

# CanadaWatch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

SPECIAL DOUBLE ISSUE—FROM DOHA TO KANANASKIS: THE FUTURE OF THE WORLD TRADING SYSTEM AND THE CRISIS OF GOVERNANCE

## What is the WTO for?

### GLOBAL GOVERNANCE

There has been a lot of discussion about two issues: to what extent can or should the WTO contribute to global governance by expanding its rule-making functions into new areas, and can the new multilateral trade round do enough to help lift the WTO's poorest members out of poverty? Does it deserve the title "the Doha Development Agenda"?

With respect to the first issue, many critics of the WTO have demonized the organization as a stealthy conspiracy between multinational companies and unaccountable

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bureaucrats to trample the world into submission. Among other things, they say it stands accused of despoiling the environment, pauperizing entire nations, and even of killing people. Not bad going for an organization with 500 permanent staff and an annual budget of less than \$90 million. World domination never came so cheap.

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## Reflections on global economic governance

### THE NEED FOR GLOBAL ECONOMIC GOVERNANCE

The emergence of a global economy implies the need for some form of global economic governance. The same functions that governments perform at the national level somehow must be performed at the global level. These include maintaining the supply of "public goods" that markets do not supply—for example, macro-economic management for global economic stability (now imperfectly performed by the IMF (International Monetary Fund), BIS (Bank for Inter-

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national Settlements), and G7 finance ministers; the formulation and policing of rules for economic exchange, both internationally and, to some degree, domestically (now imperfectly performed in the WTO); and the setting of a floor below which levels of human living must not sink (now im-

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# The dog that won't bark

After the successful Doha meeting last November, the WTO is moving forward once again with its complex and demanding agenda. Its governance culture has cobbled together an agreement for a new negotiating round, the result of many compromises on the big-ticket items such as investment rights, development, intellectual property, and generic drugs to name but a few of the areas where large question marks remain.

Significantly there is a backlog of issues that remain unaddressed, including US and EU conflicts over agriculture, biotechnology, and the scope of negotiations; the north-south divide; process and investment-related issues. There is also the formidable opposition of the anti-globalization movement, which remains unconvinced that the WTO is an effective guardian of the world's trading system and doubts whether the WTO with its stronger rule and dispute resolution systems is producing better outcomes. What is increasingly clear is that there is no broad-based consensus and there are many debates about the content and process of the Doha Round. The complexity of the agenda and the extent of the north-south divide give one pause that another failure like Seattle could be the final blow to the WTO.

## THIS ISSUE

This special issue of *Canada Watch*, "From Doha to Kananaskis: The Future of the World Trading System and the Crisis of Governance," grew out of a conference organized by Sylvia Ostry of the Munk Centre and Daniel Drache of the Robarts Centre for Canadian Studies with the support of IDRC and DFAIT. The aim of the conference was to find out what agreements had been made at Doha with respect to services, agriculture, trade, the environment, and labour. It wanted to examine a se-

The conference brought together some of the leading experts in the world. . . . The contributors to this special issue are sharply divided on whether the WTO will successfully conclude the Doha Development Round.

ries of north-south issues with respect to intellectual property rights and labour and human rights as well as the views from anti-corporate globalization NGOs with respect to the future of the WTO and the future prospects for global governance for G7 and G8 countries at Kananaskis in June.

The conference brought together some of the leading experts in the world, including Guy de Jonquières, *Financial Times* journalist and editor; Keith Maskus, World Bank; and Robert Howse and Michael Trebilcock, University of Toronto, along with international NGOs—Friends of the Earth, Focus on the Global South, and the National Farmers Union. The contributors to this special issue are sharply divided on whether the WTO will successfully conclude the Doha Development Round.

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# The WTO negotiations on services: The regulatory state up for grabs

## SETTING THE STAGE FOR NEGOTIATIONS

At present, WTO members are negotiating to further liberalize international trade in services. Services cover activities ranging from financial and telecommunications services over health and education to energy services and the provision of water. In the context of the General Agreement on Trade in Services (GATS), trade-policy makers currently design new rules to more comprehensively govern worldwide trade in such services. In June 2003, they will start a new phase of negotiations—the request/offer phase—aimed at rendering each other’s domestic services markets more open by requiring their trading partners to enter into additional liberal commitments under the GATS market access and national treatment provisions. Together, these negotiations bring about a series of challenges for trade-policy makers, domestic regulators, and civil society.

## THE THREAT TO DOMESTIC REGULATORY FLEXIBILITY

Most prominent among these challenges is the fear that further liberalization of international trade in services may inappropriately constrain domestic regulatory prerogatives. Domestic regulatory activities are crucial to attain legitimate policy goals intertwined with the provision of services. There are important public goods aspects to many service sectors, such as telecommunications, education, health, or the provision of water, with a corresponding need for extensive regulation. Even where there are justifications for demonopolization and regulatory reform, new regulations are needed to address access to “networks,” consumer protection, and equitable access to basic services.

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**Flexibility and diversity in domestic regulation are at risk from future liberalization of trade in services.**

Flexibility and diversity in domestic regulation are at risk from future liberalization of trade in services. Services liberalization aims to increase international trade by reducing obstacles to trade. As is obvious from even a cursory glance at the manual on services trade regulation produced by the WTO Secretariat, many domestic regulations of a generally applicable character are considered as possible “obstacles to trade” to be eliminated through commitments negotiated at the WTO, even where the measures in question contain no explicit element of discrimination against trading partners.

## LACK OF CLARITY IN GATS

Here it is important to note that the existing agreement on services trade at the WTO, the GATS, doesn’t clearly limit or define the scope and coverage of obligations that WTO members may undertake within the framework for serv-

ices trade liberalization. One apparent exception is GATS article I:3(b), which excludes “services supplied in the exercise of governmental authority.” However, a closer look reveals that the exact scope of this governmental/public services exception is far from clear. In order to be exempt from the GATS, a service has to be provided “neither on commercial basis” nor “in competition with one or more services suppliers.”

To date, the precise meaning of these provisions remains unclear. In the case of basic health services, for example, it remains unclear whether user fees or even insurance premiums charged for public health care would result in these services being found to be provided on a “commercial basis,” and thereby subject to general GATS disciplines. The wording of article I:3(b) creates uncertainty for governments seeking to experiment with public/private partnerships, or with regulatory reform of a services sector that combines a role for government in the provision of public goods with a role for the private sector in assuring competitiveness and efficiency in non-monopoly aspects of the service.

Similar lack of clarity surrounds some of the rules based upon which members enter into specific commitments for individual services subsectors and modes of supply. For example, the GATS national treatment obligation (article XVII) establishes that a member, once it has accepted that one of its subsectors and modes of supply is bound by this provision, may not discriminate between domestic and foreign “like” services and service suppliers. In that case, the scope of permissible regulatory action depends upon whether two services or service suppli-

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ers are considered to be “like” or “unlike.” However, neither the GATS nor any other WTO agreement provides guidance on how to determine the “likeness” of services and service providers. Such a determination is crucial from an environmental perspective, where different production methods might warrant different regulatory treatments. In the case of energy services for example, different energy sources—that is, solar versus carbon—might require different regulatory frameworks. With respect to energy, the situation is even more complex because some WTO members view electricity as a good, falling under the GATT, while others view the generation of electricity and the operation of power plants as a service. Consequently, before entering into further commitments under the GATS, WTO members may wish to clarify the breadth of its basic obligations. Also, members may wish to carefully design their specific commitments to carve out policies they wish to preserve.

## NEW RULES AND DISCIPLINES

Another source of concern is linked to the design of new rules and disciplines in the ongoing negotiations. To ensure that the GATS framework more comprehensively governs international trade in services, members are currently negotiating new rules in the areas of subsidies (article XV), government procurement (article XIII), and domestic regulation (article VI.4). Future disciplines on domestic regulation would either apply across the board to all services sectors, to certain commonly agreed upon sectors, or at a minimum to all sectors with respect to which members have made specific commitments in their schedules.

## THE NECESSITY TEST

A central concern in that context is the proposal to apply a necessity test to non-discriminatory domestic regulations. If in the future, a necessity test would be applied “horizontally,” that is for all services sectors and in the form

## What, it has to be asked, are the consequences of applying a “necessity test” to such a broad array of domestic regulations?

of “general disciplines” without granting members the possibility to decide whether their individual services sectors and modes of supply should be bound—such rules would indeed significantly constrain domestic regulatory prerogatives. Affected regulations would be those relating to qualification requirements, for professions such as doctors or teachers; technical standards and licensing requirements, which most likely would also cover zoning restrictions designed to monitor planning permission—for example, in the retail sector. Thus, a great deal of domestic regulations would have to be “not more trade restrictive than necessary.” What, it has to be asked, are the consequences of applying a “necessity test” to such a broad array of domestic regulations?

Here the intrusiveness of the proposed disciplines is far greater than those of the GATT in the case of trade in goods. Under the GATT, generally speaking, only if domestic regulations are found to constitute trade-protective discrimination, in other words to be in violation of the obligation of national treatment, are they subject to scrutiny under a necessity test.

The role of the necessity test proposed in the GATS framework would, however, be quite different. Its purpose would not be to grant a government the

possibility to justify domestic regulations that have been found, *prima facie*, to contain elements of trade-protective discrimination, as is the case where the necessity test is applied in relation to certain exceptions in article XX of GATT. Rather in the GATS concept, the meaning of the necessity test would be that the WTO dispute settlement organs would become something like a global regulatory review agency, second-guessing domestic regulatory trade-offs in services regulations, regardless of whether there is any element of protectionism.

## TRADE EXPANSION VERSUS THE REGULATORY RIGHTS OF GOVERNMENTS

The fundamental purpose of a necessity test, as explained by the WTO Secretariat, is that of a “means by which an effort is made to balance between two potentially conflicting priorities: promoting trade expansion versus protecting the regulatory rights of governments.” How, if at all, should such a balancing take place and are WTO tribunals the right organs to carry out such a balancing exercise? In the current negotiations WTO members have further elaborated on how this “balance” between promoting free trade and preserving governments’ regulatory rights to achieve legitimate policy objectives may look. The EC, for example, has made a proposal that suggests that “[a] measure should be considered not more trade-restrictive/not more burdensome than necessary if it is not *disproportionate* to the objective[s] pursued.”

Again, a fundamental concern is that this could lead to a WTO tribunal deciding whether a domestic measure aimed at achieving a legitimate policy objective “*disproportionately*” restricts trade. Similarly, it is highly questionable whether it should rest with a WTO tribunal to make value judgments about the *importance* of a domestic policy objective. Many believe that the WTO is ill equipped and the wrong forum to make

these sorts of decisions, because such a balancing exercise would involve judgments weighing fundamental societal values. Given these serious concerns, WTO members may wish to refrain from designing rules that give overly broad decision-making powers to WTO tribunals.

### **THE LACK OF A SAFEGUARDS MECHANISM**

The above concerns about loss of domestic regulatory flexibility are aggravated by the difficulties surrounding export changes of the relevant GATS disciplines and individual specific commitments. Most importantly, unlike the regulatory framework covering trade in goods, the current GATS framework does not yet contain a safeguards agreement. Safeguard provisions usually aim to allow the importing trading partner to take back obligations that cause serious injury to domestic industries producing a good or service, which is “like” or in competition with those goods or services whose importation is increasing, due to the acceptance of market-opening obligations.

In the GATS context, members cannot currently resort to any safeguards mechanism. Thus, if a member’s services market is being swamped by foreign imports and if its industry is negatively affected by such imports, the importing member to date has no means to unilaterally impose temporary measures to allow its domestic industry to adjust. Yet, such a safeguards mechanism would be of fundamental importance for developing country WTO members because, in most cases, their services industries are still at an early stage of development and, therefore, most vulnerable to increasing imports from highly competitive service providers.

The need for a safeguards mechanism is even recognized in the GATS agreement, which mandated members to adopt such a mechanism by January 1998. Unfortunately, although members have spent the last years negotiating such a mechanism, the adoption of any

**Although feasible in theory, it is virtually impossible for a WTO member to reverse specific commitments: the “modification of schedule” process may start only three years after a commitment has been taken and it entails lengthy and difficult negotiations about the level of compensation for affected trading partners.**

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respective instrument has been postponed several times, most recently from March 2002 to March 2004. With the request/offer phase coming closer, the ongoing lack of safeguards is likely to become particularly detrimental for developing countries, many of which will be pressured into opening up their services markets to foreign competition, without being granted any possibility to impose temporary safeguards measures.

### **THE LOCK-IN EFFECT**

In addition to the lack of safeguards, undue constraints for domestic regulatory flexibility may also arise from the GATS’s “lock-in” effect for specific commitments. Indeed, many hail it as one of

the positive features of the GATS in that its specific commitments provide services exporters with the type of legal security and predictability necessary to conduct international business. Although feasible in theory, it is virtually impossible for a WTO member to reverse specific commitments: the “modification of schedule” process may start only three years after a commitment has been taken and it entails lengthy and difficult negotiations about the level of compensation for affected trading partners. Again, this bargaining process promises to be particularly difficult for developing country members, which, because of their lack of negotiating expertise and their difficult economic situations, might be those countries most in need of quick and easy modification processes. In addition, the GATS “lock-in” effect may also bring about ramifications for citizens’ democratic right to decide how services are regulated in the future. Citizens having elected a government upon its promise to reverse or adapt certain steps toward economic liberalization in the services sector will realize that the latter may have virtually no means of taking back measures if preceding governments had enshrined them as binding GATS commitments.

### **FUTURE CONSIDERATIONS**

Beside the area of specific commitments, similar issues might also arise with respect to current rule-making processes under the GATS. As explained above, there are concerns that certain rules and negotiating proposals might not be adequate for the services sector. Yet it is most likely that members will go ahead and agree on a set of disciplines, possibly without the foresight and experience required to design adequate and well-balanced disciplines. Also, to not endanger the conclusion of any agreement, the highly political nature of multilateral trade negotiations might induce members to agree upon ambiguous language. In both cases, modification or clarification of the provision in question might

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be needed. However, experience with the TRIPS agreement has shown how hard it is to change agreed rules in order to re-balance a once agreed upon WTO agreement. Likewise, experience with GATS article I:3 has shown how difficult it is for members to acknowledge the need to clarify a highly ambiguous provision.

### **A THOROUGH AND COMPREHENSIVE ASSESSMENT AND EVALUATION PROCESS IS CRITICAL**

Thus, WTO members should not rush blindfolded into accepting binding specific commitments or agreeing upon new rules and disciplines. Rather, members should precede any negotiations with a thorough and comprehensive assessment and evaluation process, reviewing both positive and negative effects of services liberalization with a view to promoting key environmental, social, and development goals. Only such an assessment will provide negotiators with the much-needed information to achieve a sustainable and well-balanced outcome of negotiations. The need for such an assessment is already acknowledged in the GATS agreement itself, which states in article XIX:3, that for the purpose of establishing negotiating guidelines and procedures, members "shall carry out an assessment of trade in services."

Unfortunately, members have not succeeded in carrying out a satisfactory assessment before the establishment of the negotiating guidelines and, therefore, paragraph 14 of the March 2001 guidelines makes assessment an ongoing activity of the council. More importantly, the guidelines also state that negotiations shall be adjusted in light of the result of the assessment. Indeed, when comprehensively looking at the pros and cons of services trade liberalization as well as at the regulatory challenges arising in that context, GATS assessment could provide valuable input into the negotiating process and assist negotiators to avoid some of the pitfalls and dangers described above. Assessment will become even more crucial with the request/offer phase rapidly approaching.

### **OPEN, TRANSPARENT NEGOTIATIONS**

In addition, both the assessment as well as the negotiating processes should be conducted in an open and transparent way. Unfortunately, this is not yet the case. Both a recent two-day WTO symposium on services trade assessment as well as the ongoing negotiating and working sessions of the CTS (Council for Trade in Services) and its subsidiary bodies are closed to the public. Also, while the WTO Secretariat appears to increase transparency by regularly up-

dating a list of most recent negotiating documents on the WTO web site, many of the equally important background documents, informal "job-" or "non-papers" and the minutes of the relevant meetings remain largely inaccessible for the interested public.

Even greater transparency issues are likely to arise once the next phase of the bilateral request/offer negotiations start. Up until now, many WTO members have agreed to make their initial expressions of interest for the request/offer phase public. However, to date, several WTO members have also indicated that the more detailed requests and offers, as well as initial agreements among negotiating partners will remain secret.

Given the broad implications that a country's GATS commitments have upon its regulatory freedom to enact policies aimed at attaining legitimate objectives, depriving the public of access to a country's negotiating position seems fundamentally undemocratic and thereby raises serious concerns. In that vein, it is crucial that both the June 2002 request and March 2003 offers, as well as any intermediary conclusions, agreements, or changes of negotiating positions are readily communicated and available to the interested public and that WTO members' negotiating positions reflect the concerns of all affected constituencies. 

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Many of the criticisms are based on the mistaken notion that the WTO has autonomous authority that overrides that of its individual members. Of course, in reality, it is a voluntary arrangement for negotiating and implementing contracts between sovereign powers. The WTO as such has no mechanisms of its own to coerce or impose outcomes on governments. It is up to the individual member nations to join, and they are free to pull out—though so far none has done so.

Behind many of the attacks lies resentment at the WTO's binding dispute procedures. Many recent dispute rulings have been castigated as undemocratic intrusions into national sovereignty. However, critics are divided about solutions. Some simply want to demolish the organization. For others, undoubtedly the majority, the problem is less with binding rules as such, than the purposes they are intended to serve. Their chief interest appears to be in getting the rules re-written and interpreted

to uphold priorities other than trade. Indeed, some that assail the WTO as unaccountable and dictatorial appear eager to appropriate its machinery to promote diverse and sometimes conflicting alternative agendas.

