unwillingness to actively negotiate. The failure of the Cancún Ministerial has led to a greater emphasis on bilateral and regional trade negotiations. Part VI will argue that it is significantly more difficult for developing countries to advance their developmental priorities within these initiatives, especially in bilateral trade accords with the US where the overtly strong liberalisation conditions of the *North American Free Trade Agreement*<sup>6</sup> act as a template. Part VII then ties together these lines of inquiry and concludes with some suggestions on lessons that can be discerned from the Cancún Ministerial to reinvigorate the Doha negotiating round.

## II A STEP BACK FROM THE DOHA ‘DEVELOPMENT’ AGENDA: THE PUSH ON THE SINGAPORE ISSUES AT CANCÚN

With the spectre of the failed Seattle WTO Ministerial in 1999 and ongoing public demonstrations against economic globalisation, WTO members were under great pressure to reach agreement to start a new round of negotiations at the Doha Ministerial in late 2001. In many ways, the Doha talks were shadowed by the results of the Uruguay Round — the last major negotiating round, from 1986 to 1994 which led to the creation of the WTO. The Uruguay Round fundamentally expanded the operation of the former *General Agreement on Tariffs and Trade*.<sup>7</sup> Historically, the *GATT*'s mission had been to progressively liberalise border restrictions on the movement of trade in goods such as tariffs and quota restrictions.<sup>8</sup> Indeed, in these areas, the *GATT* was an unquestionable success.<sup>9</sup> In contrast, the Uruguay Round saw new rule-making to liberalise regulatory non-tariff barriers in areas of comparative advantage to developed states such as trade in services<sup>10</sup> and, to a much lesser degree, foreign

<sup>6</sup> Opened for signature 17 December 1992, 32 ILM 289 (1993) (entered into force 1 January 1994) ('*NAFTA*').

<sup>7</sup> *Marrakesh Agreement*, above n 1, annex 1A (*General Agreement on Tariffs and Trade*) 1867 UNTS 190 ('*GATT*').

<sup>8</sup> For an historical overview of the *GATT*'s operation from inception in 1949 to the creation of the WTO in 1994, see Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (2<sup>nd</sup> ed, 2001) 37–44.

<sup>9</sup> *Ibid* 19–20: The weighted average tariff on manufactured goods had fallen from 35 per cent before the creation of *GATT* in 1947 to 4 per cent by the completion of the Uruguay Round in 1994.

<sup>10</sup> *Marrakesh Agreement*, above n 1, annex 1B (*General Agreement on Trade in Services*) 1869 UNTS 183.

investment.<sup>11</sup> Furthermore, the Uruguay Round led to the *TRIPS Agreement* which requires all WTO members to implement a minimum level of intellectual property protection.<sup>12</sup> At the other end of the spectrum, the completion of the Uruguay Round did provide some attractive trade-offs for developing countries. A notable result was the conclusion of the *Agreement on Textiles and Clothing*, which promised to gradually phase out protective quotas on textile imports from developing countries.<sup>13</sup> The Uruguay Round also marked the integration of agriculture into the rules of the WTO compact in the form of the *Agreement on Agriculture*.<sup>14</sup> Despite this, the promise of these initiatives remains somewhat unfulfilled: liberalisation in the case of textiles has proceeded slowly at best,<sup>15</sup> whilst the agriculture compact continues to contemplate distortive practices such as export subsidisation.<sup>16</sup>

Within the calculus of trade-offs to result from the Uruguay Round, the *TRIPS Agreement* deserves particular attention as it became a flashpoint issue for developing countries both at the 2001 Doha Ministerial and the 2003 Cancún Ministerial. Intellectual property protection is an inherent trade-off between incentives for innovation on the one hand and economic efficiency (and distribution of income) on the other.<sup>17</sup> The *TRIPS Agreement* fails to strike a balance between these two competing objectives and instead requires protection at a high level for all WTO member countries regardless of their needs and abilities to pay for the affected products. This is problematic for most developing countries where innovation is not a major source of economic activity.<sup>18</sup> On the whole, developing countries are more likely to benefit in terms of consumer welfare in permitting cheap domestic imitations of innovations created elsewhere.<sup>19</sup> This imbalance in coverage came under public scrutiny at the Doha

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<sup>11</sup> *Marrakesh Agreement*, above n 1, annex 1A (*Agreement on Trade-Related Investment Measures*) 1868 UNTS 186.

<sup>12</sup> The *TRIPS Agreement* is unique within the WTO compact as it is an instrument that imposes a positive obligation on member states to pass laws guaranteeing minimum levels of intellectual property protection. Most other instruments within the WTO reflect the traditional *GATT* approach of 'proscriptive' (thou shalt not) rather than 'prescriptive' (thou shalt) harmonisation. The best example of this is the classic injunction of non-discrimination. This obligation gives WTO members complete regulatory freedom to pass any laws they see fit subject to the overarching injunction not to discriminate against foreign goods or services: see *ibid*, arts 1, 41.

<sup>13</sup> *Marrakesh Agreement*, above n 1, annex 1A (*Agreement on Textiles and Clothing*) 1868 UNTS 14 ('*Agreement on Textiles and Clothing*').

<sup>14</sup> *Marrakesh Agreement*, above n 1, annex 1A (*Agreement on Agriculture*) 1867 UNTS 410 ('*Agreement on Agriculture*').

<sup>15</sup> See, eg, Hanaa Kheir-El-Din, 'Implementing the Agreement on Textiles and Clothing' in Bernard Hoekman, Aaditya Mattoo and Philip English (eds), *Development, Trade and the WTO: A Handbook* (2002) 186, 186–94.

<sup>16</sup> The limitations of the *Agreement on Agriculture* and their particular impact on developing countries is considered further in Parts III and IV of this commentary.

<sup>17</sup> For a concise analysis of this tension within the context of the Doha negotiating agenda, see Alan Deardorff and Robert Stern, 'Enhancing the Benefits for Developing Countries in the Doha Development Agenda Negotiations' (Policy Brief No 1, William Davidson Institute, University of Michigan Business School, 2003) 5–6.

<sup>18</sup> See *TRIPS Agreement*, above n 5, art 41.

<sup>19</sup> For an analysis of the welfare implications of intellectual property protection amongst different states at different stages of development, see Michael Trebilcock and Robert Howse, 'Trade Liberalisation and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics' (1998) 6 *European Journal of Law and Economics* 5, 18–21.

Ministerial due to the human suffering and deaths connected with the HIV/AIDS pandemic, particularly in Sub-Saharan Africa. The strong patent protections mandated by the *TRIPS Agreement* have served to drive up drug prices, putting medicines out of reach of the citizenry of developing countries.<sup>20</sup> The public nature of this issue led to a political — albeit non-binding — statement supportive of public health as part of the Doha Ministerial.<sup>21</sup> Not surprisingly, the issue did not disappear after Doha. Indeed, in the weeks leading up to Cancún, WTO members agreed to a landmark relaxation of the stringent patent protection mandated by the *TRIPS Agreement*, despite the opposition of the pharmaceutical lobby.<sup>22</sup> Under this agreement, small countries that have insufficient manufacturing capacity in the pharmaceutical sector are allowed, in cases of public health emergency, to import low cost generics produced under compulsory licence in other WTO member countries.

The conflict over the *TRIPS Agreement* in the lead up to the Cancún Ministerial is highly symbolic of developing country dissatisfaction with the results of the Uruguay Round.<sup>23</sup> At the same time, since the completion of the Uruguay Round, developing country membership of the WTO has increased dramatically. Developing countries now represent an overwhelming majority of the WTO membership. This led to a greater advocacy of their interests at the Doha Ministerial in 2001. Indeed, while it might be slightly ambitious to describe the agenda resulting from that Ministerial as a ‘development round’ of negotiations, it is clear that developing country interests are at the heart of the negotiating agenda which resulted from that Ministerial.

The overall outcome of the Doha Ministerial was to launch immediate negotiations on nine different topics,<sup>24</sup> eight of which are to be concluded as a single undertaking by 1 January 2005.<sup>25</sup> The eight topics are implementation, agriculture, services, industrial tariffs, subsidies, anti-dumping, regional trade agreements, and the environment. Of these eight substantive topics, there are four primary areas of interest for developing countries included in the single undertaking negotiations. First, implementation of existing commitments is an issue for negotiations in its own right together with a separate *Decision on*

<sup>20</sup> On the high cost of medication to treat HIV/AIDS in developing countries, see Scott Hensley, ‘Pfizer Makes Aid Pledge, Breaks Aid Pact’, *The Wall Street Journal* (New York, US), 12 November 2003, B1.

<sup>21</sup> *Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN(01)/DEC/2 (20 November 2001).

<sup>22</sup> *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health — Decision of 30 August 2003*, WTO Doc WT/L/540 (2003). The opposition of the pharmaceutical industry at Doha to binding relaxation of patent protection in the *TRIPS Agreement* is detailed in ‘Fight over *TRIPS* Narrowed to Whether Declaration Would be Binding’ (13 November 2001) Special Report *Inside US Trade* 3, 3; ‘WTO Countries in Deadlock on *TRIPS*’ (26 October 2001) 1(43) *Inside US Trade* 1, 22–3.

<sup>23</sup> For a representative view, see the comments of the Fijian Ambassador to the WTO: Iskikeli Mataitoga, ‘The Experience of Developing Countries in the Multilateral Trading System: An Assessment of the Seattle Ministerial and Beyond’ in Kim Van der Borgh (ed), *Essays on the Future of the WTO: Finding a New Balance* (2003) 47, 47–63.

<sup>24</sup> These topics are Implementation, Agriculture, Services, Industrial Tariffs, Subsidies, Anti-Dumping, Regional Trade Agreements, Environment, and on a separate track, the Dispute Settlement Understanding. See *Doha Declaration*, above n 4, [12]–[13], [15]–[16], [28]–[31].

<sup>25</sup> The concept of a single undertaking means that nothing is finalised until negotiations are concluded in all areas. See *Doha Declaration*, above n 4, [47].

*Implementation-Related Issues and Concerns.*<sup>26</sup> Developing countries have expressed concern with the lack of implementation of existing commitments virtually since the coming into force of the Uruguay Round agreements. Secondly, the difficult issue of agriculture is placed at the heart of the Doha negotiating agenda with the surprisingly strong commitment to work to 'reductions of, with a view to phasing out, all forms of export subsidies' regarded as among the most distortional forms of agricultural trade policy.<sup>27</sup> Finally, developing countries succeeded in including anti-dumping and subsidy reform amongst the topics for immediate negotiation. Reform of the use of anti-dumping and countervailing duty laws has long been a priority for developing countries.<sup>28</sup> The *Doha Declaration* also contains substantial sections on topics such as technical assistance, capacity building and least-developed-countries.<sup>29</sup> Aside from the negotiating program, a general work program was also launched on priority issues for developing countries such as trade and debt,<sup>30</sup> finance and technology transfer,<sup>31</sup> and special and differential treatment.<sup>32</sup>

On the opposite side of the ledger, outside of the context of implementation issues, no substantial progress was made on a longstanding issue of interest for developing countries — further market access for textile products. This remains an inherently sensitive topic in many developed states, particularly in the US. Similarly, the issue of movement of people (rather than of goods or capital) was not addressed in the Doha agenda. Whilst this is not surprising (given the politically sensitive aspects of this topic, especially since the events of 11 September 2001), this issue is of considerable interest to developing countries given their comparative advantage in this area.<sup>33</sup> The EU scored a major victory with the immediate launch of negotiations on certain, albeit limited,

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<sup>26</sup> WTO Doc WT/MIN(01)/W/10 (2001). See also *Doha Declaration*, above n 4, [12].

<sup>27</sup> The issue of agricultural trade policy, its interest to developing countries and marginalisation at the Cancún Ministerial is analysed further in Part III of this commentary.

<sup>28</sup> The anti-dumping procedure under the *Marrakesh Agreement*, above n 1, annex 1A (*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*) 1868 UNTS 201 ('*Antidumping Agreement*'), which can lead to the imposition of anti-dumping duties, tends typically to be initiated against developing countries. From 1995–2003, the countries (or customs territories) most affected were China (261 investigations), the Republic of Korea (139), the US (103) and Chinese Taipei (96). At the same time, whilst developed states have been the traditional users of the anti-dumping procedure, developing countries such as India and Argentina have themselves increased the use of trade remedy laws in recent years: see WTO, *Annual Report 2003* (2003) 23–4; Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (2<sup>nd</sup> ed, 1999) 166–71. The desire of developing countries to commence negotiations for reform of the anti-dumping rules to prevent disproportionate use of anti-dumping measures is detailed in 'Group of 77 Pushes Concessions in Agriculture, Open to Investment Talks' (26 October 2001) 19(43) *Inside US Trade* 17; 'WTO Draft Declaration Proposes AD Negotiations, Delays Environment' (30 October 2001) Special Report *Inside US Trade* 1, 9.