At the same time, the role of WTO rules has recently aroused growing controversy among its members. First, there are developing countries' complaints about implementation, above all of the TRIPS (Trade-Related Aspects of Intellectual Property Rights) agree-

ment. And, second, because of demands by the European Union, with Japanese support, for negotiations on rules in “non-trade” areas including investment and competition, and a “clarification” of rules on the environment. More surprisingly, WTO Director General, Mike Moore has recently taken a public position in the debate, saying it is in developing countries’ economic interest to subscribe to agreements on the four Singapore issues.

### TRADE RULES: PROSCRIPTION VERSUS PRESCRIPTION

The European Union failed to get its full wish list accepted in Doha. However, it would be premature to conclude it has given up the struggle. Doha ducked tough decisions on whether, and in what form, to proceed with negotiations on the Singapore issues and the environment, remitting them instead to the fifth ministerial. That may have set the stage for a showdown, even a crisis, in Mexico next year.

The most eloquent advocate of expanding WTO rule making is Pascal Lamy the EU’s trade commissioner. He argues that rules on non-trade issues are needed to enable the WTO to “harness” globalization—in the sense of controlling or taming it. That, he suggests, is not only a worthwhile objective in itself, but necessary to make further trade liberalization palatable to skeptical public opinion.

Many outside the EU have dismissed such arguments as a cynical ploy to fend off pressures for agricultural liberalization by tying negotiations up in knots. But the EU’s position is also clearly influenced by its experience in formulating harmonized rules and standards for its internal market, and by a belief that its model should be applied to the wider world. This view is supported not only by France, where political and public opinion is still struggling to come to terms with globalization, but also by countries with such impeccable free trade credentials as Sweden.

Such thinking marks a shift away from the GATT model, in which rules

## The recent bitter disputes about TRIPS should give grounds for caution, particularly as an object lesson in trade negotiators’ limitations as rule makers.

were essentially *proscriptive*. Many of the rules the European Union has in mind would be heavily *prescriptive*. They would also not be designed to underpin market access undertakings, but would involve entering into additional commitments.

The WTO has, of course, already moved some way toward the prescriptive approach. It is evident, for instance, in the reference paper on regulatory principles in the telecommunications and SPS agreements (Agreement of Application of Sanitary and Phytosanitary Measures). But its most notorious expression is the TRIPS, which is both prescriptive and enshrines rules only tenuously related to market liberalization.

### TRIPS: A CAUTIONARY LESSON

The recent bitter disputes about TRIPS should give grounds for caution, particularly as an object lesson in trade negotiators’ limitations as rule makers. Not only are they poorly equipped to deal with highly technical issues outside trade; but the dynamics of complex multilateral negotiations also tend to breed second- or third-best outcomes. When negotiators cannot agree, they habitually paper over their differences with woolly compromises and semantic ambiguities that leave unclear what, if anything, they really meant.

Such lack of clarity mattered less in

the old GATT, which had more built-in escape valves for avoiding the strict application of rules. But in the WTO, it has increasingly left dispute panels and the appellate body open to damaging charges that they are making, rather than merely *interpreting*, rules. Such accusations are now heard not just from NGOs, but from jurists and sections of the US Congress. Loading the apparatus with yet further layers of poorly thought-out rules would risk heightening, rather than allaying, public resentment and mistrust of the organization.

### NON-TRADE ISSUES

In reality, much of the pressure to bring non-trade issues into the WTO arises not because it is institutionally well constituted to deal with them, but simply because other international forums have failed to provide answers acceptable to the petitioners. Labour standards and the environment are cases in point.

Some of these failures arise not because alternative forums do not exist, but because of internal contradictions and conflicts in national policy making. Governments frequently face one way on trade policy and another on other issues. In the negotiations on the Cartagena biodiversity protocol, some countries took positions diametrically opposed to those they have long fought for in the WTO. This incoherence is at the root of the potential conflict between WTO rules and multilateral environmental agreements. While such tensions persist at the national level, the idea that they can be reconciled in the WTO appears fanciful.

Finally, there are questions about how far efforts to impose uniform standards of conduct through more active prescriptive rule making will achieve their advertised purpose. As many commentators have pointed out, imposing minimum labour standards on poor countries would be more likely to rob them of their chief source of comparative advantage—low costs—than to improve their workers’ living standards.

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Then again, perhaps that is the real agenda of some of those calling for such rules in the WTO.

Or take competition policy. While it clearly overlaps in certain areas with trade policy, advocates of WTO competition rules appear less concerned with clarifying the relationship than with strengthening and harmonizing national approaches to anti-trust enforcement. The European Union, for instance, talks of fostering an international “competition culture” by elaborating WTO rules and principles for the conduct of policy.

Surely, this is going about the task the wrong way round. About 80 countries currently have competition laws, and their number is growing steadily. Yet few, even in the industrialized world, have agencies with the resources, experience, and institutional maturity to apply them effectively. Even within the European Union, which has supranational competition laws, quality and standards of implementation vary widely among countries. What likelihood is there that WTO rules would be any more effective in encouraging uniformity?

What is most needed to create a “competition culture” is more education, learning-by-doing, and the gradual development of mutual trust between regulators. That seems more likely to be achieved informally through dialogue and peer pressure in the new international competition network than through the more formal mechanisms of the WTO, in which anti-trust enforcers are not even represented.

If the case for expanded global rule making in the WTO remains to be made, what are the prospects for what many consider its mainstream role, opening markets?

## THE NEW DEVELOPMENT AGENDA

Much emphasis in Doha was placed on the development dimensions of the new round. This reflected awareness among richer WTO members that being

**[W]hether strengthening negotiating capacity is a sensible use of scarce development resources remains a much-debated question. Not only is it costly, but it does not tackle poor countries’ biggest challenge—how to translate the opportunities offered by trade liberalization into economic growth.**

seen to respond to poorer ones’ complaints about inequities in the multilateral trade system was indispensable to winning their support for a round. Indeed, one of the most striking features of Doha was how many members of the WTO’s formerly silent majority discovered they had a voice.

But how, in practice, will the new Development Agenda differ from earlier rounds? Axiomatically, all trade liberalization aims to promote economic development. Making that objective explicit seems to promise more, implicitly fuelling expectations that trade will deliver greater benefits to developing countries than in the past. It has also created an onus on the WTO’s richer members to do what is needed to deliver the goods.

The agreement on reinterpretation of TRIPS, despite strong counterlobbying by western pharmaceutical companies, was one response. US willingness to improve Pakistan’s access to its textiles market, albeit by a niggardly amount, was another. Since Doha, rich countries’ efforts to prove their bona fides have focused largely on the search for “capacity-building” measures, to equip the least developed to negotiate and operate more effectively in the organization.

There is certainly much that could be done. Many least-developed coun-

tries lack even the basic tools of information gathering and analysis needed to participate fully in the WTO. Some cannot even afford permanent Geneva representation.

## TRANSLATING TRADE LIBERALIZATION INTO ECONOMIC GROWTH

Nonetheless, whether strengthening negotiating capacity is a sensible use of scarce development resources remains a much-debated question. Not only is it costly, but it does not tackle poor countries’ biggest challenge—how to translate the opportunities offered by trade liberalization into economic growth. This is a huge and unresolved conundrum. Colombia, for instance, has some excellent trade negotiators. Yet all their efforts to win better access to foreign markets have failed to contribute measurably to the performance of its economy.

That in no way excuses rich-country protectionism, and the fact that most OECD (Organisation for Economic Cooperation and Development) members impose much higher tariffs on imports from developing countries than on trade with each other. Nor is it a reason for not lowering their barriers. Politically, without a clear signal that rich countries are decisively ready to open their markets, particularly for agricul-

tural products, textiles, and footwear, the Doha Round risks failure.

It is, however, not clear how far such action will lead to real economic benefits for the very poorest. The 48 least-developed countries account for 0.4 percent of the world exports, and Africa's share has continued to slip since the Uruguay Round, even though developing-countries' exports have grown substantially overall.

The benefits of any such liberalization in the Doha Round may turn out in practice to be very unevenly spread. Brazil's efficient agriculture sector looks likely to profit from better access in the United States and Europe, but what about Tanzania or St. Lucia? Some countries could even end up worse placed than before. China's surge in exports to the United States has been largely at other developing-countries' expense, and it stands to do better still once the multifibre arrangement (MFA) ends. Some competitors, such as Bangladesh, are already talking about trying to extend the MFA in another form; so as to continue benefiting from guaranteed historic market shares.

Of course, removing your own trade barriers is not a favour you do for others. It is a favour you do for yourself. Economic gains from liberalization stem not from increased exports, but from efficiency improvements stimulated by keener competition from imports. On this score, the high levels of border protection in many developing countries suggest they owe themselves a lot of favours.

But, here again, there are big questions. Although an apparent strong correlation has been traced between growth and economic openness among developing countries, cause and effect are still poorly charted. How far open trade regimes produce growth, and how far they result from it, remains an unsettled argument.

### **THE ROLE OF DOMESTIC POLICIES**

What is clear is that an open trade policy cannot substitute for inadequate and flawed domestic policies. And, too

## **If benefits fail to materialize, there is a risk of a relapse into bitter arguments about the alleged inequities of the multilateral system.**

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many poor countries are poor because they lack the domestic conditions needed to support sustained growth. At a minimum, these conditions include political stability, functioning public institutions and the rule of law, sound macroeconomic management, and some basic level of market regulation. Yet, in Africa, as many as a third of that continent's countries have latterly been engaged in ruinous wars. Some are, quite simply, failed states, ruled by corrupt elites concerned solely with preserving their own power.

Of course, there are exceptions. Some, such as Uganda, have made courageous efforts to lay the foundations for growth and open up to the world. Continuing trade liberalization clearly can contribute significantly to their future economic development. But, in too many African nations, a half-century of international development efforts have failed to prevent a downward economic spiral. It is unrealistic to suppose that this trend can be reversed simply by endowing poor countries with better trade negotiating and administrative resources; just as it is plainly wrong to condemn trade liberalization when it fails, because of other factors, to enhance prosperity.

All of this raises serious questions about the prospects for this round. Outside the field of agriculture, achieving the trade-offs necessary for a workable bargain is likely to require more concessions by developing countries than by

developed ones, because the latter have the highest barriers. But without greater assurance that liberalizing trade will bring tangible economic returns, how many will be prepared to move? And even if the round is successfully concluded, if benefits fail to materialize, there is a risk of a relapse into bitter arguments about the alleged inequities of the multilateral system.

### **THREE LESSONS FOR THE WTO**

First, whether in rule making or development matters, realistically knowing what the WTO can and cannot achieve is important. It can no more produce miracles than coerce sovereign governments into taking particular actions. At best, the multilateral system can nudge them further down a path they were already disposed to follow and buttress domestic reforms. But the driving impetus must come from within countries themselves.

Second, as multilateral trade policy extends further "beyond the border," frictions at the interface are likely to become more frequent. How these can be contained, and the extent to which they require reform of the WTO and its disputes settlement mechanisms, is one of the biggest longer-term questions confronting trade policy makers. These frictions risk being made more severe if the response is to try to turn the WTO into an institution for dealing with a range of global governance issues only indirectly related to trade. That could lead to paralysis and further recrimination.

The final lesson is to beware of building up exaggerated expectations. Equipping all the WTO's members to participate in its deliberations is clearly desirable to ensure its proper functioning and management. But giving the impression that it will automatically assure them of the benefits of more open world trade is a formula for disillusionment and disenchantment. Whatever happens on the way from Doha, the WTO cannot afford a return to the corrosive bitterness and resentment that set in after Seattle. 

## DOHA: THE DEAL-MAKING ELEMENTS

Doha contained these major elements:

- *General*: embedding development issues at the heart of WTO negotiations, including implementation issues, technical assistance, and capacity building.
- *Non-agricultural products*: improved market access, with agreement on modalities on tariffs and non-tariff measures (to the extent possible) targeted for end-March 2003.
- *Agriculture*: modalities for further commitments on the three pillars of the Agreement on Agriculture (domestic support, disciplines on export subsidies, and market access) to be established by end-March 2003.
- *Services*: a firm timetable has been set for services negotiations with tabling of initial requests by end-June, 2002, and initial offers by end-March 2003.
- *Trade-related intellectual property*: over and above the political declaration on TRIPS and public health, negotiations will be held on a limited number of technical issues (in particular, on a wines and spirits registry).
- *Rules negotiations*: negotiations are to address disciplines on subsidies, anti-dumping, and countervailing duties, as well as regional trade agreements.
- *Systemic issues*: improvements to the dispute settlement system, and consideration of the interaction between the WTO and the Multilateral Environmental Agreements (MEAs).

Developing countries constituted the vast majority of the WTO's 142 members at the time of the Doha meetings. Many developing countries remain convinced that the Uruguay Round had been a one-sided deal, involving commitments for major structural reforms on their part in return for market access. Developing countries are angry that they have not benefited

**Global governance is more contested than ever and no one can be certain that the WTO with all its muscle and resources has the political will and capacity to successfully negotiate a new deal for the world trading order.**

from the new world trading order and that the promises made by northern countries have not been kept. At the same time, at Doha, they were prepared to exercise their new-found clout.

### MANY UNRESOLVED ISSUES

As readers of this special issue will discover, it is very unclear what a development round could mean that will meet the expectations of southern countries. At the Uruguay Round, the developed world had promised southern countries access for their agricultural and textile industries but they never got the access. Tariffs against the South remain four times higher than those against the rich northern countries. With respect to governance issues, the WTO proposes to reduce the buffer zone between domestic and international policy space. This prospect is troubling, because it will lead to greater instability and insecurity for many countries.

Finally, even if the Doha Round is successfully concluded there is little assurance that the larger issue of international coherence both within the trading system and also the international financial regime of exchange rates and capital flows will be improved. The WTO and Bretton Woods institutions have not caught up to the fast-paced accelerating change of the global economy. Global governance is more contested than ever and no one can be certain that the WTO with all its muscle and resources has the political will and

capacity to successfully negotiate a new deal for the world trading order. The jury is out and the balance seems to have shifted for the time being in favour of the WTO skeptics. No one knows the answer to what a development round consists of? Are there better rules for global governance? Which rules would produce better outcomes for the unstable global trading system? What are the chances of a consensus on investment, agriculture, and public services? These are tough questions for which no one has answers.

### AN UNCERTAIN FUTURE

Southern countries are not one trading bloc, but the powerful controlling Quad composed of the European Union, United States, Canada, and Japan has successfully divided the South by splitting off Africa from the other southern countries with NEPAD (New Partnership for Africa's Development) to rescue that region from grinding poverty, war, and corruption (see [www.nepad.org](http://www.nepad.org)). The Doha declaration is compellingly ambiguous and any country can read anything that it wants into it. The current round may not fail but the atmosphere has been badly damaged, if not poisoned. So far the ducks are not lining up the way the once supremely confident global free traders predicted. *Caveat emptor.*

— Daniel Drache  
Editor-in-chief

perfectly sought in the various agencies of the United Nations). Whatever positions may be held on the role of government at national levels, there is now virtually universal agreement that the global economy is undergoverned. More and better governance is required, not less. Institutions, customs, rules systems, and dispute settlement systems to perform these functions for the global economy have begun to appear; but satisfactory global economic governance arrangements are still only a distant prospect.

## OBJECTIVES AND GOALS

Anti-poverty and developmental objectives are essential components of any ethically and politically sustainable approach to a globalized economy. Global poverty eradication and development for the poorest countries are already universally accepted global objectives, at the highest political levels, unlike objectives such as universal market liberalization or the harmonization of global market rules. There is agreement, at least at the level of official rhetoric, as found at the Millennium Summit, the Children's Summit, the Monterrey draft declaration, and various G7/8 pronouncements on humanitarian and developmental objectives that are often quite detailed in their specifics. When one asks, "what are international organizations for?" the answer is, in large part, to pursue the latter objectives. Yet the concrete reality of national and international policies does not square well with these ostensibly agreed upon, but still only rhetorical, objectives. There remains a huge gap between political rhetoric and policy practice.

## THE GAP BETWEEN POLITICAL RHETORIC AND POLICY PRACTICE

There should be no illusion as to where the real power in decision making relating to the global economy will, for the present, continue to rest and that is, with the economically strongest countries, firms, and organizations.

**If new processes and governance arrangements for the global economy are to carry worldwide credibility and legitimacy, they must provide greater voice, collective influence, and power for the developing countries and their peoples.**

Money still talks. Even within "democracies," power and interest usually prevails over social objectives. At present, the most powerful country of all, the United States, isn't very interested either in strengthened multilateral organizations or in developmental objectives in the poorest corners of the globe (unless they can be shown to threaten US security).

Still, most of the world recognizes democratic principles and the universal validity of certain basic human rights, again at least at the level of political rhetoric. One must therefore begin, through appropriately democratic and universalistic processes, to build global economic and global governance arrangements that are not fundamentally at odds with agreed democratic principles as currently practised in the key international financial institutions (the IMF and World Bank) and, to some degree, in the young WTO. If new processes and governance arrangements for the global economy are to carry worldwide credibility and legitimacy, they must provide greater voice, collective influence, and power for the developing countries and their peoples. Financial crises in "emerging market economies" have forced some rethinking and rearrangement, although still fairly marginal, in the interest of systemic stability, of the role of crisis-prone and potentially systemically significant developing countries in international financial governance.

The poorest and smallest countries remain, however, on the margins of all global governance arrangements, without much prospect of significant voice or influence. Their situation is particularly stark in the WTO where many are not yet members and even more have zero or extremely limited representation in Geneva, where this supposedly member-driven and consensus-based organization does its work.

## GLOBAL GOVERNANCE: A COMMUNICATIVE AND CONSULTATIVE PROCESS

Global governance should be thought of, not in terms of the creation of new global institutions but, above all, as a communicative and consultative process. A process through which genuine, uncoerced consensus is gradually built, rules and customs are mutually understood and often even agreed upon, and performance is continually reviewed. It is now widely agreed that the key existing multilateral economic institutions will have to move toward greater transparency, increased democracy and accountability to the global citizenry, increased provision for independent evaluation, and effective ombudsman-like and/or legal-aid mechanisms to protect the weak against the strong. The objective of "coherence" can be over-emphasized; often there may be increased productivity from a degree of constructive overlap.

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Existing WTO decision-making processes are severely flawed, especially in terms of the limits upon effective participation on the part of the smaller and poorer developing countries. Developing countries are deeply disaffected with the WTO and the legitimacy of its decision making is being subjected to serious question. At Doha, although these countries were better prepared for the ministerial meetings than ever before, they eventually had only marginal impact upon their outcome. "Consensus" was achieved, as before, through bilateral, behind-the-scenes pressure, dealing, and bullying. The WTO simply must find a more credible and effective decision-making system than the impossibly awkward, and abuse-prone, 140-country "consensus"-based system it now employs. The need for such reform of its internal governance is urgent.

Far from constituting an excuse for inaction, as some would have it, the WTO's youth should be seen as an opportunity for change before the encrustations of age set in, as they have done in the international financial institutions. In such internal governance reform, the GATT's "bicycle theory" should be recognized as dead and irrelevant in the new world of the WTO. With a new organization, while it is bound to have its ups and downs, as did the IMF and World Bank, there is no reason to assume that progress is best achieved through feverish bursts ("rounds") of mercantilist, lobby-driven negotiations. It is time for these urgent and breathless rounds to be replaced by careful, steady, step-by-step efforts, aimed at agreed long-run global objectives, to bring purpose, order, and credibility to the global trade regime and poverty eradication around the world.

## A SUSTAINABLE APPROACH FOR GLOBAL RULE MAKING

As long as there is deep political and professional disagreement as to how national policies are best deployed in

**[T]hose pursuing development from the most disadvantageous starting conditions must have the freedom to develop their policies in their own interest and in their own ways. They must be free to learn through trial-and-error, as others have done, what works best in their own unique and ever-changing circumstances.**

pursuit of anti-poverty and developmental objectives, there is only one approach to global rule making in the WTO and elsewhere that is sustainable. That is a flexible and pragmatic one. Efforts at harmonization should not be pushed too far. In particular, those pursuing development from the most disadvantageous starting conditions must have the freedom to develop their policies in their own interest and in their own ways. They must be free to learn through trial-and-error, as others have done, what works best in their own unique and ever-changing circumstances. Universal rules systems, totally harmonized laws, completely "level playing fields," and irreversible "undertakings" are inconsistent with the need for local ownership of development policies and the learning-by-doing that is the essence of development. Nor is a tightly time-limited provision for "special and differential treatment" for the poorest countries sufficient to the purpose.

## LOCALLY-OWNED POLICY DEVELOPMENT

Locally-owned policies are likely to include variations from "standard" northern-model and northern-pushed approaches to investment policies, trade policies, and intellectual property policies, among others. Within broad limits,

the global rules system should permit the poorer developing countries greater latitude for innovation and experimentation in the development of laws, institutions, and other development-friendly arrangements that their understanding of their own situations leads them to believe may encourage sustainable growth and poverty reduction. If there is to be expanded trade-related technical assistance for these countries, it should not, as now, consist primarily of instruction as to how to translate northern interpretations of existing WTO rules into reformed local legislation, or how to liberalize markets more quickly. Rather, it should comprise a sensitive response, with legal and economic expertise, to requests for help from countries struggling to develop their own institutional arrangements and systems, in their own way, for "dealing with" or "integrating into" the global economy. In this vision, as Dani Rodrik puts it, "the WTO would serve no longer as an instrument for the harmonization of economic policies and practices across countries, but as an organization that manages the interface between different national practices and institutions. . . . The trade regime has to accept institutional diversity, rather than seek to eliminate it, and . . . it must accept the right of countries to 'protect' their institutional ar-

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# The GATS, democratic governance, and public interest regulation

## THE MOST IMPORTANT SINGLE DEVELOPMENT IN THE MULTILATERAL TRADING SYSTEM

The General Agreement on Trade in Services (GATS) has been described as “perhaps the most important single development in the multilateral trading system since the GATT (General Agreement on Tariffs and Trade) itself came into effect in 1948.” Despite its importance, the GATS was hardly known when the Uruguay Round of international trade negotiations concluded in 1994. It has only recently begun to attract the public scrutiny that it deserves. This broadly worded treaty to enhance the rights of international commercial service providers has potentially far-reaching public policy impacts. These impacts merit serious attention and debate.

### FROM THE GATT TO THE WTO

The GATS was created under the umbrella of the WTO, which came into be-

BY SCOTT SINCLAIR

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ing on January 1, 1995 after eight years of complex and difficult negotiations. The WTO agreements subsumed and ranged far beyond the GATT, which had regulated international trade since 1948. While the GATT system had gradually been amended and elaborated throughout the post-war period, the advent of the WTO profoundly transformed the multilateral trading regime in several respects.

The most important of these fundamental changes were:

- While the GATT was simply an international agreement among “contracting parties,” the WTO is a full-fledged multilateral institution with “member governments.” It now takes a place alongside the Interna-

tional Monetary Fund, the World Bank, and other elite international economic institutions.

- While GATT rules primarily covered tariffs and trade in goods, the WTO rules cover not only trade in goods, but agriculture, standards-setting, intellectual property, and services.
- While the GATT focused primarily on reducing tariffs and other “at-the-border” trade restrictions, the far broader scope of the WTO means that it intrudes into many “behind-the-border” regulatory matters.
- While the GATT agreements had gradually expanded to cover new matters such as procurement or standards-setting, adhering to these side codes was optional. By contrast, the WTO agreements are a “single undertaking,” meaning that member governments have no choice but to be bound by all WTO agreements.

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rangements.” This is the pragmatic and constructive way of the WTO’s future.

### INTERNATIONAL FINANCIAL SUPPORT

In the end, there is no escape from the fact that poverty eradication and developmental objectives will require more finance. At present, the United States lacks the political will to increase significantly its official development assistance, except to those countries in which it has a security interest. But other countries, even some G7 members, do. Any Kananaskis consensus will have to incorporate US foot dragging on foreign aid. More progress in global poverty eradication and development objectives is therefore likely to be made in forums and cooperative arrangements other than the G7. If the

government of Canada were serious about its stated objectives in Africa, it would do better aligning itself with Europe and increase its support for development significantly.

Among the reasons why the UN Conference on Finance for Development (March 2002 in Monterrey) is potentially significant is that it marks the first time that the more representative procedures of the UN have been permitted to “intrude upon” the procedures and practices of the international financial institutions. Because of pressure from the United States and others, this “intrusion” has not been permitted to travel very far. Some would even argue that the UN has been co-opted into the world of the Bretton Woods institutions. Yet finance ministers are forced, by this event, to talk

about major financial issues with their “more political” counterparts in ministries of foreign affairs, not only in international circles but also at home. Despite the best efforts of the IMF, World Bank, and G7 officials to keep such matters off the agenda, global governance issues cannot help but surface at this UN conference.

Little of significance is likely to be achieved at this UN conference on international financial policies or governance, or even on development finance. This event, nevertheless, marks a small step toward more legitimacy because it consists of a slightly more representative process for the discussion of global economic governance. However small a step it may appear, its long-run significance, as a precedent, may prove to be profound. 

- Perhaps most significantly, while the GATT dispute settlement system was essentially “diplomatic” (panel rulings had to be adopted by consensus, including the agreement of the defendant government), the WTO dispute system is “legally binding” (the adoption of panel rulings can be blocked only by consensus, including the agreement of the complaining government).

## A CONSTITUTIONAL SHIFT

These changes qualitatively transformed not only the GATT regime, but the entire multilateral system. Taken together, they amount to a constitutional shift: a fundamental reworking of the basic legal precepts of the multilateral trading regime and of its role in the international system. Multilateral rule making, and especially enforcement, to protect commercial trading interests surged ahead of international rule making in other vital areas such as environmental protection, human rights, public health, and cultural diversity. These changes, relatively unnoticed and undebated at the time, are now proving both controversial and destabilizing.

## THE SCOPE OF THE GATS

First, a few undisputed facts. The GATS was concluded in 1994 as part of the Uruguay Round. It took effect on January 1, 1995. It is part of the WTO’s single undertaking and therefore binds all WTO member governments. It is subject to legally binding dispute settlement. The GATS consists of a “top-down” framework of rules that cover all services, measures, and ways (or “modes”) of supplying services internationally. This framework is combined with more intrusive rules that apply only to services that governments explicitly agree to cover. Further negotiations to expand GATS rules and to increase its coverage are built into the agreement. The first of these successive rounds to broaden and deepen the GATS is currently underway in Geneva.

**GATS critics and proponents agree on at least one critical point. The scope of the GATS is very broad—far broader than traditional rules governing trade in goods. Indeed, the subject matter of the GATS—services—is immense.**

GATS critics and proponents agree on at least one critical point. The scope of the GATS is very broad—far broader than traditional rules governing trade in goods. Indeed, the subject matter of the GATS—services—is immense. These range from birth (midwifery) to death (burial); the trivial (shoe shining) to the critical (heart surgery); the personal (haircutting) to the social (primary education); low-tech (household help) to high-tech (satellite communications); and from our wants (retail sales of toys) to our needs (water distribution).

Moreover, the GATS applies to all measures affecting services taken by any level of government, including central, regional, and local governments. Therefore, no government action, whatever its purpose, is, in principle, beyond GATS scrutiny and potential challenge. As noted, all service sectors are also on the table in ongoing, continuous negotiations.

For the critics, this breadth and the GATS novel restrictions set off alarm bells. As a former director general of the WTO, Renato Ruggiero, has admitted the GATS extends “into areas never before recognized as trade policy.” Not limited to cross-border trade, it extends to every possible means of providing a service internationally, including investment. While this broad application does not, of course, mean that all services-related measures violate the treaty, it does mean that any regula-

tory or legislative initiative in any WTO-member country must now be vetted for GATS consistency or risk possible challenge.

## HOW FLEXIBLE IS THE GATS?

The proponents, however, while acknowledging the treaty’s universal scope, stress its “remarkable flexibility.” They also point to its controversial exclusion for governmental services and the range of exceptions available to protect otherwise non-conforming measures from successful challenge.

Proponents sometimes refer to the GATS as a “bottom-up” agreement. This refers to a treaty that applies only to those specific government measures and sectors that individual governments explicitly agree to cover. By contrast, “top-down” treaties automatically apply to all measures and sectors unless governments explicitly exclude them by negotiating them off the table. The GATS, however, is not a purely bottom-up agreement. It is, in fact, a hybrid agreement that combines both bottom-up and top-down approaches.

Certain GATS obligations, most notably the most-favoured-nation rule, already apply unconditionally across all service sectors. And, while it is true that the most forceful GATS obligations apply only to sectors that governments explicitly agree to cover, there are serious limits to this flexibility:

- Most governments have already given up much flexibility by not

- making full use of their one-time chance to specify limitations to their initial GATS commitments.
- Members remain under intense pressure to cede flexibility in successive rounds of negotiations to expand GATS coverage.
  - The GATS requires governments that withdraw previously made commitments to compensate other governments whose service suppliers are allegedly adversely affected.
  - Protective country-specific limitations will endure only if all future governments are committed to maintaining them.

The GATS vaunted flexibility is, therefore, considerably less than is sometimes claimed.

### **THE GATS GOVERNMENTAL SERVICES EXCLUSION**

The GATS covers all services, except those “supplied in the exercise of governmental authority.” At first glance, this controversial exclusion is potentially broad, but it is highly qualified. GATS article I:3 excludes services provided “in the exercise of governmental authority,” but it goes on to define these as services provided on neither a commercial nor a competitive basis. These terms are not further defined and, if left to the dispute settlement process, will most likely be, according to the rules of treaty interpretation, interpreted narrowly.

“Public services” are rarely delivered exclusively by government. They are complex, mixed systems that combine a continually shifting combination of public and private funding, and public, private not-for-profit, and private for-profit delivery. A truly effective exclusion for public services should safeguard government’s ability to shift this mix and to regulate all aspects of these mixed systems. Where the GATS exclusion is most needed, when governments want to expand or restore the public, not-for-profit character of the system, it is least effective. This controversial exclusion is, therefore, ambiguous at best and ineffective at worst.

**A common refrain in every official rejoinder to GATS critics is that the GATS specifically recognizes governments’ right to regulate. Regrettably, it is terribly misleading to suggest that the mere affirmation of the right to regulate, contained in the treaty preamble, fully protects the right to regulate. It does not.**

### **THE GATS PREAMBLE AND THE “RIGHT TO REGULATE”**

A common refrain in every official rejoinder to GATS critics is that the GATS specifically recognizes governments’ right to regulate. Regrettably, it is terribly misleading to suggest that the mere affirmation of the right to regulate, contained in the treaty preamble, fully protects the right to regulate. It does not. While the preamble does contain a clause that “recognizes the right of Members to regulate,” this language has strictly limited legal effect. It would have some interpretive value in a dispute but should not be construed as providing legal cover for regulations that would otherwise be inconsistent with the substantive provisions of the treaty. In short, governments retain their freedom to regulate only to the extent that the regulations they adopt are compatible with the GATS.

### **THE MFN RULE**

The GATS most-favoured-nation treatment (MFN) rule, which applies to all service sectors, has proven to be a surprisingly powerful obligation in two recent GATS-related disputes. This rule (GATS article II) is best understood as a most-favoured-foreign *company* rule, because it requires that any regulatory or funding advantage gained by a single foreign commercial provider must be extended, immediately and unconditionally, to all. The MFN obligation has

the practical effect of consolidating commercialization wherever it occurs. While not legally precluding a new policy direction, this rule makes it far more difficult for governments to reverse failed privatization and commercialization.

### **THE NATIONAL TREATMENT AND MARKET ACCESS RULES**

The hard core of the GATS comprises restrictions that apply only to the sectors, or subsectors, where governments have made specific commitments. These commitments, together with any country-specific limitations, are listed in each government’s GATS schedule.

The GATS national treatment rule (GATS article XVII) requires governments to extend the best treatment given to domestic services (or service providers) to like foreign services (or service providers). In the GATS, this rule is quite intrusive, because it explicitly requires government measures to pass a very tough test of *de facto* non-discrimination. That is, measures that on their face are impartial can still be found inconsistent if they modify the conditions of competition in favour of domestic services or service providers. This gives dispute panels wide latitude to find measures GATS-illegal even when they are, on their face, non-discriminatory or when such measures alter the conditions of competi-

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tion merely as an unintended consequence in the legitimate pursuit of other vital policy goals. The GATS stiff national treatment requirement thus opens the door for non-discriminatory public policy to be frustrated for reasons that are unrelated to international trade.

The GATS market access rule (GATS article XVI) is one of the treaty's most novel, and troublesome, provisions. There is nothing quite like this rule in other international commercial treaties. Framed in absolute rather than relative terms, it precludes certain types of policies whether or not they are discriminatory. A government intent on maintaining otherwise inconsistent measures is forced to inscribe them in its country schedules when it makes its specific commitments. This rule prohibits governments from placing restrictions on the number of service suppliers or operations; the value of service transactions; the number of persons that may be employed in a sector; and, significantly, the types of legal entities through which suppliers may supply a service.

Such prohibitions call into question, for example, the GATS-consistency of limits imposed to conserve resources or protect the environment. Also, many governments restrict the private delivery of certain social services such as childcare to non-profit agencies. Many also confine certain basic services such as rail transportation, water distribution, or energy transmission to private, not-for-profit providers. Such public policies certainly restrict the market access of commercial providers, whether domestic or foreign. But they have never before been subject to binding international treaty obligations. Now, whether this was intended or not, these vital policies are exposed to GATS challenge.

## **GATS RESTRICTIONS ON MONOPOLIES AND EXCLUSIVE SERVICE SUPPLIERS**

The GATS restrictions on monopolies and exclusive service suppliers (GATS

## **Any government wishing to designate a new monopoly in a listed sector is required to negotiate compensation with other member governments or face retaliation.**

article VIII) impose new burdens on monopolies and exclusive service supplier arrangements. In fact, monopolies and exclusive service suppliers are GATS-inconsistent and must be listed as country-specific exceptions in committed sectors. Any government wishing to designate a new monopoly in a listed sector is required to negotiate compensation with other member governments or face retaliation.

Monopolies, while not so prevalent as they once were, are still relied upon to provide basic services in many countries. Postal services, the distribution and sale of alcoholic beverages, electrical generation and transmission, rail transportation, health insurance, water distribution, and waste disposal are just some of the more widespread examples. Exclusive supplier arrangements are commonplace in post-secondary education, health care, and other social services. The consequences of these GATS rules, which so far have gone largely unexamined, are likely to be significant in all of these important areas.