<sup>29</sup> See *Doha Declaration*, above n 4, [38]–[44].

<sup>30</sup> See *Doha Declaration*, above n 4, [36].

<sup>31</sup> See *Doha Declaration*, above n 4, [37].

<sup>32</sup> See *Doha Declaration*, above n 4, [44].

<sup>33</sup> See generally Trebilcock and Howse, above n 28, 484–99, analysing the welfare implications of greater immigration flows and the absence of international rules on this issue.

environmental initiatives.<sup>34</sup> As a trade-off, the EU agreed to relatively strong language in the agricultural mandate, particularly on reducing export subsidies.<sup>35</sup>

Thus, on balance, developing country concerns are placed at the heart of the Doha negotiating agenda. This is also evidenced by the uncertain place of the so-called Singapore issues of investment, competition policy, government procurement and trade facilitation in the Doha Ministerial.<sup>36</sup> These issues are not part of the single undertaking set of negotiations mandated by the Doha Declaration. Instead, on each of these issues, the *Doha Declaration* provides that members ‘agree that negotiations will take place after the fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations’.<sup>37</sup> At the time, the developed members of the WTO, such as the US, viewed this language as a firm mandate to launch negotiations in Cancún. However, some developing countries have opposed this interpretation. In the last hours of the Doha conference, India extracted a statement from the Qatari trade minister Youssef Kamal in his role as the Chair of the Ministerial that:

my understanding is that at [the fifth Ministerial] ... a decision would indeed need to be taken by explicit consensus before negotiations on [the Singapore issues] could proceed ... In my view, this would give each member the right to take positions on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that Member is prepared to join an explicit consensus.<sup>38</sup>

The legal status of this statement is unclear — it is not attached to the official Ministerial Declaration itself. Nonetheless, it is symbolic of the historical resistance of some developing countries to the issue of multilateral investment

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<sup>34</sup> The agreement to commence negotiations on the environment are limited to three approved areas:

- (a) the relationship between existing WTO rules and to the trade obligations in multilateral environmental agreements;
- (b) the reduction of trade barriers to the sale of environmental goods and services; and
- (c) to clarify and improve WTO disciplines on fisheries subsidies.

See *Doha Declaration*, above n 4, [31].

<sup>35</sup> For the relevant part, see the *Doha Declaration*, above n 4, [13]:

Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.

<sup>36</sup> For an overview of negotiations between developed and developing countries on investment in the lead up to the Singapore Ministerial, see also Zdenek Drabek, ‘A Multilateral Agreement on Investment: Convincing the Sceptics’ (Staff Working Paper ERAD-98-05, Economic Research and Analysis Division, WTO, 1998) 9; Elizabeth Smythe, ‘Your Place or Mine? States, International Organizations and the Negotiation of Investment Rules’ (1998) 7(3) *Transnational Corporations* 85, 108–12.

<sup>37</sup> See *Doha Declaration*, above n 4, [20] (Investment), [23] (Competition Policy), [26] (Government Procurement), [27] (Trade Facilitation) (emphasis added).

<sup>38</sup> For a description of the Indian position as well as an extract of the Chairman’s statement, see ‘Note from Qatar Chairman Yields Uncertainty on New WTO Issues’ (23 November 2001) 19(47) *Inside US Trade* 15, 15–16.

rules.<sup>39</sup> Indeed, of the four Singapore issues — investment, competition policy, transparency in government procurement and trade facilitation — it is clearly investment that proved to be the most contentious issue at the Doha Ministerial.<sup>40</sup> The reasons for this are multifaceted. As a starting point, foreign investment (as a means of long-term ownership of national assets and resources) is much more politically sensitive than foreign trade.<sup>41</sup> Even some developed states still exclude entry of foreign investment into strategic sectors such as media, publishing and films, and other core industries involved in national defence and security.<sup>42</sup> This political sensitivity is heightened by the manner in which liberalisation is effected in the foreign investment sphere. Trade restrictions, such as tariffs, can be reduced incrementally, and the value of those reductions can be translated relatively easily into a common denominator.<sup>43</sup> This is much more difficult in the context of regulatory impediments to foreign investors.

Aside from the political sphere, there are acute developmental implications in a multilateral investment agreement. Once a foreign investor enters into a host state, there are a variety of post-admission techniques that can be used by the host state to enhance the economic benefits to flow from the investment process. These encompass techniques as diverse as compulsory joint ventures with host state participation to performance requirements, such as local content provisions to encourage domestic manufacturing.<sup>44</sup> This is not to say that developing countries are somewhat hostile to the entry of foreign investment. On the contrary, since the end of the 1970s, the interests of developing countries have shifted from an attitude of hostility regarding foreign investors (often leading to large-scale expropriations in the immediate post-decolonisation period) towards

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<sup>39</sup> India has for a particularly long time opposed the inclusion of investment on the negotiating agenda of the WTO. See generally Satya Das, 'An Indian Perspective on WTO Rules on Direct Foreign Investment' (paper presented at the WTO 2000 South Asia Workshop, New Delhi, India, 21 December 1999). For a recent example of this opposition in the lead up to the Cancún meeting, see 'India Leads New Developing Country Attack on Singapore Issues' (29 August 2003) 21(35) *Inside US Trade* 11, 11–15.

<sup>40</sup> Given its dominance as a negotiating item at Singapore, the rest of this part of the commentary will focus largely on the issue of investment. However, a useful analysis of the sensitivities surrounding multilateral rules on competition policy can be found in Keith Maskus, 'Regulatory Standards in the WTO: Comparing Intellectual Property Rights with Competition Policy, Environmental Protection and Core Labor Standards' (Working Paper No 00–1, Institute for International Economics, 2000).

<sup>41</sup> See generally Jürgen Kurtz, 'A General Investment Agreement in the WTO? Lessons from Chapter 11 of *NAFTA* and the OECD Multilateral Agreement on Investment' (2002) 23 *University of Pennsylvania Journal of International Economic Law* 713, 726.