## **GATS RESTRICTIONS ON DOMESTIC REGULATION**

If proposed GATS restrictions on domestic regulation (GATS article VI.4), now being negotiated in Geneva, were

ever agreed to, they would constitute an extraordinary intrusion into democratic policy making. At issue is the development of "disciplines" on member country's domestic regulation, explicitly non-discriminatory regulations that treat local and foreign services and service providers evenhandedly. The subject matter of these proposed restrictions is very broad, covering measures relating to qualification requirements and procedures, technical standards, and licensing procedures; a wide swath of vital government regulatory measures.

Critically, these proposed restrictions are intended to apply some form of "necessity test"—that is, that regulations must not be more trade restrictive than necessary and that measures must be necessary to achieve a specified legitimate objective. Perversely, the proposed GATS restrictions would turn the logic of the long-established GATT necessity test on its head. It would transform it from a shield to save clearly discriminatory measures from challenge into a sword to attack clearly non-discriminatory measures. The proposed GATS restrictions on domestic regulation are a recipe for regulatory chill; they are among the most excessive restrictions ever contemplated in a binding international commercial treaty. This excess is concrete evidence of the hazards of leaving the ambitions of commercial ministries, and the corporate lobbyists driving them on, unchecked by broader public scrutiny and debate.

## **A CONTROVERSIAL AGREEMENT**

The GATS is a deservedly controversial agreement. Its broadly worded provisions give too much weight to commercial interests, constraining legitimate public interest regulation and democratic decision making.

As GATS proponents frequently insist, the treaty does not *force* governments to privatize public services. But this is somewhat beside the point, because

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# TRIPS: Controversies and potential reform

The WTO Ministerial Conferences in Seattle in 1999 and Doha in 2001 may have marked a new era in global trade negotiations. In particular, governments of developing countries are becoming increasingly assertive in criticizing the structure of the trading system and presenting their own positions. The Seattle meeting failed in part because developing countries pushed for changes in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and were unwilling to countenance strengthening its standards as advocated by the United States. At Doha, the WTO members agreed to relaxed interpretations of the obligations many of the least-developed countries found onerous or impossible to meet, most significantly in the treatment of patents for essential medicines.

BY KEITH E. MASKUS

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## FROM SEATTLE TO DOHA

The road from Seattle to Doha was not travelled by trade ministers alone. As it became clear that TRIPS standards could restrain government policies in health care, agriculture, environmental protection, education, and technology supports, wider official interests questioned the utility of these standards. Numerous NGOs made their views known about how TRIPS might make more costly the provision of global collective goods in such areas as medicines, food security, and biodiversity. In turn, media interest has mushroomed with regard to

the implications of global protection of intellectual property rights (IPRs). Official organizations, such as the WTO, the World Health Organization, the World Bank, and UNCTAD (UN Conference on Trade and Development), now devote increasing resources to conceptualizing IPRs as a development issue.

TRIPS raises a number of controversies, ranging from concerns over costs and availability of medicines, agricultural chemicals, new seed varieties, and software, to the implications of asserting private ownership rights over life forms, genetic resources, and biotechnological inventions. For such reasons, there are numerous proposals to scale back, alter, or clarify the provisions of TRIPS.

At the same time, developing countries wonder if there might be gains

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- through continuous negotiations it exerts constant pressure to open services to foreign commercial providers;
- the GATS MFN rule helps consolidate commercialization;
- the GATS monopoly provisions make it more difficult for governments to maintain public services by hamstringing their ability to compete;
- where GATS commitments are made, the GATS restricts the ability of governments to restore, revitalize or expand public services; and
- in such cases, compensation must be negotiated or retaliatory sanctions faced.
- the GATS clearly applies to government regulatory measures, whatever their form or purpose;
- the GATS applies a very tough test of non-discrimination when considering the possible adverse effects of domestic governmental measures on foreigners;
- the GATS prohibits certain types of measures, whether they are discriminatory or not; and
- negotiations to apply a necessity test to non-discriminatory domestic regulation pose a very serious threat to crucial regulatory instruments.

Apparently, the GATS strongest proponents would prefer to keep these threats out of public view. But they are unlikely to succeed in this. The negotiations to broaden and deepen GATS coverage will make services one of the centrepieces of the new round of WTO negotiations launched recently

in Doha. The existing GATS and the negotiation to expand it raise such serious challenges to democratic governance that they are certain to stimulate even greater public interest and controversy.

With only modest effort, non-governmental organizations, elected officials, and ordinary citizens are more than capable of understanding the GATS and its critical implications for public policy. When they do, they are likely to react with disapproval at how far this, nominally, *trade* agreement intrudes into the crucial regulatory prerogatives of democratic *governance*. Hopefully, this will result in greater public mobilization to bring citizens' considerable influence to bear on their respective governments, both to change the nature of GATS negotiations now underway in Geneva and to chart a more balanced future for the multilateral system. 

Similarly, the GATS does not *eliminate* governments' ability to regulate, however,

- the recognition of the right to regulate in the preamble has little legal effect;

from extending TRIPS to areas of their own comparative advantage. Chief among these are geographical indications for food products and collective marks for textile designs and other products of traditional knowledge. For their part, developed countries (chiefly the United States and the European Union) remain interested in incorporating stronger protection for copyrights on Internet transmissions, databases, and other areas.

The stage is set for additional negotiations in the next WTO round. Whether there is scope for agreement depends on numerous factors. A reasonable prediction is that TRIPS is unlikely to be strengthened in the interests of intellectual property (IP) developers unless there are serious commitments by the rich countries to provide additional market access to poor countries in agriculture and labour-intensive goods and services. Beyond that, it is difficult to foresee what might emerge.

## WHAT DOES DOHA SAY ABOUT IPRs?

The Doha meeting produced declarations on two issues of great concern to developing countries.

First, members agreed that TRIPS does not prevent countries from taking measures to protect public health and promote access to medicines for all. They affirmed that members have freedom to determine grounds on which compulsory licenses may be granted and to establish exhaustion regimes. Members instructed the TRIPS Council to find a solution before the end of 2002 for the problem that countries with weak manufacturing capabilities may not be able to use compulsory licences effectively. Least-developed countries were excused from the obligation to patent pharmaceutical products and to safeguard confidential test data until the year 2016. While this compromise did not go as far as many developing countries wished, it provides considerable leeway for poor coun-

**The agreement on pharmaceuticals and compulsory licences essentially recognized that poor countries could not meet their obligations and needed flexibility in procuring medicines in light of major health difficulties. In that regard, it affirmed the limitations inherent in TRIPS without explicitly abandoning the patentability of new drugs per se.**

tries to limit patent rights in their territories for purposes of public health.

Second, members affirmed that the provisions of article 66.2 of TRIPS are mandatory, so that developed countries must establish incentives for their enterprises to transfer technology to least-developed members. Many developing countries are frustrated that, despite claims made by advocates of TRIPS, little has been done to promote such technology transfer. This issue alone threatened to derail any prospect for moving forward in the IP area.

Both TRIPS advocates and critics hailed these agreements as victories. The agreement on pharmaceuticals and compulsory licences essentially recognized that poor countries could not meet their obligations and needed flexibility in procuring medicines in light of major health difficulties. In that regard, it affirmed the limitations inherent in TRIPS without explicitly abandoning the patentability of new drugs per se.

## TRIPS CONTROVERSIES

There are many issues currently under international debate. First, many developing countries find the requirement to establish administrative systems and

effective enforcement procedures for IPRs to be costly relative to any gains they might anticipate, particularly because economic benefits will go largely to foreign firms over the intermediate term. Technical and financial assistance for funding these costs has been small in relation to overall needs. If IPR holders wish to see their rights protected in poor countries, some international mechanism for generating such funds must be found. In a related vein, pressures are building for developed countries to make effective their commitments to encourage technology transfer.

Second, countries are exploring the flexibility provided by TRIPS in the area of patent eligibility, scope, compulsory licensing, and other exemptions. Of particular concern are the implications of pharmaceutical product patents for prices and availability of new drugs and for generic competition. It is fair to claim that TRIPS implicitly condemns weak patent rights as a means of industrial policy (consider the WTO panel ruling against Canada's provisions for early stockpiling) while condoning them as health policy in cases of emergency. In practice this distinction will be difficult to make as

the recent Brazilian case suggests. Required patents will place considerable pressure on countries with significant generic industries, such as India and China. For the least-developed countries, the issue will remain costly procurement under difficult conditions. It is evident that no comprehensive and lasting solution may be found for this problem without significant infusion of public monies from the rich nations.

### **PATENTING LIFE FORMS**

Article 27.3 of TRIPS is a delicate—some would say confused—compromise about patenting life forms. It requires patenting of microorganisms, micro-biological processes and non-biological processes, while permitting members to exclude traditional breeding methods and higher (generally interpreted as multicellular) life organisms. Thus, countries must make complex determinations of what is a micro-organism, what is non-biological, and whether to patent such items as genetic sequences, biotechnological research tools, cloned animals and plants, and genetically modified plants and animals, such as the Harvard Oncomouse. A number of poor countries have opted for strong protection, essentially adopting WIPO (World Intellectual Property Organization) model laws in this regard—a questionable tactic.

The area of patents in biotechnology is intensely controversial. Within developed economies, many scientists worry that the award of broad claims on genetic sequences and research tools is overly protective and may diminish future research progress. At the international level, while developing countries might choose not to patent certain products emerging from biogenetic processes, they cannot prevent other countries, such as the United States, from issuing patents on products that use resources extracted from their territories unless they can demonstrate the existence of written prior art. Thus, considerable concerns exist about “biopiracy,” or the uncompen-

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sated extraction of genetic resources for making pharmaceuticals and cosmetics. TRIPS, which recognizes private rights to such products, and the Convention on Biodiversity (CBD), which claims that the underlying resources are owned, or managed by, sovereign nations, are inconsistent in this regard. Efforts to date to establish systems of prior informed consent and benefit-sharing agreements in such resources have been limited.

### **NEW PLANT VARIETIES AND PROTECTION FOR GEOGRAPHICAL INDICATORS**

Third, whether they adopt patents in the area or not, countries are required to provide effective protection for new plant varieties, in the form of plant breeders’ rights (PBRs). Such systems provide exclusive marketing rights for developers of new plant varieties (including those of genetic modification) but permit farmers to retain seeds for replanting and some scope for rival firms to use the protected materials as parents for their own breeding programs. A number of countries have followed the US model of permitting plant developers to opt for PBRs, patents, or both, which raises questions about the consistency of rights. A looming controversy relates to whether so-called genetic-use restriction technologies

(GURTs) must be patented under TRIPS.

Fourth, TRIPS requires governments to protect confidential test data issued in the act of achieving regulatory approval for medicines, foods, and other products. TRIPS is silent on the length of time required for this protection and countries have adopted several different standards. The United States has advocated a global standard of at least five years of protection, while Argentina and Brazil have opted for far-shorter periods. In its accession agreement with the WTO, China adopted a 10-year term of protection, making its standard higher than most international norms.

Fifth, a number of countries are now pushing for an extension of the WTO system for protecting geographical indications for wines and spirits to foodstuffs and plant strains for which the regional location of production imparts certain characteristics desired by consumers. In this way it is thought that countries might assert protection over such widely used terms as basmati rice and Darjeeling tea, though the prospects for doing so are weak. For new, or not widely known, products with geographical characteristics, however, this approach could be of some value to exporters. Some observers advocate

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applying geographical indications to such items as textile and carpet design, which would be more problematic. A more promising approach would be the establishment of collective marks that identify groups within which distinctive designs would be registered.

## WHERE TRIPS MIGHT EVOLVE

Given these complex questions, it is difficult to predict where the agreement might move in the next round. As noted earlier, any strengthening of TRIPS, and perhaps any attempt to avoid its being weakened, likely will depend on serious commitments on market access in agriculture and textiles by the rich countries. Beyond that basic observation, however, we might expect to see negotiations along several lines.

To begin, some resolution of the issues discussed above must be found. Some of the inconsistencies may be sorted out through dispute settlement over the next several years, particularly with regard to enforcement obligations. Most complex is the area of biotechnology patents and genetic resources, along with the inconsistency between TRIPS and the CBD. Also important are the scope of geographical indications across products and the duration of protection for test data.

A further complex question is whether the TRIPS agreement is the appropriate location for establishing protection norms for collective and traditional knowledge, including oral histories, artistic works, music, designs, medical preparations, and methods of production. It is difficult to protect these items with traditional IPRs because they are traditional (not novel) and collectively known.

Thus, programs to develop new rights, combining elements of collective marks, copyrights, and trade secrets along with *sui generis* recognition of traditional practices, will be advanced forcefully by developing coun-

**One highly contentious issue is whether patents should be available anywhere for items that had been known to the public by means of oral tradition, permitting oral prior art to defeat patent applications. The United States is adamantly opposed to this possibility.**

tries. One highly contentious issue is whether patents should be available anywhere for items that had been known to the public by means of oral tradition, permitting oral prior art to defeat patent applications. The United States is adamantly opposed to this possibility.

The scope of copyright protection for digital products placed on the Internet, involving rights for artists, producers, and performers, remains unclear. The WIPO Copyright Treaty and Phonograms Treaty provide a means for incorporating these rights into TRIPS, so long as countries retain flexibility to establish liberal fair use of Internet transmissions for educational and research purposes.

Finally, developing countries are faced with the prospect of establishing competition regimes with regard to abuses of intellectual property rights. In this context there is some potential for international negotiations over broader competition issues.

## MOVEMENT TOWARD GLOBAL HARMONIZATION

By setting out high minimum standards, albeit with some flexibility in their application, TRIPS establishes a significant movement toward global harmonization of IP norms. To economists, this is remarkable given the evident dif-

ferences in costs and benefits from IPRs across countries at different levels of development. For example, the agreement mandates a minimum 20-year patent term in all countries. TRIPS is, therefore, a “one size fits all” approach to a complex set of economic, political, and social factors. While harmonization may generate global efficiency gains in principle, the distributional effects may make the agreement internationally unsustainable without effective compensation to developing nations. So far there is little evidence of such compensation being paid, either explicitly or implicitly. Indeed, the tendency seems to be one of a “race to the top”—for example, the nearly completed Patent Harmonization Treaty would considerably harmonize examination standards across countries, most likely on the US and European models.

An alternative approach would be to recognize the importance of private IPRs but to depart from global harmonization. To some degree, the Doha Declaration already achieved this by extending transition periods for least-developed countries in pharmaceuticals. However, the principle could be broadened to other departures from unity, such as differential terms of patent protection keyed to levels of economic development. 

# The WTO services agreement: Problems for municipalities

## INCREASING MARKET ACCESS

In 1994, countries signed the first multilateral free trade agreement on services, the WTO General Agreement on Trade in Services (GATS). The purpose of the GATS is to achieve “progressively higher levels of liberalization” of services trade through “successive rounds” of negotiations to “increase effective market access” to services sectors in all countries. Although municipal governments were not involved in the 1994 negotiations, they may increasingly find that their scope for decision making is affected by them.

## SCOPE AND COVERAGE

The GATS disciplines apply to governmental “measures affecting services,” a broad coverage that includes laws, regulations, procedures, administrative actions, and subsidies. They cover all “modes” of providing trade in services, including cross-border supply (data processing in the United States); consumption abroad (tourism, foreign students); commercial presence (foreign investment) and the presence of staff of foreign businesses (management consultants). The GATS specifically applies to municipal measures (GATS article 1:3a).

It contains two levels of liberalization commitments. All countries must make their measures affecting services public (transparency) and provide all foreign service suppliers with any advantage provided to those of any other WTO member (most favoured nation).

In addition, in 1994, countries made more stringent commitments regarding service sectors they chose to list in country-specific schedules. The national treatment provisions (GATS article XVII) require that countries treat foreign businesses at least as favourably as domestic ones, to provide “effective equality of opportunities,” and prevent

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**This standard is so vague and inappropriate, as a criterion of measurement for public protections that it invites biased decision making in favour of strictly economic interests.**

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even incidental (unintended) disadvantages for foreigners, such as might result from short timelines for tendering processes. “Market access” (GATS article XVI) prohibits, for both domestic and foreign services in sectors listed in the country’s schedule, measures that restrict numbers of service suppliers, total values of service sales or assets (economic means tests), numbers of service operations or employees, types of legal structures, and foreign ownership. These provisions prohibit, for both domestic and foreign services, many measures countries have used to develop national economies in industrialized countries.

## DOMESTIC REGULATIONS

A GATS Working Party on Domestic Regulations is currently considering rules for all domestic regulations,

whether or not they discriminate between domestic and foreign companies. Regulations regarding professional qualifications and licensing and technical standards for services must not be “more burdensome than necessary to ensure the quality of the service” (GATS article VI.4). This standard is so vague and inappropriate, as a criterion of measurement for public protections that it invites biased decision making in favour of strictly economic interests. The GATS contains no articulated standard for measuring “burdensome” such as whether it includes measures that add mere inconvenience to potential exporters, or must entail significant costs or even serious disadvantage. The Canadian government has not indicated what meaning it considers applicable to these discussions, or whether there is an agreed definition among negotiators (not that such an agreement would bind future trade dispute panels) and if so, what the agreed definition is.

The concept of regulations being burdensome conflicts with the increasing relevance of precaution in regulation making for environmental protection and human health. Application of a precautionary principle or approach involves taking steps to prevent or minimize harm when a risk has become apparent, even though scientific uncertainty exists regarding some elements of the risk and the cause-effect relationships that produce it. Technical standards implemented on a precautionary basis are likely to be particularly vulnerable to a finding that they are unnecessarily burdensome.

## GOVERNMENT SERVICES

A key question under the GATS is whether its disciplines apply to government services. They are not covered if they are “neither supplied on a com-

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mercial basis nor in competition with private suppliers" (GATS article I:3c). However, the WTO concedes that the meaning of "commercial basis" is unclear. It may include businesses owned by public entities and services, which are paid for by the public. Precedents in other jurisdictions suggest that this exemption would likely be interpreted narrowly in the case of a challenge. Services purchased for governmental purposes and not for resale are likely not affected by GATS as they fall within "government procurement" for which GATS does not contain significant rules.

Municipal services to the public are most likely covered, not exempt, since they're often provided by a mix of public and private suppliers, and fees for service are common (waste disposal, water, public transit). It would be difficult to argue they're provided neither on a commercial basis nor in competition with private suppliers. Public utilities (transit commissions, water and sewage boards, library boards) are "monopolies and exclusive services suppliers" under GATS and must comply with its rules.

## POTENTIAL GATS IMPACTS ON CANADIAN WATER AND SEWAGE SERVICES

The Canadian schedule to the GATS lists many commitments that affect water services in Canada. These include engineering and project management services for water supply and sanitation works; sewage services; sanitation and similar services; business services including inspection and quality control; and construction services. They also include various environmental services and the non-specific "other environmental services," which may cover elements of water service delivery.

The degree of private sector involvement in water and sewage construction and operation in various Canadian centres means it is likely that GATS rules apply to the provision of these services in most Canadian cities. The govern-

**Much-needed improved national water quality standards and standards for operator training might be found, in a trade dispute, to be "more burdensome than necessary."**

mental services exemption is unlikely applicable.

The broad coverage of services related to water service delivery in the Canadian schedule gives rights to foreign companies (engineering, construction, including scientific water testing and monitoring firms) to the same degree of involvement in water services and wastewater quality and quantity monitoring as Canadian companies may have. It increases the number and scale of private sector players who may create pressure for more privatization of water services or parts of these services.

### "MORE BURDENSOME THAN NECESSARY"

Measures to promote water efficiency and use reduction, as well as energy reduction related to water services, are not exempted from GATS coverage because the GATS general exception (article XIV) does not protect measures adopted for conservation of a resource. Since GATS covers subsidies, private water companies may seek access to the subsidies now paid to public water providers. Much-needed improved national water quality standards and standards for operator training might be found, in a trade dispute, to be "more burdensome than necessary."

Changed land use planning for watershed management, stormwater runoff absorption, and demand management may ultimately imply limits to urbanization in certain rural areas and denial of water to proposed new businesses, meaning reduced opportunities for market entry by new suppliers, con-

trary to GATS article XVI.

The need for energy conservation, to reduce greenhouse gas emissions, requires flexibility for municipalities in designing service systems to meet multiple purposes. This flexibility is reduced when, due to high capital costs, corporations gain long-term contracts and procedures for service delivery. The flexibility is further reduced by GATS, which gives foreign firms more strategies to demand access to such long-term service commitments.

The necessary use of a mix of regulatory tools (sewer use bylaws, permits, policies, user fees, and education) to control discharges to sewers implies controls on rights of establishment of industries, as well as questions of domestic regulation of water effluents, both vulnerable to GATS oversight.

### A COMPLEX WEB OF DOCUMENTS

The effects of the GATS may be considerable for municipal water and sewage services. Unfortunately, the GATS is a particularly difficult agreement to understand and apply. A complex web of documents, it includes commitments, the GATS text, the service classification schedules, and the country-specific schedules. Each document contains unclear wording, unclear exemptions, and unclear overlap between obligations with regard to services and goods. These complexities mean it is difficult to predict all possible impacts. In addition, defending municipal measures, should trade disputes be launched, will also be difficult. 

# Water for sale: The impact of international services on public policy and law

## WATER AS BIG BUSINESS

Like virtually every sector of the global economy, the water and water services industry is dominated by a decreasing number of large and growing corporations that must maximize shareholder value by increasing revenues and profit. This imperative to grow is being pursued on two broad fronts.

The first is the acquisition of water rights: transforming water from a public resource to a commodity on the open market. In many countries, public ownership of fresh-water resources are increasingly being assigned to private interests, usually through licensing and permitting schemes. In developing countries, the World Bank is promoting private water rights, in an effort to define water as an economic rather than a social good.

The second involves the acquisition of water services. Because corporate mergers and acquisitions of private utilities and water companies have consolidated much of the industry, the new frontier for corporate growth lies in privatizing public water services. To overcome resistance to the loss of public control over drinking water services, an incremental strategy, public-private partnerships (P3s), has been developed. A typical P3 involves a joint venture between a transnational water corporation and a local government in which the former contracts to design, build, and operate water plants and delivery systems, usually for several decades.

In developing nations, P3s are underwritten by development agencies and financing institutions such as the World Bank, with funding often tied to the participation of the water transnationals. Thus these institutions not only underwrite global corporate expansion but also inhibit poor countries from developing public water infrastructure.

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Indeed, trade rules concerning services and investment are not in fact about services or investment, but rather about the capacity of governments to participate in, or regulate, these economic sectors.

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However, to achieve their goals, water corporations must overcome a number of obstacles: first among these is government as resource owner, service provider, or regulator. This is where international trade and investment agreements come into play by codifying a trade liberalization agenda to constrain the exercise of these traditional and sovereign powers.

## AN AGENDA FOR DEREGULATION

Trade officials may decry the characterization, but NAFTA and WTO rules do represent an agenda for deregulation. Indeed, trade rules concerning services and investment are not in fact about services or investment, but rather

about the capacity of governments to participate in, or regulate, these economic sectors. In fact, trade agreements are little more than a catalogue of *measures* that governments are prohibited from adopting or maintaining. A “measure” is virtually any government action that even indirectly affects services or investment.

In addition, international investment and services agreements impose constraints on *non-discriminatory* domestic measures, thereby abandoning the historic justification for trade constraints on sovereign government authority, which was to level the playing field for foreign goods, investors, and service providers. Now broad categories of government regulation are prohibited no matter how fairly conceived or applied.

## THE GENERAL AGREEMENT ON TRADE IN SERVICES

Most services, particularly water, are delivered on a local basis and have nothing to do with international trade. However, the GATS defines “trade in services” so expansively that it applies to even the most local transactions if the interests of foreign corporations are at stake. Thus the GATS defines “trade in services” to include the supply of a service “through commercial presence in the territory of another [WTO] member.” By so distorting the concept of trade, the GATS extends international trade law and sanctions to matters of domestic policy and law never before the subject of international trade disciplines.

## WATER SERVICES

To date, much of the debate on the impact of the GATS on water has focused on the supply of drinking water. Because full GATS disciplines apply only to services to which countries have made specific commitments, the WTO

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disingenuously argues that as no member has yet made a commitment to *water distribution*, public policy options concerning water remain unaffected. But this ignores European proposals to encourage such commitments and the explicit obligation of all WTO members to expand this services treaty.

Moreover, in the new round of trade negotiations launched in Doha, November 2001, members agreed to initiate negotiations immediately on *the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services*. The European Union and many others define water supply as an environmental service.

The WTO's posture also obscures the broader ramifications of the GATS services classification regime, which includes hundreds of categories that specifically refer to water. These range from the construction of dams and the operation of water-treatment plants to the manufacture of soft drinks. A great many other services depend upon the supply of water, or can adversely affect water quality through polluting activities.

The WTO's glib assurance that "the WTO is not after your water" is comforting only if one imagines that water is somehow isolated from other aspects of the services economy. But as we all know, water is essential not only to life, but also to most businesses and industries.

Thus, while the WTO correctly says that no country has committed water-supply services, dozens have made commitments to other water-related services, including:

- environmental services including pollution control and wastewater and sewage treatment;
- general construction work for civil engineering, including construction for waterways, harbours, dams and other water works, for long distance and local pipelines;
- engineering and project management services for water supply and sanitation works; and

The WTO's glib assurance that "the WTO is not after your water" is comforting only if one imagines that water is somehow isolated from other aspects of the services economy.

- technical testing and analysis services (for example, water quality) including quality control and inspection (for example, water and wastewater works).

In other words, while the supply of drinking water is not yet a committed service, virtually every aspect of designing, building, and operating water supply infrastructure is the subject of services commitments made by many WTO member countries.

## WATER QUALITY AND WATER PROTECTION

The extent to which water is degraded and depleted depends largely upon the regulatory framework in place to protect it. But the GATS provision on *Domestic Regulation* imposes broad constraints on *non-discriminatory* measures, including those needed to protect and conserve water. By requiring that regulations be *no more burdensome than necessary*, the GATS empowers the judgment of international trade adjudicators to supersede those of accountable, elected representatives.

Consider, for example, setting ambient water quality standards, given scientific uncertainty about the concentra-

tion of a toxic substance or pathogen that will compromise ecosystem or human health. We know that pollution controls or water quality standards are often opposed by the companies that must bear the costs of compliance.

Now, foreign service providers can turn to dispute resolution under the GATS to challenge such unwanted initiatives. An international trade tribunal will then decide whether a less "burdensome" approach to protection might have been adopted: perhaps better water treatment technology could have been used; other sources of pollution controlled more assiduously; better watershed management practices adopted; or perhaps public health officials might be more vigilant in issuing "boil water" advisories. It isn't surprising that no environmental measure has ever been able to satisfy such open-ended and ill-defined criteria.

## CONSERVATION IS NO EXCUSE

While the GATS does allow government measures to protect human, animal, or plant life, if these can pass the "necessity" test, it does not allow the other critical WTO environmental exception for measures relating to the "conservation of exhaustible natural resources." Thus no government can use conservation to justify interfering with the rights of foreign services providers.

The failure of the GATS to acknowledge conservation as a legitimate exception is the clearest indication of its intent to loosen or eliminate public control of water. International investment treaties are even more problematic, typically allowing no meaningful exceptions for either conservation or environmental and human health protection.

## FOREIGN INVESTMENT

In 1998, efforts to create a Multilateral Agreement on Investment (MAI) under the auspices of the Organisation for Economic Co-operation and Development (OECD) fell apart when France withdrew from the negotiations. How-

ever, the prototype for the MAI remains integral to the North American Free Trade Agreement (NAFTA), and is the model for both the Free Trade Areas of the Americas initiative (FTAA) and the Agreement on Trade-Related Investment Measures of the WTO. The principles of the MAI have also been embedded in almost 2000 bilateral investment treaties (BITs) quietly negotiated over two decades, most within the past few years. More than 100 nations are parties to such treaties.

## THE RIGHT OF PRIVATE ENFORCEMENT

The most remarkable feature of these regimes is the right of private enforcement they accord foreign corporations. Under NAFTA, for example, foreign investors are granted a virtually unqualified right to enforce the constraints it imposes on government policy and regulation. However, unlike the GATS and other WTO agreements, there is no reciprocity—foreign investors have no obligations whatsoever under the treaties they may enforce.

This represents a profound departure from the norms of international trade law, which allowed only nation states to access dispute procedures. As a result, the powerful enforcement mechanisms of these international treaties have been freed from the diplomatic, strategic, and practical constraints that often limit state-to-state dispute resolution.

When investor claims do arise, they are decided, not by national courts or judges, but by private tribunals operating under international law and in accordance with procedures established for resolving private commercial claims, not disputes over questions of public policy and law. The tribunals deliberate in camera, and pleadings and evidence are routinely subject to strict confidentiality orders.

Not surprisingly, these investment treaties have become weapons with which to attack government efforts to achieve health, environmental protection, and other societal goals. They

**Since the recent global consolidation of this industry, when water services are privatized, bidding is usually dominated by transnational water corporations, and local competition is virtually non-existent.**

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have been invoked or threatened on at least five occasions to challenge government actions concerning water or water services, including claims

- by Canadian-based Methanex Corporation against the United States, for US\$970 million in damages because of a ban by California and other states on the fuel additive the company manufactures, because it has become a major groundwater contaminant. Among other claims, Methanex is arguing that the ban was unnecessary because less trade-restrictive measures were available;
- by US-based Sun Belt Water Inc. against Canada, for US\$10 billion, because a Canadian province interfered with its plans to export water to California. Even though Sun Belt had never actually exported water, it claims that the ban expropriated its future profits;
- by Compañía de Aguas del Aconquija (CAA), an affiliate of Compagnie Générale des Eaux (a subsidiary of Vivendi), against Argentina, for US\$300 million, arising from a water and wastewater privatization deal gone sour. The claim alleges that public health orders, mandatory

service obligations, and rate regulations all offended its investor rights;

- threatened by Aguas del Tunari, an affiliate of US-based Bechtel, against Bolivia for more than US\$25 million, for breach of its contract to provide water services to the City of Cochabamba. When public anger erupted over rate increases too steep for many residents to afford, Bolivia cancelled its privatization deal with the company; and
- by US Metalclad Corporation, against Mexico, for more than US\$15 million, because an impoverished rural municipality refused to grant it a building permit for a 650,000-ton/annum hazardous waste facility on land already so contaminated by toxic wastes that local groundwater was compromised.

## EXPANDING THE CONCEPT OF EXPROPRIATION

Several of these claims turn on a provision of NAFTA, common to other investment treaties, that prohibits government measures that directly or indirectly nationalize or expropriate foreign investments, or take a measure tantamount to nationalization or expropriation. When such expropriation occurs, the investor must be compensated for the full market value of its investment. That the expropriation was for a public purpose, carried out on a non-discriminatory basis, and in accordance with due process of law is irrelevant.

When the tribunal ruled in favour of Metalclad, Mexico unsuccessfully appealed to the courts, which commented that NAFTA's expropriation rule was so broad that it would include a legitimate rezoning by a municipality or other zoning authority. By this standard, any government action diminishing the value of foreign investment interests could provide a basis for an investor claim.

## PUBLIC-PRIVATE PARTNERSHIPS AND GLOBALIZATION

Since the recent global consolidation of this industry, when water services are

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privatized, bidding is usually dominated by transnational water corporations, and local competition is virtually nonexistent. Because these corporations qualify as foreign investors and service providers under NAFTA, BITS, and the GATS, they benefit from the exclusive rights these regimes accord. Thus, when these transnational corporations become partners in a public-private partnership (P3) relationship, what would otherwise be entirely a matter of domestic regulation and contract becomes subject to international trade regulation as well.

Defenders of P3 arrangements are encouraging municipalities to believe that they can oust foreign investor rights through clever contract drafting, even suggesting that specific trade obligations be excluded by the agreement. But governments can no more contract out of the international obligations than they can alter those commitments by domestic legislation.

## PRIVATIZATION

Public services depend upon a framework of policies, laws, institutions, and funding arrangements that restrict the rights of private investors and service providers, to ensure public policy goals such as universal and affordable service. But international investment and services agreements seek to minimize the capacity of governments to regulate or otherwise intervene in the market. For example, the first principle of international trade law, *National Treatment*, obligates governments to accord “no less favourable” treatment to foreign investors and services than is provided to their domestic counterparts. However, by failing to distinguish between private and public sector service suppliers, the trade regimes provide little latitude for policies, programs, and regulations that may explicitly or effectively favour public sector service providers. In fact, the very existence of public sector service monopolies may be regarded as a barrier to foreign service providers. Thus

## While these international “trade” regimes establish certain exceptions that may allow governments to rebuff trade challenges and investor claims, these safeguards are ambiguous, highly qualified, and limited in their application.

Canada, for one, has declared a reservation to its National Treatment obligations that—the supply of a service, or its subsidization, with the public sector is not a breach of this commitment.

But such reservations are rare, highly qualified, and likely to be given very narrow application if the WTO’s record is to be a guide. WTO attempts to quiet concern about the loss of public control over water stress that drinking water services are not yet covered by GATS disciplines. However, this argument rests upon the meaning of an ambiguous exclusion for “services delivered in the exercise of government authority”—a definition fraught with controversy and also likely to be narrowly interpreted.

## CONCLUSION

The advent of international investment and services agreements has superimposed binding international disciplines over the exercise of sovereign authority concerning water. Because these agreements codify an agenda of privatization, deregulation, and free trade, they are fundamentally incompatible with maintaining public ownership of water, public sector provision of water services, and public regulation for conservation and environmental purposes.

Moreover, the powerful private enforcement machinery of international investment treaties has now been invoked by several transnational corporations to assail water protection laws,

water export controls, and decisions to re-establish public sector water services when privatization deals have gone sour.

Only slightly less problematic is state-to-state enforcement of the GATS and other international services agreements. While these international “trade” regimes establish certain exceptions that may allow governments to rebuff trade challenges and investor claims, these safeguards are ambiguous, highly qualified, and limited in their application. Moreover, even the modest environmental exceptions that apply to other international trade agreements have largely been written out of international investment and services agreements.

In many ways, the establishment of truly enforceable international disciplines, crafted to serve the interests of the most powerful private institutions in the world, represents a profound challenge not only to the sovereignty of nations, but to the protection of such a basic human right as the right to water. If water is to remain part of the global commons, with use and allocation decisions reflecting the public trust; and if water is to be a basic human right guaranteed every human being, then international trade, investment, and services agreements must be fundamentally reformed to restore the sovereign authority of governments to achieve these ecological and human imperatives. 

# The crisis of governance and the WTO

## SUBSIDIES AND TARIFFS

As the new trade negotiations round launched at Doha commence, agriculture remains the most distorted sector in global trade. Support for farmers in the OECD (Organisation for Economic Co-operation and Development) amounts to about US\$1 billion a day, with roughly 80 percent of total global support concentrated in the United States, Europe, and Japan. According to *The Economist* (June 9, 2001) Special Report on Agricultural Trade, “if rich countries were to remove . . . subsidies . . . poor countries would benefit by more than three times the amount of all the overseas development assistance they receive each year.”