<sup>42</sup> For a comprehensive analysis of the exclusion of national defence and security sectors from the entry of foreign direct investment into the US, see Trebilcock and Howse, above n 28, 342–4; David Nance and Jessica Wasserman, 'Regulation of Imports and Foreign Investment in the United States on National Security Grounds' (1990) 11 *Michigan Journal of International Law* 926.

<sup>43</sup> For an overview of the mechanics, negotiating techniques and reciprocity criterion for reducing tariffs, see Hoekman and Kostecki, above n 8, 122–33.

<sup>44</sup> Kurtz, 'A General Investment Agreement in the WTO?', above n 41, 727–9.

the need to attract and retain foreign direct investment ('FDI').<sup>45</sup> Indeed, the debt crisis of the 1980s limited the supply of loan finance to excessively indebted developing countries and made FDI a much more desirable source of foreign capital. Thus, at the national level, numerous developing countries have taken unilateral steps to liberalise restrictions on the entry and operation of FDI,<sup>46</sup> but often within core developmental parameters which encompass techniques such as performance requirements to fully capture the economic benefits of the investment process.<sup>47</sup> The danger for developing countries is that, much like *TRIPS* in the context of intellectual property regulation, an overtly strong WTO investment agreement would significantly constrain their ability to use such developmental techniques.

Despite the uncertain place of the Singapore items on the Doha negotiating agenda, it seems that the format of the Cancún talks prioritised those items. If anything, given the likely resistance of developing countries, it would have seemed logical to make progress on a priority area of interest to developing countries, such as agricultural policy, before moving on to the Singapore items.<sup>48</sup> This does not seem to have occurred. Although there were clearly external discussions on agricultural policy, it appears that they were not formally undertaken within the Cancún meeting.<sup>49</sup> Not unexpectedly, this initial focus on the Singapore issues, and on investment in particular, led to fierce opposition by many developing countries. Eventually, the EU — which was the chief *demandeur* for negotiating disciplines on these issues — finally offered to drop investment and competition policy, which were clearly the most controversial items.<sup>50</sup> This attempt at compromise arrived far too late to save the Ministerial. Developing countries rejected this compromise largely on the basis that there were insufficient concessions on their own priorities especially with regard to

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<sup>45</sup> It is pertinent to distinguish FDI, which is normally marked by some degree of managerial control over the business in the host country, from portfolio investment, where a foreign investor purchases securities or debt instruments without the desire to control or manage the domestic firm. Generally speaking, developing countries have been much more interested in attracting and retaining FDI given its stability (when compared to the lower exit costs of portfolio investment), especially after the events of the Asian financial crisis in 1998. For statistical evidence of the stability of FDI in terms of outflows when compared to other forms of capital in the period following the Asian financial crisis, see United Nations Conference on Trade and Development, *World Investment Report 2000: Cross-Border Mergers and Acquisitions and Development* (2000), 17–23.

<sup>46</sup> Kurtz, 'A General Investment Agreement in the WTO?', above n 41, 720–2.

<sup>47</sup> For a case study of Vietnam and its system of *doi moi* economic reforms to progressively liberalise foreign investment regulation, see Jürgen Kurtz, 'Developing Countries and the Troubling Disparity between Bilateral, Regional and WTO Commitments: The Case of the New US-Vietnam Trade Agreement' in Kim Van der Borgh (ed), *Essays on the Future of the WTO: Finding a New Balance* (2003) 105, 107–14.

<sup>48</sup> For a suggested set of inter-issue trade-offs on issues of interest to developing countries (such as agriculture) to offset their anticipated objection to negotiations on the Singapore items, see Kurtz, 'A General Investment Agreement in the WTO?', above n 41, 779. Suggested intra-issue trade-offs (on a prospective WTO investment agreement) are also detailed in Kurtz, 'A General Investment Agreement in the WTO?', above n 41, 780–9.

<sup>49</sup> Daniel Pruzin and Gary Yerkley, 'WTO Talks Crashed When Developing Countries Balked at Taking Up Some "Singapore Issues"' (2003) 20 *Bureau of National Affairs International Trade Reporter* 1533, 1533–4.

<sup>50</sup> 'Cancún Declaration Envisioned Unbundling of Singapore Issues' (15 September 2003) Special Report *Inside US Trade* 5, 5.

agriculture.<sup>51</sup> Indeed, the difficult issue of agricultural policy — while at the putative heart of the Ministerial — was dealt with largely outside the formal discussions and in a manner that further entrenched developing country opposition to the talks.

### III THE FORGOTTEN PROMISE ON AGRICULTURE

Most of the early part of the Cancún negotiations focused on the Singapore items, so that the talks never really moved to substantive negotiations on the contentious issues surrounding agricultural liberalisation. Yet unlike the Singapore issues, agriculture has a prominent position as one of the single undertaking items for negotiation in the Doha mandate.<sup>52</sup>

Agricultural policy is of crucial and strategic interest to most developing countries. Agriculture is by far the largest employer in low-income countries, accounting for 60 per cent of the labour force and producing about 25 per cent of GDP.<sup>53</sup> Given that 73 per cent of the poor in developing countries live in rural areas, agricultural production and trade is crucial to poverty alleviation.<sup>54</sup> However, protectionist governmental policy — especially in the US, the EU and Japan — has significantly impeded agricultural performance in developing countries. These policies take various forms but most typically encompass three categories: import tariffs and other border barriers to access to agricultural products; domestic production subsidies and export subsidies.

In theory, production and export subsidies reduce prices to world consumers, but the lower world prices inflict net cost on countries that also export the same product. The impact on developing countries, and especially their rural and poor populations, is particularly severe. For example, cotton prices have declined by almost 40 per cent over the last few years.<sup>55</sup> This reduction is in large part due to the enormous production support provided by developed states to their producers. The US provides the greatest support of around US\$3 billion annually.<sup>56</sup> In Benin — a poor country where cotton is the major export crop — the decline in world cotton prices, if fully passed on to farmers, has been estimated to reduce overall welfare in rural areas by 6–7 per cent and that of cotton farmers by about 19 per cent.<sup>57</sup>

Agriculture is the area in which the WTO promise of liberalisation has borne few dividends for developing countries. Agriculture was first integrated into the mainstream rules of the WTO compact after the completion of the Uruguay Round.<sup>58</sup> Yet the resulting *Agreement on Agriculture* has had very modest

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<sup>51</sup> 'Cancún Ministerial Collapses Over Singapore Issues' (15 September 2003) Special Report *Inside US Trade* 1, 6–7.

<sup>52</sup> See *Doha Declaration*, above n 4, [13].

<sup>53</sup> World Bank, *Global Economic Prospects 2004: Realizing the Developmental Promise of the Doha Agenda – Chapter 3: Agricultural Policies and Trade* (2003) 103 <<http://www.worldbank.org/prospects/gep2004/>> at 1 May 2004 ('*Global Economic Prospects 2004*').

<sup>54</sup> See, eg. *ibid* 105–7.

<sup>55</sup> *Ibid* 108.

<sup>56</sup> *Ibid* 129.

<sup>57</sup> *Ibid* 108.

<sup>58</sup> For a comprehensive analysis of the tortured path of agriculture into the WTO compact, see generally Melaku Geboye Desta, *The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture* (2002).

ambitions.<sup>59</sup> The most notable achievement of this modest package of reforms was the idea of ‘tariffication’ of pre-existing non-tariff barriers on agriculture, such as quotas and quantitative restrictions, into their tariff equivalents. The *GATT* and later WTO have historically preferred the use of tariffs rather than other forms of barriers on the basis that tariffs are a more transparent form of restriction. Unfortunately, the actual conversion was left to member countries themselves which led to the questionable practice of ‘dirty tariffication’ where countries deliberately chose high levels of tariff equivalents. This has meant that average agricultural tariffs are much higher than manufacturing tariffs in developed countries.<sup>60</sup> An egregious example is Japan where tariff and related border protection on rice is estimated at 700 per cent of production cost at world prices.<sup>61</sup>

In contrast to border measures, the Uruguay Round *Agreement on Agriculture* has led to relatively few constraints on the use of domestic support and export subsidies.<sup>62</sup> Domestic support is generally used to guarantee a certain level of income for agricultural producers — and hence their livelihood. This is often justified on the basis that a functioning rural sector is particularly important in countries such as those that comprise the EU on cultural grounds.<sup>63</sup> In theory, domestic support to producers should not be of particular concern to developing countries provided that support is linked to income — in the form of direct budgetary transfers — rather than production. Such decoupled, non-distorting transfers are really an internal policy question for the subsidising country’s own taxpayers and government.<sup>64</sup> On the other hand, agricultural export subsidies, from the perspective of developing countries, are the most destructive policy instrument used by developed states. As noted earlier, such subsidies directly depress global prices to the detriment of the large poor and rural population in developing countries. There is also a distinct cleavage within the treatment of such forms of subsidies within the WTO compact. Export subsidies on non-agricultural products have long been prohibited by the *GATT* and later by

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<sup>59</sup> For a concise consideration of the modest nature of the *Agreement on Agriculture*, see Melaku Geboye Desta, ‘Agriculture and the Doha Development Agenda: Any Hopes for Improvement?’ in Kim Van der Borgh (ed), *Essays on the Future of the WTO: Finding a New Balance* (2003) 149, 150–2.

<sup>60</sup> For example, agricultural tariffs remain at around 19 per cent for the EU in comparison to 4.2 per cent for manufactured goods. Similar disparities exist in each of Canada, Japan and the US: see World Bank, *Global Economic Prospects 2004*, above n 53, 118.

<sup>61</sup> *Ibid* 130.

<sup>62</sup> See Desta, *The Law of International Trade in Agricultural Products*, above n 58, 155–80.

<sup>63</sup> This justification can be related to the idea of multifunctionality — ‘the idea that agriculture, in addition to producing food and fibre, produces a range of other non-commodity outputs such as environmental and rural amenities, and food security and contributes to rural viability’. See, OECD, *Multifunctionality* (2004) <[http://www.oecd.org/department/0,2688,en\\_2649\\_33779\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,2688,en_2649_33779_1_1_1_1_1,00.html)> at 1 May 2004 (‘*Multifunctionality*’).

<sup>64</sup> However, such decoupled transfers might still expand output if they are framed in such a way to allow the farmer to continue production who otherwise would not. In appreciating the economics of decoupling domestic support from production, I have benefited greatly from various rich conversations with Professor Robert Stern of the University of Michigan. For a very brief but concise description on this point, see Deardorff and Stern, above n 17, 4.

the WTO.<sup>65</sup> In contrast, export subsidies are still allowed in agricultural products although putatively capped and subject to reduction commitments.<sup>66</sup>

Given the importance of agricultural policy to developing countries, they lobbied heavily on this issue at Doha in 2001. Indeed, these efforts led to agriculture being placed firmly on the Doha negotiating mandate. In particular, the Doha mandate led to surprisingly strong language on the most trade-distorting component of agricultural policy, the use of export subsidies. That mandate commits WTO member states to negotiations on 'reductions of, with a view to phasing out, all forms of export subsidies'.<sup>67</sup> This is a particularly important concession as the mandate contemplates the eventual elimination rather than merely progressive — and potentially slow — reduction of export subsidies. As noted earlier, substantive negotiations on agriculture never really commenced at Cancún. However, in the weeks leading up to Cancún, the US and the EU prepared a joint proposal on agriculture.<sup>68</sup> This proposal was relatively broad and undefined in parts. The authors of the proposal expected it to be welcomed as a sign of willingness to negotiate. Developing countries, however, perceived the joint proposal in an entirely different manner. For one thing, the joint proposal even in its vague form departs from the exact terminology of the Doha mandate. For example, it restricts elimination of export subsidies to a potentially narrow group of products, while only providing for reduction of subsidies used for other products.<sup>69</sup>

Yet the real problem with the joint proposal seemed almost one of perception. Like many other international organisations, major developments in the evolution of the GATT and later WTO have often been predicated on agreement by the most powerful members such as the US, Japan, and the EU which in turn have been presented as a *fait accompli* to the remaining membership. This is despite the formal promise of decision-making by consensus within the GATT/WTO compact.<sup>70</sup> The joint proposal seems to have been perceived by developing countries as a return to such a restricted form of decision-making despite their proportionate increase in membership in the WTO and their hard sought gains in the Doha mandate. This could only have entrenched an already strong sense of disenchantment through the heavy and unexpected emphasis on the Singapore items at Cancún. One additional, albeit unanticipated, agricultural issue at Doha completed this sense of disenchantment with the Cancún meeting — cotton subsidies.