With average tariffs on agricultural products more than three times higher than on non-agricultural goods, and peaks unmatched at 800 percent, market access also remains a serious problem. Access to OECD markets is very restricted, with European OECD countries alone accounting for almost half of the tariff rate import quotas embedded in WTO member country market access commitments. Furthermore, in no other area are export subsidies tolerated. In the early stages of post-war multilateral trade negotiations, export subsidies were recognized, and prohibited, as the most harmful form of subsidies for manufactured goods.

## THE CAIRNS GROUP

Historically, outcomes on agriculture were determined by agreements between the United States and the European Union. As members where agriculture plays a relatively minor role in their respective economies, both in terms of employment and share of GDP, and with budgets able to sustain massive domestic support, they did not represent the majority of the GATT/WTO membership. Not surprisingly then, ag-

BY MARTIN SHARP

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After the failure of the Seattle Ministerial Conference to launch a new round, it was crucial for the health of the multilateral trading system that the Doha Ministerial succeed. It was also very important for trade in agriculture.

riculture was continually glossed over to the detriment of poorer countries with a comparative advantage in this sector. A third force was needed to break the impasse and to create momentum for reform, and it was the Cairns Group that played this role.

The Cairns Group, established in 1986, is a specific-issue trade coalition of agricultural exporting countries of which both Australia and Canada are original members. The common objective that unites the diverse membership is a desire to see agriculture treated the same as other sectors of global trade. This is to be achieved via

reform addressing the “three pillars”—namely, elimination of all forms of export subsidies, substantial improvements in market access, and major reductions in trade and production-distorting domestic support leading to its elimination.

In the 15 years or so since its inception, the Cairns Group has continued to grow and mature. The Cairns Group now has 17 members, with the enlargement of membership in South America, and the addition of South Africa in particular, having reinforced its relevance. It includes countries from Africa, the Americas, and the Asia-Pacific region, at various stages of development. The majority of members are developing countries. This unique diversity has lent its voice an additional credibility. Today, the Cairns Group is an instantly recognizable brand name in agricultural trade policy and is accepted WTO-wide, including by the United States and the European Union, as the third force in the agriculture negotiations.

## MANDATED NEGOTIATIONS

The important achievement of the last round for the Cairns Group was the extent to which agriculture was integrated into the multilateral rules-based trading system. Furthermore, WTO members recognized that this was just a first step in liberalizing agricultural trade, and agreed to mandated negotiations that commenced in March 2000.

At the beginning of the Doha Ministerial Conference, the article 20-mandated negotiations on agriculture had been in progress for almost two years. During this time, negotiating proposals from 121 governments (including 4 proposals by the Cairns Group) had already been submitted, but with little real progress made in negotiating further liberalization.

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## DOHA MINISTERIAL CONFERENCE

After the failure of the Seattle Ministerial Conference to launch a new round, it was crucial for the health of the multi-lateral trading system that the Doha Ministerial succeed. It was also very important for trade in agriculture. Prospects for further agricultural liberalization outside a larger round would have been much more problematic. Negotiating across a number of sectors and issues allows greater flexibility in finding trade-offs that can accommodate members normally opposed to reform in agriculture.

The Doha Ministerial Conference (November 9-14, 2001) was successful for a number of reasons. With the risk of a global economic slowdown, there was a greater onus on the major players to demonstrate leadership and flexibility in ensuring that agreement was reached. In addition, the Doha Declaration offered a mandate for negotiations, which was broad enough to allow many members to claim they had met their objectives.

The Doha Declaration provided for a more far-reaching and ambitious mandate on agricultural reform as well as a time frame for the negotiations. In paragraph 13 of the Doha Declaration, the previous work done on the negotiations is recognized, including members' negotiating proposals. The key reform commitments are as follows:

- 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*.

These are closely aligned with the objectives of the Cairns Group, especially the focus on the three pillars of market access, export subsidies, and domestic support. The declaration makes it clear that these are the main platforms for negotiations. In negotiating these, members must also ensure

**The interests of developing countries are best served by opening their economies to global trade. In this endeavour, however, such countries face special challenges. This is particularly the case in agriculture since it plays such a dominant role in developing-country economies.**

that "special and differential treatment for developing countries . . . be an integral part of all elements of the negotiations," included in the schedule of concessions and commitments. At the bottom of the hierarchy, "non-trade concerns" need only be "taken into account."

## DEVELOPING COUNTRY INTEREST IN THE NEW ROUND

With developing countries making up the vast majority of the WTO membership, the success or failure of addressing their concerns was always going to be key to the successful launch of a new round. Such countries were more involved in the process than they had been in the Seattle Ministerial Conference, and this was reflected in the resulting Doha Declaration where fully two-thirds of the text made references to special provisions for developing countries.

The interests of developing countries are best served by opening their economies to global trade. In this endeavour, however, such countries face special challenges. This is particularly the case in agriculture since it plays such a dominant role in developing-country economies. But it is precisely for this reason that a transition to a more competitive market-based agriculture is so crucial to their development. Avoidance of reform is not the answer. Preliminary research from

ABARE, Australia's leading applied economic research agency, shows that if developing countries were to increase their import barriers over current levels, while other countries maintained current support, developing countries would sustain economic losses individually and as a group.

Operationally effective special and differential treatment plays a crucial role facilitating adjustment to a more open and fair trading environment. These can and should include, *inter alia*, flexibility in the implementation of reform commitments, provision of technical assistance to promote capacity building, and the improvement of export opportunities for products of interest to developing countries.

With the Doha Ministerial Declaration stating that "special and differential treatment for developing countries shall be an integral part of all elements of the negotiations," it is clear that the WTO is focused more than ever on development issues. How agriculture is dealt with in the new round will also be crucial in this respect. After all, it is the elimination of trade and production distortions in agriculture that will be of the greatest benefit to developing countries, whose farmers cannot compete against the treasuries of rich developed countries. This is also essential to addressing such non-trade concerns as food security, poverty alleviation, and rural development. 

# Farmers' opposition to corporate globalization and trade agreements

BY DARRIN QUALMAN

Darrin Qualman is executive secretary of the National Farmers Union.

**NAFTA and the WTO agreement may increase trade, but much more importantly, they dramatically alter the relative size and market power of the various players in the agri-food production chain.**

There were many farmers in the streets of Seattle, Quebec City, Porto Alegre, and other places where citizens have gathered by the tens-of-thousands to protest the negative effects of trade agreements, structural adjustment, and corporate globalization. Farmers around the world, through organizations such as the Via Campesina, have asked that food be taken out of the WTO agreement.

To understand their opposition to trade agreements and the globalization of food and farming, you must understand farmers' experiences so far.

## HOW TRADE AGREEMENTS AND GLOBALIZATION HARM FARMERS

Since 1988, the year Canada signed the Canada-US Free Trade Agreement, Canadian agri-food exports have nearly tripled. Canadian farmers and exporters have been very successful in increasing exports and gaining "market access." The result, however, has not been the farm prosperity that politicians, economists, and trade negotiators predicted. Since 1988, net farm income has remained stagnant, or fallen dramatically if inflation is taken into account.

Why have our trade agreements—the Canada-US FTA, NAFTA, and the WTO agreement—failed to bring prosperity to our farms? The answer comes when one realizes that increasing exports is only one effect of these agreements. To understand the spreading farm income crisis, you must understand the often overlooked, and much more significant, effects of these agreements.

For farmers, so-called free trade agreements do two things simultaneously. By removing trade barriers—tariffs, quotas, and duties—these agreements erase the economic borders between nations and force the world's one billion farmers into a single, hyper-competitive market. Simultaneously, these

agreements facilitate waves of agribusiness mergers that nearly eliminate competition for these corporations.

Economists agree that when competition increases, prices and profits decrease; and when competition decreases, prices and profits increase. Thus, as trade agreements and globalization increase competition among farmers, these agreements predictably decrease prices and profits. And, by fostering a dramatic *decrease* in competition among agribusiness corporations, trade agreements dramatically *increase* profits for these companies.

The NAFTA and WTO agreements may increase trade, but much more importantly, they dramatically alter the relative size and market power of the various players in the agri-food production chain. For farmers and their net in-

comes, increased exports may be one of the *least significant* effects of trade agreements and globalization. Much more important, perhaps completely overwhelming any potential benefits from increased exports, may be the effect these agreements have on the balance of market power between farmers and agribusiness corporations, because this relative balance of market power is the primary determinant of the distribution of profits within the agri-food production chain.

## TRADE AGREEMENTS AND FARMERS: THE EMPIRICAL DATA

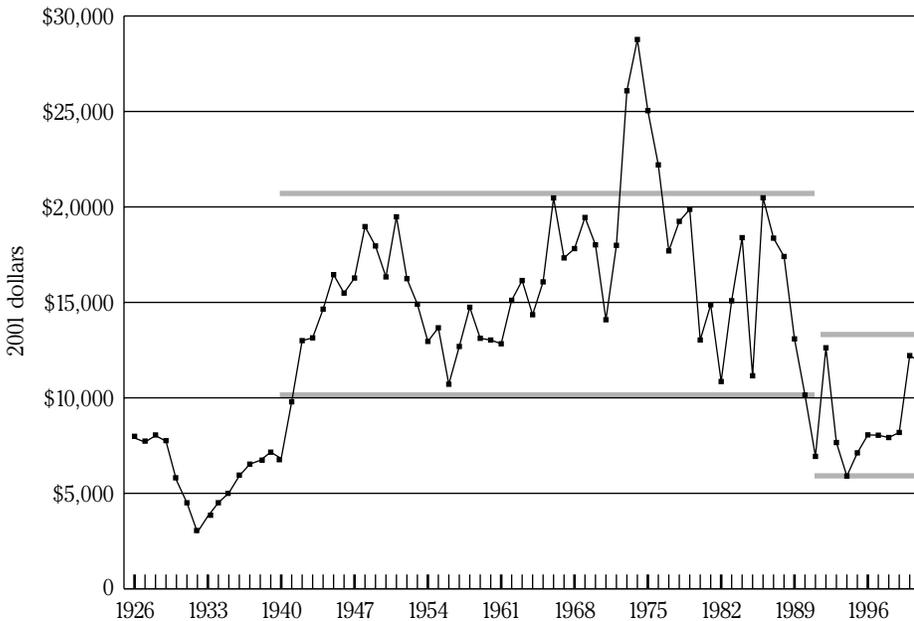
Some may doubt that trade agreements and globalization decrease farmers' prices and profits. Canadian net farm income data for the past 75 years, however, strongly support these assertions. Figure 1 graphs Ontario per-farm net income adjusted for inflation. Figure 2 presents that same data for Saskatchewan. Graphs for many other provinces are similar. The graphs show three distinct periods. In the 1930s, net income on the average farm fell to zero or below. Then, for 50 years, net incomes were relatively stable, fluctuating within a consistent range, but never falling below \$10,000 per farm. Finally, in 1989, net farm incomes dropped dramatically and stayed down, fluctuating within a much lower range. What happened in 1989? Canada implemented its first major trade agreement: the Canada-US Free Trade Agreement.

Basic economic theory predicts that when corporations and governments use trade agreements to globalize markets, they will increase competition among farmers and, thus, push down farmers' market power, prices, and profits. The evidence in Canada over the past 12 years supports that prediction. This prediction becomes *inescapable* if

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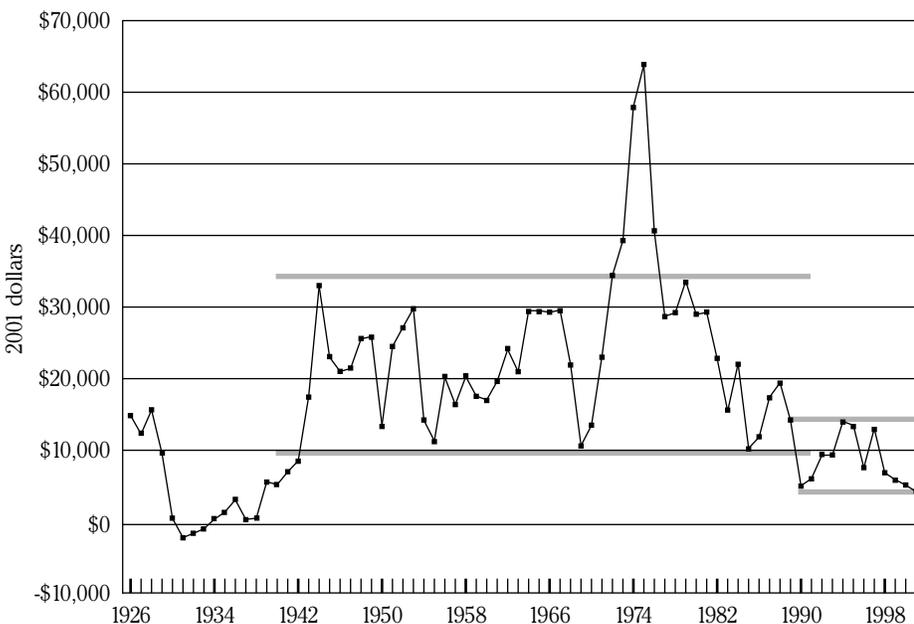
# Farmers' opposition continued from page 29

**Figure 1 Ontario per-farm, realized net farm income, adjusted for inflation, 1926–2001**



Sources : Agriculture Economic Statistics, Statistics Canada Cat. #21-603E;  
Consumer Price Index, Statistics Canada Cat. #62-010;  
Historical Overview of Agriculture, Statistics Canada Cat. #93-358.

**Figure 2 Saskatchewan per-farm, realized net farm income, adjusted for inflation, 1926–2001**



Sources : Agriculture Economic Statistics, Statistics Canada Cat. #21-603E;  
Consumer Price Index, Statistics Canada Cat. #62-010;  
Historical Overview of Agriculture, Statistics Canada Cat. #93-358.

governments and corporations force farmers into highly competitive, globalized commodity markets *at the same time* that agribusiness corporations are encouraged to merge globally and nearly eliminate the competition they face. This is because the resulting shift in relative market power between farmers and agribusinesses will ensure that the latter will capture almost all the profits within the agri-food chain.

## OTHER EFFECTS OF TRADE AGREEMENTS AND GLOBALIZATION

Canadian farmers have benefited greatly from our orderly marketing systems, including the Canadian Wheat Board (CWB) and our supply management systems for milk, eggs, and poultry. NAFTA, however, effectively ended our ability to create new orderly marketing agencies or expand existing ones. Under NAFTA, farmers and government cannot implement single-desk selling for potatoes or cattle and we cannot add canola to the CWB.

NAFTA chapter 11, article 1110 states:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment except: . . .

d) on payment of compensation . . .

Ethyl Corporation's NAFTA victory and the pending Sunbelt Water case indicate that, under article 1110, the Canadian government would have to compensate companies such as Cargill if farmers and the government add canola to the CWB's single-desk-selling jurisdiction. Affected companies argue that such a move expropriates their potential profits and, by reducing the profit potential of their elevators and other property, expropriates a portion of those assets. If the government does not pay compensation voluntarily, Cargill

and other companies could sue the Canadian government under section B of chapter 11 of NAFTA.

Chapter 11's compensation requirement effectively deprives the government of a number of other policy options including our abilities to:

- create railway competition by requiring railways to grant widespread running rights;
- ban unwanted agricultural technologies such as genetically modified (GM) wheat;
- regulate grain-handling tariffs (as we did before 1995); and
- use government payments to induce farmers to move to organic agriculture.

## THE LOSS OF AGRICULTURAL POLICY TOOLS

NAFTA has stolen many of the vital agricultural policy tools in Canada's toolbox. There are a number of examples of trade agreement interference in domestic farm policies. Annex 2 of the WTO Agreement on Agriculture prescribes the details of domestic support programs "exempt from reduction commitments" ("green box" programs). The design of Canada's failed AIDA (Agricultural Income Disaster Assistance) program is taken directly from that agreement, which states:

(a) Eligibility for such payments shall be determined by an income loss . . . which exceeds 30 per cent of average gross income or the equivalent in net income terms . . . in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and lowest entry.

The key elements of AIDA are in the WTO Annex: three-year averages, 70 percent coverage (100% - 30% = 70%), etc. Trade agreements such as the WTO increasingly dictate the domestic measures that the Canadian government can take to support our farmers.

Another example, the Canadian government used the then-pending 1995 WTO agreement as a major rea-

# Through unrestricted mergers and takeovers, tractor makers have restructured themselves into a duopoly.

son for terminating the Crow Benefit that kept transportation rates competitive. Since the end of the Crow benefit, farmers' freight rates have increased more than two-and-one-half-fold to become the single largest expense on many western farms.

In addition to restricting the types of programs governments can create in the future, NAFTA and the WTO agreement facilitate attacks by transnationals and their (nominal) governments on existing farm programs and agencies. There have been nine unsuccessful attacks against the CWB. Under the WTO framework, there have been several attacks on our milk supply management system. While corporations and foreign governments have been only partially successful in weakening our CWB and supply management agencies, corporate meat packers have succeeded in destroying hog farmers' single-desk-selling agencies in Saskatchewan, Manitoba, Alberta, and Ontario.

## POSITIVE EFFECTS ON AGRIBUSINESS CORPORATIONS

While farmers have lost as a result of trade agreements and globalization, corporations have gained. NAFTA's chapter 11 robbed farmers and their governments of so much power and transferred that power to the world's dominant agribusiness corporations. Chapter 11 gives corporations the power to sue foreign governments. It gives corporations near absolute rights to their profits and property and requires gov-

ernments to pay compensation if regulations decrease those profits or the value of corporate property.