#### IV THE LAST STRAW: COTTON SUBSIDIES

In addition to the expected conflict on the Singapore issues, an unexpected agricultural item starkly highlighted the refusal to consider developing country demands at Cancún. In early 2003, four African countries — Benin, Chad,

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<sup>65</sup> *Marrakesh Agreement*, above n 1, annex 1A (*Agreement on Subsidies and Countervailing Measures*) 1869 UNTS 14. Article 3.1 prohibits the use of non-agricultural export subsidies.

<sup>66</sup> See *Agreement on Agriculture*, above n 14, art 9.

<sup>67</sup> *Doha Declaration*, above n 4, [13].

<sup>68</sup> *Joint EC-US Paper on Agriculture* (2003) <<http://usinfo.state.gov/ei/Archive/2003/Dec/31-143080.html>> at 1 May 2004.

<sup>69</sup> *Ibid* 1403.

<sup>70</sup> *Marrakesh Agreement*, above n 1, art 9(1).

Burkina Faso and Mali — proposed that the elimination of cotton subsidies be placed on the WTO negotiating agenda.<sup>71</sup> Cotton subsidies provided by primarily the US and the EU undercut one of the very few comparative advantages enjoyed by these African countries.<sup>72</sup> The target of this proposal was largely the US, as it is estimated to account for 50 per cent of cotton subsidies in the world with 75 per cent of those subsidies going to 25 000 large US producers.<sup>73</sup> The export prospects, and hence overall welfare effects, for developing country exporters — especially in Sub-Saharan Africa — would be vastly improved if these distortive subsidies were eliminated. Removal of these distortions would increase cotton exports from Africa by 13 per cent.<sup>74</sup> Aside from the likely trade benefits, the issue could also be characterised as heavily symbolic for the group of developing countries as a whole. Of this large disparate grouping, it is clear that the African countries have gained the least from the world economy in recent decades. The lack of attention provided to this region contrasts starkly with the period prior to the end of the Cold War where the major powers intervened both financially and militarily throughout much of the African continent.

The symbolic resonance of this issue led the WTO Director-General, Supachai Panitchpakdi, to relinquish his customary neutrality and agree to act as a facilitator to help find a solution to this issue.<sup>75</sup> In effect, the Director-General staked his prestige on the issue. Despite this unique endorsement, the developed states refused to agree to concrete cuts to their program of cotton subsidisation. Indeed, the US delegation even went so far as to characterise the atmosphere in Cancún as having been ‘radicalised’ by the cotton subsidy issue.<sup>76</sup> Instead, the US delegation succeeded in having the draft declaration urge the WTO Director-General to consult with other multilateral institutions such as the IMF and World Bank on how they could help these countries diversify their economies away from cotton production.<sup>77</sup> The audacity of this response is almost breathtaking. At its most functional level, a fundamental objective of the WTO — as with its predecessor, the GATT — is the lowering of trade barriers to enable countries to exploit their natural comparative advantages. In a region largely untouched by the benefits of growth in trade and investment, the US would effectively ask some of the poorest countries in the world to devote scarce resources and ignore classic economic theory to move into other untested areas of production.

<sup>71</sup> ‘African Proposal for Cutting Cotton Subsidies Gains Momentum’ (12 September 2003) 21(37) *Inside US Trade* 1, 1–2.

<sup>72</sup> For a fascinating short history of the cotton trade and its political implications within the US, see ‘Cotton: A Great Yarn’, *The Economist* (New York, US), 20 December 2003, 43–6.

<sup>73</sup> ‘African Proposal for Cutting Cotton Subsidies Gains Momentum’, above n 71, 2.

<sup>74</sup> World Bank, *Global Economic Prospects 2004*, above n 53, 129.

<sup>75</sup> Eric Hazard, ‘The Cotton Thread: Was Cancun a Failure of Regulation or a Success for Deregulation?’ (2003) 7(7) *Bridges Monthly Review* 11, 11–12 <<http://www.ictsd.org/monthly/bridges/BRIDGES7-7.pdf>> at 1 May 2004.

<sup>76</sup> ‘Cancún Ministerial Collapses Over Singapore Issues’, above n 51, 7.

<sup>77</sup> *Ibid* 7; Hazard, above n 75, 11; Daniel Pruzin, ‘Failure in Cancun Prompts Reflections, Interest in Possible Procedural Reform’ (2003) 20 *Bureau of National Affairs International Trade Reporter* 1594, 1594–5.

## V THE EMERGENCE OF THE G-20

A prominent development at Cancún was the emergence of the G-20 group of developing countries. This group — led by Brazil, India and South Africa — formed in the weeks leading up to the Cancún Ministerial.<sup>78</sup> The G-20 largely rallied around the issue of agriculture and developed a strong counterproposal to the joint proposal submitted to the WTO membership by the US and EU.<sup>79</sup> Much has been made of the G-20's supposed unwillingness to compromise on agriculture at Cancún. This seems somewhat of an overstatement given that the talks collapsed over the Singapore issues before substantively moving on to agriculture. Indeed, an internal G-20 shadow proposal — which was never formally tabled due to the collapse of the Ministerial — offered various grounds for potential compromise.<sup>80</sup>

More broadly, the emergence of the G-20 is symbolic of the greater confidence of developing countries in challenging an agenda they consider unsatisfactory. In this respect, the G-20 is a continuation of a growing assertiveness which bore dividends in shaping the negotiating agenda to result from the 2001 Doha Ministerial. It is not surprising that the G-20 acted so forcefully in defending the hard-won gains made at Doha. Their stance on the Singapore issues at Cancún was arguably justified when one considers the overall negotiating mandate to result from Doha. That mandate placed much greater emphasis on issues of interest to developing countries, especially on agriculture.

Despite the Doha mandate, one might still argue that the strong G-20 position on agriculture was extreme, particularly given the political realities facing countries like the US, EU, and Japan. For these countries, agricultural policy is not merely a question of efficient allocation of resources, but is seen as a multifunctional issue which impacts on the cultural and heritage values of the rural landscape.<sup>81</sup> Yet recent events have shown that supposedly entrenched and intransigent developed state positions — which often reflect the interests of a powerful lobbying group within those states — in the WTO can and do change.

The compromise on the *TRIPS Agreement* in the lead-up to Cancún shows that it is clearly possible for developing countries to achieve a largely common goal through WTO processes. However, in using their increasing influence within the WTO, developing countries should be careful not to overplay their hand. The danger is not that occasional Ministerials — and by extension, negotiating deadlines — such as Cancún or Seattle pass without formal conclusion or agreement. Indeed, the Uruguay Round extended far beyond its

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<sup>78</sup> Pre-Cancún, the group comprised 20 members, but membership has fluctuated since Cancún and it appears that the group now consists of 19 members comprising Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom and the US. See G-20, *G-20 Members* (2004) <<http://www.g20.org/public/index.php?page=members&skin=1>> at 1 May 2004.

<sup>79</sup> 'US Works to Erode Support for Developing Country Farm Paper' (12 September 2003) 21(37) *Inside US Trade* 1, 8.

<sup>80</sup> International Centre for Trade and Sustainable Development, 'How Real is the Impasse on Agriculture?' (2003) 7(7) *Bridges Monthly Review* 4, 4 <<http://www.ictsd.org/monthly/bridges/BRIDGES7-7.pdf>> at 1 May 2004.

<sup>81</sup> See OECD, *Multifunctionality*, above n 63.

initial assigned duration of four years to eventually take up eight years of sustained and difficult negotiation.<sup>82</sup> Instead, the real danger in the perception, rather than reality, of developing country intransigence is that powerful countries will increasingly shift their trade policy emphases from the multilateral to regional and even more problematic bilateral arenas.

#### VI THE SHADOW OF *NAFTA*: A SHIFT TO BILATERAL AND REGIONAL AGREEMENTS?

It is clear that an immediate consequence of the failure of the Cancún Ministerial will be a shift towards bilateral and regional trade agreements. The US in particular has vowed to further move ahead in this direction.<sup>83</sup> Further, the EU — for whom multilateralism has been a central tenet of international trade policy — has also considered giving greater priority to bilateral trade initiatives in the wake of Cancún.<sup>84</sup>

This pronounced shift is an extension of an already existing and popular trend. As of December 2002, 177 regional trade agreements were in force and notified to the WTO, 20 more than at the end of the preceding year.<sup>85</sup> Of the 146 members of the WTO (as of April 2003), only Hong Kong, Macao, Mongolia and Chinese Taipei are not currently party to any regional trade agreement.<sup>86</sup> However, recent events would seem to indicate that the fundamental problems that led to the Cancún impasse are likely to be mirrored at least in the larger regional initiatives. At the November 2003 Miami Ministerial of the 34 countries aiming to create a Free Trade Area of the Americas ('FTAA'), the region's largest economies — Brazil and the US — clashed over agricultural subsidies which the US insisted could only be addressed at the WTO.<sup>87</sup> Not surprisingly, Brazil reacted by rejecting negotiations on areas of interest to the US, such as intellectual property protection, services, and Singapore issues such as investment and government procurement.<sup>88</sup> The resulting compromise was a vaguely worded declaration reaffirming the commitment to conclude negotiations by January 2005, but now expressly leaving open the option for countries to conduct plurilateral negotiations in individual areas.<sup>89</sup>

For developing countries, the real danger will be an even stronger shift towards bilateral trade accords. The great advantage of multilateral negotiations with multiple trading partners in a forum such as the WTO is the ability to trade

<sup>82</sup> For an analysis of the difficult early stages of the Uruguay Round negotiations, see Terence Stewart, 'Introduction and Overview' in Terence Stewart (ed), *The GATT Uruguay Round: A Negotiating History (1986–1992) Volume I – Commentary* (1993) 1, 1–124. See also Hoekman and Kostecki, above n 8, 105.

<sup>83</sup> Simon Romero, 'Frustrated, US Will Seek Bilateral Trade Pacts', *The New York Times* (New York, US), 19 November 2003, C2.

<sup>84</sup> Arthur Rogers, 'EU May Emphasise Bilateral Accords Following Cancun Debacle, Officials Say' (2003) 20 *Bureau of National Affairs International Trade Reporter* 1617, 1617–18.

<sup>85</sup> WTO, *Annual Report 2003*, above n 28, 110.

<sup>86</sup> *Ibid.*

<sup>87</sup> International Centre for Trade and Sustainable Development, 'After Cancún, Free Trade Area of Americas Talks Show Limits of the Single Undertaking' (2003) 7(8) *Bridges Monthly Review* 1, 1–2 <<http://www.ictsd.org/monthly/bridges/BRIDGES7-8.pdf>> at 1 May 2004.

<sup>88</sup> *Ibid.* 1.

<sup>89</sup> *Ibid.*

reciprocal concessions both within and across issues to reach consensus.<sup>90</sup> In bilateral negotiations, individual developing countries have significantly less leeway to negotiate concessions in areas of interest to them. Weaker economies are much more vulnerable in bilateral negotiations to economic and political pressure from countries whose markets offer the best outlets for their exports. Indeed, as suggested by the US position on agricultural export subsidies in the regional FTAA negotiations, agricultural policy is largely absent from most bilateral accords involving developing countries.<sup>91</sup> At the other end of the spectrum, the Singapore issues which the developing countries so strongly opposed at the Cancún WTO Ministerial regularly appear in bilateral agreements. Indeed, there is abundant evidence that the US approach to bilateral negotiations is to use the very strong *NAFTA* provisions as a template for coverage of issues such as foreign investment.<sup>92</sup> The dangers for developing countries in facing such a template should not be underestimated. *NAFTA* has just reached its 10<sup>th</sup> anniversary as a trade agreement among its member states of the US, Canada and Mexico. The coverage of *NAFTA* clearly extends beyond the WTO provisions in areas such as services,<sup>93</sup> foreign investment,<sup>94</sup> intellectual property protection,<sup>95</sup> and government procurement.<sup>96</sup> In recent years, scholarly attention has turned to the effects of *NAFTA* on Mexico, its sole developing country member. The evidence would seem to indicate that, despite higher productivity, *NAFTA* has led to an overall decline in real wages in Mexico with a troubling increase in income inequality, especially with regard to segments of the poor rural populace.<sup>97</sup>

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<sup>90</sup> For an example of this viewpoint, see Jeffrey Schott, 'The WTO after Seattle' in Jeffrey Schott (ed), *The WTO after Seattle* (2000) 10. For an analysis of the role and criteria of reciprocity in both tariff and non-tariff barrier liberalisation, see Hoekman and Kostecki, above n 8, 122–35.