Corporations have won increased patent protections through enhanced "intellectual property rights." These protections have resulted in longer, more wide-ranging patents on drugs, agricultural chemicals, and seeds and in decreased competition and increased corporate profits. One of the major outcomes of a process advertised as focusing on "free trade" and "deregulation" has been to dramatically expand corporate mechanisms of monopoly control and to create a huge global bureaucracy charged with enforcing corporate patents.

## REDUCED COMPETITION

The greatest contribution to corporate power, however, has been the de facto suspension of anti-combines and competition laws around the world. Just 25 years ago, Canadian farmers were buying tractors made by Allis Chalmers, Versatile, White, Massey Ferguson, International Harvester, Case, John Deere, Deutz, Ford, and Steiger. Today, two tractor manufacturers dominate the world market: John Deere and Case/New Holland. Through unrestricted mergers and takeovers, tractor makers have restructured themselves into a duopoly. This dramatic reduction in competition and increase in market power was facilitated and spurred by globalization and trade agreements.

Grain companies are merging to reduce competition. Agricore United, which may soon be controlled by US-based Archer Daniels Midland, Saskatchewan Wheat Pool, which may soon be controlled by US-based ConAgra, and Cargill now control 75 percent of western Canadian grain-handling capacity. Monsanto sold the seed used on 94 percent of the acres planted to genetically modified crops in 2000.

Canada's agri-food chain stretches from oil and gas companies at one end; through fertilizer, chemical, and seed companies; through farmers in the mid-

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# Farmers' opposition continued from page 31

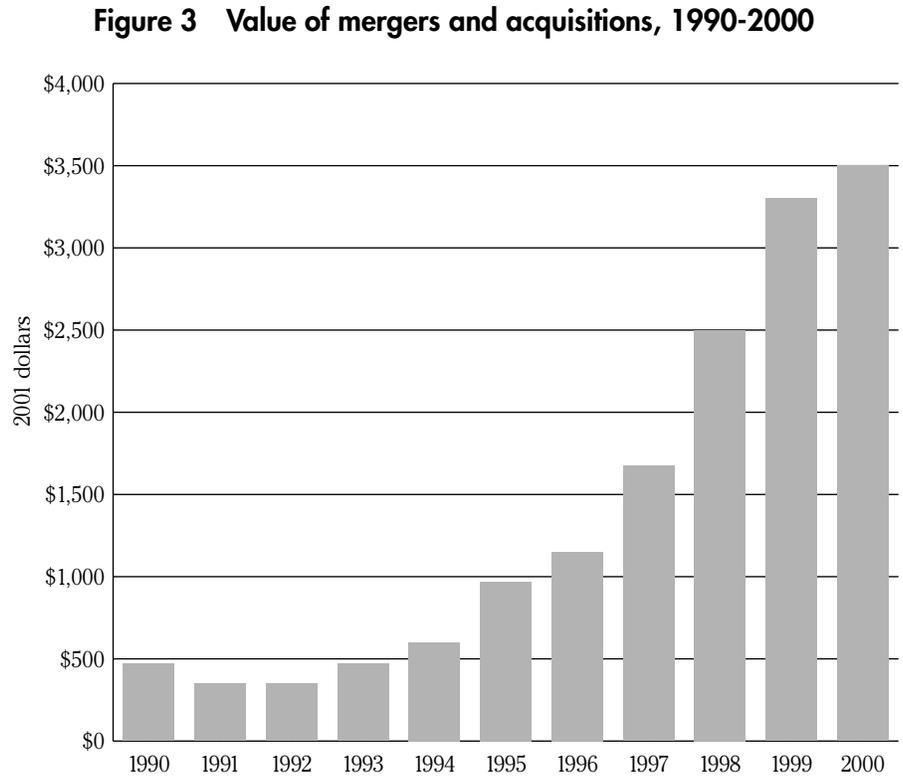
dle; and to grocery stores and restaurants at the other end. Every link, with the exception of the farm link, is dominated by between 2 and 10 multibillion-dollar transnationals. The size of the companies that dominate each link is increasing and the number of companies is decreasing. Figure 3, highlights the acceleration of global corporate consolidation.

The dominant agribusiness corporations have pursued strategies of rapid growth and equally rapid reductions in competition. In so doing, these corporations have dramatically increased their market power. At the same time, trade agreements have also added to corporations' powers and reduced the powers of national governments. Taken together, these events have yielded awesome increases in corporate power. This, much more than increased exports, is the primary effect of trade agreements and globalization.

## THE FUTURE: DOHA AND BEYOND

Any new WTO agreement will extend and accelerate the trends outlined above: increasing corporate concentration, decreasing competition, increasing corporate profits, declining net incomes for farmers, and the erosion of governments' powers to shape agricultural policies. Farmers will be the clear losers if we move forward with the Doha WTO Round, a Free Trade Area of the Americas (FTAA), or a latter-day Multilateral Agreement on Investment (MAI).

In numerous challenges to the Canadian Wheat Board and our supply-management systems, the United States has proven that it will work relentlessly to destroy these institutions. It will do so because these institutions serve both as barriers to US corporate penetration and as counter-models to their corporate-dominated system. Increasingly stringent and corporate-friendly "disciplines" contained in new trade agreements or in a re-negotiated WTO agreement will ensure that the United States



Source: ETC Group *Communiqué*, July/August, 2001, Issue #71.

and others will, in the end, be successful: they will force Canadian farmers to relinquish their marketing agencies and force the Canadian government to relinquish more of its powers to shape agricultural policy.

## THE IMPOVERISHMENT OF RURAL CANADA

In much of rural Canada, corporations are tearing down the elevators and ripping up the railways. Increased trucking is destroying the roads. The schools, hospitals, stores, and rinks are closing as the impoverishment of rural Canada leads to its depopulation. Much of this decline and de-development began in the 1980s when we pledged ourselves to free trade, and it intensified throughout the 1990s as we learned the word "globalization."

With more than a decade of evidence and experience, there can be little debate: free trade and corporate globalization are granting tremendous

benefits to agribusiness and other corporations and heaping huge costs onto farmers, public infrastructure, rural communities, and the environment. This is the reason that farmers are taking to the streets in increasing numbers to protest against these agreements. This is also the reason that farmers are organizing nationally and internationally through organizations such as the Via Campesina.

The government of Canada, like governments around the world, has committed a fundamental policy error. It has mistakenly signed agreements corrosive to the common good and beneficial to a small number of wealthy and powerful corporations and individuals. The National Farmers Union, the Via Campesina, and organizations around the world are acting in the best traditions of democracy in opposing such agreements and in helping our elected representatives to reverse their policy error. 

# A Community (or European Community) perspective on the agricultural part of Doha

## NEGOTIATIONS ON AGRICULTURE FROM SEATTLE TO DOHA

To understand the negotiations on agriculture in Doha, it is necessary to look also at Seattle and at the negotiations on agriculture that took place between Seattle and Doha based on article 20 of the existing WTO Agreement on Agriculture.

When the European Community proposed that the inbuilt agenda, agriculture and services, be folded into a new comprehensive round, the countries most interested in reforming the agricultural trading system saw both a risk and an opportunity. The risk was that the round would delay progress under article 20. The opportunity was that combining agriculture with other issues would enable them to exert greater pressure on the Community on agriculture. They therefore argued that the agricultural mandate in article 20 had been “paid for” in the Uruguay Round and that, if they were to agree to a new mandate on other subjects, they should “obtain in return” a more ambitious mandate on agriculture. There was some support for this point of view from the United States, probably because in the United States the farmers were the main interest group supporting a new round and signs of progress on agriculture would therefore be needed if they were to sell a round to Congress.

For these reasons, preparation for Seattle concentrated almost entirely on agriculture and the agricultural negotiations were the most animated ones at Seattle itself. The abrupt end of the Seattle Ministerial Conference, when it suddenly became apparent that there was no text on other issues into which the agriculture text could have been slotted, came as a shock and, at the time, it seemed as though the agriculture negotiators could have found better ways of wasting a week.

BY DAVID ROBERTS

David Roberts is deputy director general in agriculture, Directorate of the European Commission.

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**The United States seems to belong to neither group or perhaps its heart lies in one and its head in another.**

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But, as later events were to show, the work done on the agriculture text in Seattle proved to be a valuable preparation for success in Doha. The sensitive issues were identified and ideas on how to resolve the apparently unbridgeable gap between those who wanted a “new agricultural mandate” and those who wanted the existing inbuilt agenda with its existing mandate to be folded into a new round began to emerge. What then were the key sensitive issues?

### INTEGRATION OF AGRICULTURE INTO THE RULES OF THE WTO

At first sight this seems an odd subject to stir up so much passion. A lawyer would say that the legal principal is already clear. Agriculture is subject to general WTO rules, except where special rules are laid down in the Agreement on Agriculture. So what sense would it make to announce that a negotiation on the Agriculture Agreement should have as its object the integration of agriculture into WTO rules? But behind the phrase lay two sharply contrasting views. On the one side stands the Cairns Group. They see in the

derogations from general WTO rules contained in the Agriculture Agreement a discrimination against agriculture, meaning a discrimination against countries that have comparative advantage in agriculture. On the other side stands the European Community, the Friends of Multifunctionality, and most of the non-Cairns developing countries. They see in agriculture a sector that is different from other industries in that it will always require its own rules, even when the long-term goal to which all members have been committed since the Uruguay Round of a “fair and market oriented agricultural trading system,” has been achieved. The United States seems to belong to neither group or perhaps its heart lies in one and its head in another.

### THE FUTURE OF AGRICULTURAL EXPORT SUBSIDIES

NAFTA has made the use of export subsidies on cereals ineffective, and so the United States has given them up, while still employing them for dairy products. The Uruguay Round left only the United States and the European Union with a volume of permitted export subsidies, which is significant in world terms. So the statistics on export subsidies notified to the WTO suggest that the European Community is responsible for 85 percent of all export subsidies paid on agriculture. It is hardly surprising then that the United States has become the world’s cheerleader in calling for their total elimination. Of course, the picture would be different if the value of notified export subsidies included the volume of exports aided by state-subsidized and state-guaranteed credit. It would be even more different if it included food aid granted more as a market opening than a famine-alleviating device and sales by single-desk exporters at prices

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made possible by price pooling. But for the moment, they do not. Most WTO members were very happy to support the United States in calling for the abolition of the EU's form of export subsidies, while arguing, perhaps with less passion, that other forms of export subsidies should also go.

## HOW THE NEGOTIATIONS SHOULD ADDRESS NON-TRADE CONCERNS, INCLUDING MULTIFUNCTIONALITY

The argument here revolved around the question whether the fact that non-trade concerns are referred to in article 20, as matters to be "taken into account" implies that they have an inferior status to the three pillars: market access, export competition, and domestic support. Even the most adept of theologians are incapable of providing an unequivocal answer to this question because the three pillars are not referred to explicitly in article 20 at all. One group of theologians argues that they are referred to implicitly in the commitment to fundamental reform and hence have a superior status. Another group argues that the implicit reference is contained in article 20(c). This includes, among matters to be "taken into account," the "other objectives and concern mentioned in the preamble to the Agreement," which is the only place where the three pillars are set out in detail.

## TWO PIECES OF ADVICE

The same three issues divided the Community from the Cairns group in the run up to Doha but the debate was less passionate because lessons had been learned both from Seattle and from the subsequent negotiations under article 20.

When Ambassador Harbinson, the chairman of the General Council, set out on the difficult task of preparing a draft text for Doha, he demonstrated that he had received, or had divined for himself, two key pieces of advice.

First, start with the other issues, not

**And so, the draft text was created. To comfort the agricultural liberals, it said things not stated directly in article 20, and to comfort the conservatives these were mainly things that can be found in the preamble to the Agriculture Agreement to which article 20 refers.**

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with agriculture. Don't imagine that if agriculture is solved, the rest will fall into place.

Second, don't ask either side to give up on points of theology. The negotiations on agriculture that have been taking place over the last 18 months have shown the Cairns group that the world is not divided between those who want a round but don't want to "give" on agriculture and those who want to "gain" on agriculture and don't much care for a round. There are plenty of countries that are doubtful about a round and defensive on agriculture. So those who want a promise of major progress on agriculture will, if they are wise, see that a round isn't a battering ram that will beat down all resistance. And those who want a round can be expected to know that the text can't be one that guarantees the rejection of the long-term ambitions of the liberals.

## THE TEXT

And so, the draft text was created. To comfort the agricultural liberals, it said things not stated directly in article 20, and to comfort the conservatives these were mainly things that can be found in the preamble to the Agriculture Agreement to which article 20 refers. The text said nothing about integrating agriculture into the general rules of the WTO, except for the subtle statement wherein the text refers to the objective of a fair

and market-orientated trading system not an "agricultural" trading system. Was this avoidance of unnecessary repetition given that the paragraph is headed "Agriculture"? Or was it a hint at a single trading system—and "integration"? On agricultural export subsidies, it said "reduction of all forms of export subsidies." This is precisely in line with what the Community had offered but it appeared a ray of hope to those who demanded abolition by adding, "with a view to phasing out." On non-trade concerns, it stuck to the formula "taken into account," thus meeting the concerns of the liberals but added "in the negotiations," thereby reassuring the friends of multifunctionality that the need to meet these concerns will condition the negotiations on the three pillars.

## "WITH A VIEW TO PHASING OUT"

Harbinson's conjuring trick very nearly survived Doha unchanged. But the Community could not live with "with a view to phasing out" of export subsidies. Why not? The formal reason was that this phrase could be seen as an attempt to prescribe the end point of the negotiation, rather than setting the agenda. The practical point was that the mandate, which the 15 member states had given the Commission, was designed to avoid prejudging future ag-

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# Labour standards and trade agreements: Never the twain shall meet?

## PROTECTING CORE LABOUR STANDARDS IN TRADE AGREEMENTS?

The possibility of including provisions to protect core labour standards in free trade agreements, either those negotiated regionally (such as the Free Trade Area of the Americas) or multilaterally (such as the WTO) has facilitated many debates. Some labour organizations have called for core labour standards to be attached to trade agreements. They hope that such provisions would help to direct the competitive forces unleashed by free trade into more beneficial channels, such as genuine improvements in quality and productivity, rather than into efforts to restrict and roll-back wages and other compensation for workers in tradable industries.

While many have called for labour standards to be included in trade agreements, it is unlikely that efforts to “humanize” trade agreements by appending references to the protection of core labour rights and standards represents a promising or effective avenue to address global labour issues. Free trade agreements are not the appropriate place to define or attempt to protect labour standards. It is doubtful that meaningful labour standard provisions in trade agreements could ever be successfully negotiated. And even if they were, it is doubtful that such provisions could be meaningfully enforced by institutions whose entire *raison d’être* is the dismantling of barriers or restrictions on private market activity and competition.

## THE ISSUE OF BARRIERS

The whole idea of labour standards is to erect barriers and constraints on private market participants, in hopes of

BY JIM STANFORD

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**Empowering and entrusting free trade institutions to protect labour standards makes as much sense as asking brewers and distillers to police underage drinking.**

limiting the negative human and social consequences of their profit-maximizing activity. The whole idea of free trade agreements is to reduce or eliminate international barriers to the profit-maximizing activity of those same market participants. Why would we ever think that these two things should go together?

Empowering and entrusting free trade institutions to protect labour standards makes as much sense as asking brewers and distillers to police underage drinking, or counting on petroleum companies to lead energy conservation efforts, or asking cell phone companies to warn consumers about the need for drivers to pay attention when they are driving. If they are smart, these companies will make appropriate noises about the need for responsible drinking, energy conservation, and driver concentration. Yet their vested

economic interests ensure that those responsible-sounding efforts will be largely symbolic. Anyone seriously concerned about under-age drinking would hire someone other than brewers and distillers to police this problem. If we want to reduce driver distraction, we legislate and enforce meaningful rules and regulations to this effect; we don’t rely solely on the token warnings that cell phone companies publish about the need for drivers to pay attention. Ultimately, we can’t expect anything more than equally symbolic gestures to the importance of labour and social standards from free trade institutions and their business and political patrons, which are premised on minimizing the economic interference of state institutions and policies.

## IMPACTS OF STANDARDS

Finally, even in the far-fetched event that labour standards could be negotiated and meaningfully enforced through free trade institutions, it is still not at all clear that such standards would have any impact on the trade and investment flows that spark the original concern of labour advocates and their allies. Labour advocates in countries with more generous and interventionist labour market structures fear that enhanced international competition under free trade will undermine the economic sustainability of those relatively progressive regimes. This is a valid concern. But even if the WTO included measures that allowed one country to impose penalties on imports from another which tolerated labour abuses, it is hardly likely that those penalties would curtail the flows of goods or investment that were influenced by those abuses, let alone stop the abuses themselves.

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For example, the centre of gravity of the North American auto industry is shifting southward. Since 1990, a substantial share of new auto-related investment has been located in Mexico, and in a handful of US states in the deep south, such as Alabama, Mississippi, and South Carolina, which entice automakers with harsh anti-union labour laws and huge government investment subsidies. The relatively repressive labour practices that are typical of both Mexico and the US deep south are an important factor in the southward migration of auto investment in North America. Wages are kept lower than they otherwise would be, given the productivity levels of auto facilities there, by the lack of independent union representation. This may be changing somewhat in Mexico, but not at all in the US south.