<sup>91</sup> The reader will note that my proposition is qualified by reference to developing countries. According to recent press reports, the recently completed free trade accord between the US and Australia includes some form of liberalisation of US agricultural policy. Yet, notably, this coverage is by no means complete given the sectoral exclusion of trade in sugar. In any event, this accord is significantly different from most negotiations involving developing countries due to (i) the superior negotiating capacity of a developed state such as Australia and (ii) the nexus between the accord and Australian support for the US during the recent Iraq war.

<sup>92</sup> For an overview of the investment provisions of the recent *US–Vietnam Bilateral Trade Agreement*, its similarity to the *NAFTA* ch 11 (Investment) provisions and cleavage with the WTO compact, see Kurtz, 'Developing Countries and the Troubling Disparity between Bilateral, Regional and WTO Commitments', above n 47, 105–28. A copy of the US 'model' bilateral investment treaty — which equates with much of the *NAFTA* ch 11 provisions — is extracted in Rudolph Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (1995), 240–53.

<sup>93</sup> *NAFTA*, above n 6, chs 12 (Cross-Border Trade in Services), 13 (Telecommunications), 14 (Financial Services).

<sup>94</sup> *NAFTA*, above n 6, ch 11 (Investment).

<sup>95</sup> *NAFTA*, above n 6, ch 17 (Intellectual Property).

<sup>96</sup> *NAFTA*, above n 6, ch 10 (Government Procurement).

<sup>97</sup> John Audley et al, *NAFTA's Promise and Reality: Lessons from Mexico for the Hemisphere* (2003), 12–13; Joseph Stiglitz, 'The Broken Promise of *NAFTA*', *The New York Times* (New York, US), 6 January 2004, A23. On income inequality in particular, see Gordon Hanson, 'What Has Happened to Wages in Mexico Since *NAFTA*? Implications for Hemispheric Free Trade' (Working Paper, University of California, San Diego, and National Bureau of Economic Research, 2003) <[http://usmex.uscd.edu/papers/03\\_05\\_hanson\\_wages.pdf](http://usmex.uscd.edu/papers/03_05_hanson_wages.pdf)> at 1 May 2004.

This is not to say that Mexico has not benefited from *NAFTA* — just that it would probably have benefited more from a better *NAFTA*. For other developing countries, bilateral negotiations offer little realistic prospect of negotiating a ‘better *NAFTA*’ with the US. The WTO remains the best option in this regard. Yet, as Cancún has shown, the promise of the WTO is something of a double-edged sword. The consensus-based approach to decision-making gives developing countries some strength to negotiate in areas of common interest. However, that strength should not be used bluntly or as an excuse for intransigence, as the cost for doing so is the real prospect of even stronger liberalisation provisions through bilateral trade agreements with the large member states of the WTO.

## VII CONCLUSION

The Doha negotiations were originally set to conclude by 1 January 2005.<sup>98</sup> The events at Cancún make this an unrealistic deadline for completion. This does not mean that the Doha round is somehow fatally wounded. Many past negotiating rounds including the Uruguay round have extended far beyond their initial negotiating deadlines.

It is important, however, that all the WTO members heed the main lessons of the Cancún Ministerial. The most obvious and important lesson is to return to the negotiating parameters of the Doha agenda. That agenda clearly prioritises agriculture over, say, the Singapore issues. The intricate trade-offs within the Doha agenda reflect both the growing membership of developing countries within the WTO and their dissatisfaction with the one-sided nature of the results of the last major negotiating round. For many commentators, there was almost a sense of the inevitable in developing country opposition at Cancún given the initial focus on the Singapore issues and recent battles over the intrusiveness of initiatives such as the *TRIPS Agreement* on the domestic regulatory autonomy of those states. Pleasingly, recent events have shown a move back towards agricultural issues. The US — often criticised for its aggressive trade policy against developing countries — recently sent a letter to the trade ministers of the WTO in an attempt to restart the Doha negotiations.<sup>99</sup> That letter notably departs from the harsh rhetoric of blame following the collapse of the Cancún Ministerial and posits agriculture as the essential topic and catalyst for success in the Doha round.<sup>100</sup>

The Doha negotiations must also offer something for everyone including developed countries. The WTO negotiations are, after all, fundamentally a market mechanism to allow member states to reach consensus by trading compensatory bargains across and within separate issues of interest. There are also significant political economy implications in this mechanism as it allows each member state to garner increased domestic support for the curtailment of domestic regulatory autonomy by pointing to the net benefits to flow from the negotiated set of agreements. If real progress is made on agriculture initially,

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<sup>98</sup> *Doha Declaration*, above n 4, [45].

<sup>99</sup> Letter from Robert Zoellick, US Trade Representative, to WTO trade ministers, 11 January 2004, available at International Centre for Trade and Sustainable Development <<http://www.ictsd.org/ministerial/cancun/docs/Zoellick-letter.pdf>> at 1 May 2004.

<sup>100</sup> *Ibid* 1–3.

developing countries should not implacably oppose some movement on the Singapore issues. A starting point might be the least controversial and intrusive of these issues, being that of trade facilitation. Indeed, the last days of the Cancún Ministerial showed that the EU — as the main *demandeur* of the Singapore issues — was willing to compromise by focusing on working towards binding rules on trade facilitation alone.

Yet, developing countries should also approach the more controversial issues of investment and competition policy with an open perspective. The options for negotiation on investment in particular should not be perceived as a zero-sum game, with either full liberalisation of discriminatory regulation or full protectionism. It is possible to conceive of a mix of liberalisation provisions within a WTO investment agreement whilst preserving a degree of freedom to impose developmental restrictions.<sup>101</sup> A blunt refusal by developing countries to engage in the necessary trade-offs to reach consensus within the WTO will only mean that these issues, with their important developmental implications, will be pushed even further into the bilateral and regional arenas. Mexico's mixed experience with the strong *NAFTA* provisions, and *NAFTA*'s use as a template for US bilateral negotiations, should act as a stark warning of the dangers posed by these alternatives to the WTO.

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<sup>101</sup> For such a suggested model, see Kurtz, 'A General Investment Agreement in the WTO?', above n 41, 779–88.