One potential remedy to this situation might be to make trade flows from these regions to Canada contingent on their willingness to respect generally accepted labour rights such as the right to organize unions without risk of intimidation and persecution, and the right of duly recognized unions to normal union security arrangements. But even if appropriate provisions linking trade rights to the enforcement of labour standards could ever be negotiated and enforced, which seems highly unlikely, it is doubtful that they would significantly alter the economic incentives that are driving the continental auto industry southward. Mexican auto wages, already relatively high by the standards of a developing country, could double, yet Mexican-based producers would still enjoy massive labour cost savings compared with US and Canadian plants, and still face a huge incentive to shift production. The more important factors driving auto investment south are not anti-union labour laws, but other factors: the great improvements in productivity and quality in Mexican plants, the flexibility that producers enjoy in new plants in

## Even with genuinely free and fair labour laws, automakers would still be able to produce their vehicles a lot more cheaply in low-wage, less-developed parts of the world

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Mexico and the US south, the rapidly evolving transportation and parts supply infrastructure in both regions.

### ACCEPTING THE LOGIC OF FREE TRADE

Those who advocate attaching core labour standards to trade agreements seem to accept the logic of free trade. Their concern is limited to the risk that otherwise efficient and mutually beneficial trade flows might be distorted by the application of repressive labour practices. In reality, free trade poses much deeper risks to workers in many industries, given the reality that we all compete for scarce jobs and investment dollars. Even with genuinely free and fair labour laws, automakers would still be able to produce their vehicles a lot more cheaply in low-wage, less-developed parts of the world (like Alabama or Mexico). This will always pose a serious economic risk to autoworkers in more developed regions. The way to manage that risk is not to fine-tune the trade agreements with idealistic labour rights clauses, but to question the very logic that companies should be allowed unlimited leeway to produce their products in the lowest-cost locations, regardless of the economic dislocation this may cause elsewhere.

Continuing with the example of the North American auto industry, labour advocates would do better to argue for measures to limit or manage trade and investment patterns in this, or in any other strategic industry. Motor vehicles represent the largest component of global trade, in value terms, and constitute the largest single item in consumer spending, after housing. We can imagine ways in which auto producers could capture efficiency benefits from producing for an international market, but in which participating nations were provided with some guarantees that they will continue to benefit from a reasonable share of total investment, production, and employment. But this would represent a much more far-reaching break from the logic of free trade and competition.

So while some will find it strange, concerns over international violations of labour standards should be channeled through avenues other than the free trade institutions. Our actions against those who violate human rights, including labour rights, should not be limited to the imposition of trade penalties against the specific products and companies that may have benefited economically from those abuses.

### GLOBAL POWER DYNAMICS

In one sense, it is understandable why some labour advocates have been entranced with the idea of using the free trade institutions as an enforcement mechanism for labour standards. These institutions wield a quick and effective authority that is unique in international relations. When an offending practice is identified, trade bodies act relatively quickly to condemn the offence and impose punishment. More often than not, the offending practice ceases immediately. Labour advocates who have been waiting in vain for decades for a similarly forceful response from international institutions on labour, environmental, and human rights issues, are left drooling. They

wonder why their concerns about unacceptable international practices aren't dealt with equally effectively. And they start to dream of using the demonstrated power of the dispute-settlement mechanisms at the WTO and NAFTA, to pursue laudable labour and environmental goals.

But it is not coincidental that the WTO and NAFTA panels wield this uniquely effective and timely enforcement power. The power of the free trade institutions reflects the underlying power and interests of the global forces that brought them into being; in particular, the influence of private business, financial investors, and the market-oriented governments that reflect those constituencies most energetically and loyally. The WTO is not, as some claim, a neutral effort to extend the rule of law to the global economy. Its apparent power depends on the voluntary adherence of member market-oriented governments. Those governments are willing to create and accept a disciplining force that helps to make their respective economies all the more business-friendly and "efficient," in the private sense of that word. But these same governments are hardly interested in a global police force to supervise social, labour, and environmental standards. If they were, they would have long ago established powerful bodies to do just this. It is no accident that the WTO seems to wield quick and effective power, nor is it an accident that the ILO remains a symbolic and largely powerless institution, whose core labour principles the world's largest economy has not even bothered to ratify, let alone enforce. The dream of using the efficient authority of these same institutions to promote and protect interests that run counter to those of the powerful forces that brought us free trade in the first place, seems so far-fetched as to be counterproductive.

## **EXPANDING SOCIAL REGULATION**

And so a growing contingent of the labour movement is coming to a very dif-

# **The trend toward increased reliance on and dominance of private investors, corporations, and markets is part of a larger phenomenon that opponents term "neoliberalism."**

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ferent conclusion. Rather than promoting the wishful and in many cases the misleading belief that trade agreements can be "humanized" through the attachment of core labour standards, they are adopting a more explicit and forceful opposition to the expansion of those agreements—as evidenced, for example, by the ICFTU's (International Confederation of Free Trade Unions) unprecedented opposition to the current WTO round.

None of this is intended to imply that free trade is not relevant to international labour and environmental concerns, and to the future evolution of labour and environmental standards. There's an obvious link between the broader process of globalization, and the evolution of the whole spectrum of economic and social regulation. The trend toward increased reliance on and dominance of private investors, corporations, and markets is part of a larger phenomenon that opponents term "neoliberalism." Globalization represents the enhanced integration of those dominant private markets in the international sphere. And the free trade agreements are just one aspect of globalization, which also reflects broader political and technological forces.

To the extent that the trade agreements enhance the intensity of competition between private producers, then the prospects for efforts to limit and regulate the actions of those private producers will be obviously undermined. More worrisome are the provisions of some free trade agreements, which explicitly promote a pro-active deregulatory agenda, quite separate from initiatives aimed at integrating national economies. These will make it particularly difficult to enact progressive regulatory changes in labour rights, the environment, and other spheres. For example, the WTO's proposed "necessity test," under which national governments would have to justify any regulatory interventions before international panels, whether or not these interventions had any impact on trade and investment flows, is one bizarre manifestation of this tendency.

## **ROLLING BACK FREE TRADE AGREEMENTS**

This is why limiting and ultimately rolling back the trade agreements will be an important part of restoring the political and economic basis for future efforts to regulate and protect labour and environmental standards. Among labour advocates, environmentalists, development agencies, and other NGOs, there's a new sense of exactly how seriously the prospects for progressive national policy making are undermined by free trade commitments. There is a new sense of determination that the future expansion of these commitments needs to be opposed energetically. And there is a new willingness on the part of these forces to work together to stop that expansion, as demonstrated first in Seattle and by continuing cooperation among global labour, NGOs, and some southern governments. For this reason, it is expected that the debate over whether free trade agreements should recognize labour standards has largely become moot. We're on to a bigger issue, now: whether we should continue negotiating those agreements. 

# The trade policy–labour standards linkage

## A LONG HISTORY

The trade–labour linkage has a long history. The idea of using international labour standards to protect workers from economic exploitation was first promoted by individual social reformers in Europe in the first half of the 19th century at the early stages of the industrial revolution and the free trade movement. The work of these reformers was later taken over by various non-governmental organizations, including international associations for trade unions. Many of these early efforts were motivated by the concern that, in the absence of international labour standards, international competition in an environment of increasingly freer trade would precipitate a race to the bottom, a concern that continues to motivate contemporary debates over the trade policy–labour standards linkage.

The constitution of The International Labour Organization (ILO) notes that “the failure of any nation to adopt human conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.” The 1948 Havana Charter, intended to embody the framework for a new world trading system, similarly declared that “members recognize that unfair labour conditions, particularly in production for export, create difficulties for international trade and accordingly each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.” President Clinton’s statement at the Seattle Ministerial Conference of the WTO in December 1999, that trade sanctions should be available under the WTO multilateral system against countries violating international labour standards provoked an intensely hostile reaction from developing countries, which in many cases saw the proposed linkage as a barely disguised protectionist attack on their comparative advantage in low cost labour and was a significant factor in the failure of members of

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**Even if a trade policy–labour standards linkage were to focus only on core labour standards, it is difficult to see a justification for privileging these over at least some subset of other international human rights such as those relating to torture, genocide, detention without trial, etc.**

the WTO to agree at that time on the launch of a new multilateral round.

The recent Doha Ministerial Declaration launching a new multilateral round confirms the earlier 1996 Singapore Ministerial Decision to remit all international labour standards issues to the ILO. However, the issue of a trade–labour linkage seems unlikely to go away. Regionally, the potential expansion of NAFTA into a Free Trade Area of the Americas (FTAA) will raise the scope and status of the NAFTA Labour Side Accord in this broader context. Multilaterally, fast-track negotiating au-

thority from the US Congress to the US administration in the Doha Round may well be conditioned on the inclusion of a trade–labour linkage. And unilateral trade actions by states on account of labour practices prevailing in other states may well provoke trade disputes that will require adjudication by international trade dispute settlement bodies.

## WHICH LABOUR PRACTICES SHOULD BE TARGETED?

Here there is a wide menu of options:

- all practices covered by ILO convention;
- only those practices covered by conventions that the targeting or targeted country has ratified;
- only core labour standards (freedom from child labour; freedom from forced labour; freedom from discrimination; freedom of association) as set out in the 1998 ILO Declaration of Fundamental Principles and Rights at Work and as recognized in the UN Covenants on Civil and Political Rights and Economic, Social and Cultural Rights; and
- all universal human rights (civil, political, economic, social, and cultural) including the core labour standards.

Even if a trade policy–labour standards linkage were to focus only on core labour standards, it is difficult to see a justification for privileging these over at least some subset of other international human rights such as those relating to torture, genocide, detention without trial, etc.

Suppose, by way of hypothetical example, that India exports textiles and clothing to the United States and child labour is employed in both sectors. Assume that the United States has only a clothing industry but no textile industry, and proposes to impose trade sanctions against only clothing imports from India. Suppose further that Pakistan also exports textiles and clothing to the United States and child labour is em-

ployed in both sectors, but the United States, for geopolitical reasons, proposes to impose no trade sanctions against Pakistan. Suppose further that Burma (Myanmar) employs child or forced labour in some sectors, or engages in other abuses of civil and political rights, but in no case do these abuses occur in sectors where Burma exports goods to the United States, but that US multinational enterprises have investments in Burma.

These examples are intended to underscore the importance of being clear as to the normative rationales for a trade policy–labour standards linkage. Despite its long historical genesis, the unfair competition and race to the bottom rationales for trade policy–labour standard linkage are unconvincing, indeed inconsistent with the whole notion of comparative advantage, but that viewing a certain subset of labour standards (such as the core labour standards recognized by the ILO) as universal or international human rights is not only normatively defensible, but arguably unanswerable, and that the possibility of invoking economic sanctions including trade sanctions against countries that persistently and systematically violate at least some fundamental subset of international human rights, as part of the wider menu of possible responses, seems equally unanswerable. However, even if this conclusion is accepted, concerns will remain that trade or other economic sanctions will only be invoked for protectionist reasons, and will typically not be invoked where there are no protectionist advantages from doing so.

### **WHAT INSTRUMENT SHOULD BE EMPLOYED?**

Here basic choices must be made between incentives and sanctions, or carrots and sticks. Carrots might include special GSPs (generalized system of preferences), foreign aid, rights to participate in labelling, certification, or codes of conduct regimes. Sticks would obviously include trade sanctions, but could include other eco-

**While the issues that remain to be resolved even if this rationale is accepted are far from straightforward or uncontentious, resolving them is rendered vastly more difficult if we are not clear (as many historical and contemporary debates on the trade–labour linkage have not been) on the foundational or normative rationale for a linkage in the first place.**

omic sanctions such as bans on foreign investment, and might also include fines of the kind contemplated by the NAFTA Labour Side Accord. Carrots have the virtue of targeting countries putting their money where their mouth is, and providing assistance to impoverished developing countries to improve their labour standards, but are unlikely to be effective with authoritarian or repressive governments, and to the extent that they operate on a voluntary basis (as in the case of labelling or certification

programs), may be relatively ineffective because of information, monitoring and collective actions programs, thus suggesting that sole reliance on carrots and rejection of any role for sticks is difficult to justify.

### **WHAT INSTITUTIONAL VEHICLES SHOULD BE USED?**

Here again there is a menu of options, including bilateral–state-to-state; bilateral–state-to-NGOs; regional–NAFTA/FTAA; and multilateral–the ILO or the WTO, or some combination of the two. For example, a country being targeted by trade sanctions ostensibly on account of violations of core labour standards might file a complaint with the WTO dispute settlement body, but this complaint might be remitted to the ILO for a determination as to whether the targeted country has been guilty of persistent and systemic abuses of core labour standards, while the WTO might retain responsibility for overseeing the proportionality and appropriateness of the sanctions imposed.

### **THE NORMATIVE RATIONALE**

Hence, the unfair competition and race to the bottom rationales for a trade–policy linkage provide a thinly disguised cover for protectionism, particularly on the part of developed countries vis-à-vis imports from developing countries and rightly arouse the antagonism and cynicism of developing countries. On the other hand, the human rights rationale for a trade–labour standards linkage is much more compelling and has important implications for the scope of a trade policy–labour standards linkage, as well as the choice of instrument and the choice of institutional forum. While the issues that remain to be resolved even if this rationale is accepted are far from straightforward or uncontentious, resolving them is rendered vastly more difficult if we are not clear (as many historical and contemporary debates on the trade–labour linkage have not been) on the foundational or normative rationale for a linkage in the first place. 

# Trade and labour standards: A view from the south

## THE WTO AND MARKET ACCESS

As the world's trade organization, the WTO is essentially about broadening and deepening market access. It has however, been argued that while developed countries have succeeded in prying open markets in developing countries, they have simultaneously succeeded in denying access to their own markets through tariffs and quotas and, more recently, through non-tariff measures. Indeed, the total share of exports from least-developed countries (LDC) is barely 0.25 percent of total world trade.

With an agreement to dismantle tariffs and a proposal to consider duty-free and quota-free access to products from LDCs, non-tariff measures are likely to emerge as the new form of protectionism and the denial of access to markets in developed countries.

## LABOUR STANDARDS

One of the most powerful non-tariff barriers under discussion in various fora is labour standards. Discussions on the subject tend to be highly emotive and over the years the debate has become increasingly contentious and politicized. Indeed, post-mortems of the aborted Seattle WTO Ministerial Conference suggest that the insistence by the United States for the inclusion of labour standards precipitated the collapse of the conference.

Let us consider the issues in terms of the arguments forwarded, either in defence of the linkage or in opposing its inclusion in the trade agenda. Essentially, there seems to be two aspects to the argument for the trade-labour standards linkage: those that are overt and, as such, peripheral and those that are unstated and, hence, constitute the principal or core motivation.

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The views expressed in this paper do not necessarily reflect those of the SAARC Secretariat or the member countries of SAARC.

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## THE MORAL ARGUMENT

The overt argument is essentially "a moral argument" and is NGO and consumer driven. It argues that there is a collective moral responsibility to improve working conditions and that children should be in school and not in the workplace. They argue further that in

order to facilitate this, pressure needs to be put on errant governments and companies so that they comply and further, if required, such pressure may also be in the form of trade sanctions.

Unfortunately, the argument is based on a series of flawed assumptions. First, it assumes that the welfare of the children would, in fact, improve if they were withdrawn from the workforce when, in fact, empirical evidence seems to suggest that the opposite may be true. The case of Bangladesh in this regard may be recalled when the Bangladesh Manufacturers and Export Association (BGMEA), which is heavily dependent on the US market for its exports, undertook to eliminate child labour in the garments industry under pressure from US NGOs, consumer protection groups, and the US government. Around 50,000 children were thrown out of work, some without pay. The majority of these children did not end up in schools but rather found replacement work that was more strenuous, less safe, and offered less pay. Indeed, many of them were pushed into crime and prostitution.

Second, the moral argument fails to recognize the linkage between poverty and child labour. There is ample evidence to suggest a direct correlation between low economic performance and low labour standards. In other words, labour standards are likely to rise in the long term as countries achieve higher rates of economic development and per capita income. Poor economies, on the other hand, would find it difficult to move away from child labour or additional family income because of the prevalent poverty. Sending a child to work is, therefore, a rational economic choice.

Third, the overt argument by recommending import restrictive measures

and trade sanctions is directed against the export sector. However, in developing countries the majority of children are in fact deployed in the informal sector, which is a non-export-oriented sector. These activities would range from family-based agriculture to jobs in rural and urban areas such as street vendors, shoe-shine boys, domestic help, help in local street restaurants, helpers in trucks, small-scale manufacturing industries, automobile workshops, etc., and also in illegal trade such as prostitution, begging, etc. Children are also used for criminal activities, particularly as carriers of banned drugs and even illegal, locally manufactured guns. The overt argument is not targeted against this sector. Furthermore, as has been illustrated through the Bangladesh case, if the children are thrown out of the formal sector, they end up in the informal sector, which is by definition unregulated and unprotected, and where working conditions are generally more demeaning.

### **THE PROTECTIONIST ARGUMENT**

Given these assumptions, the unstated or core motivation behind trade-labour standards advocacy needs to be looked at. This is essentially a protectionist argument and is aimed at raising the cost of imports from low-wage economies. Firms in developed countries argue that they suffer a competitive disadvantage because of the low standards in developing countries. This raises their cost of production. Pressure on developing countries to comply or adopt higher and acceptable levels of labour standards would raise the cost of imports from these countries and thereby provide a level playing field. This is nothing short of a protectionist argument aimed at denying market access to goods from developing countries.

It would, however, be churlish to dismiss the importance of the moral argument or the fact that a large cross-section of the population in industrialized countries has genuine concern for the welfare of children and further, that this

**At the Seattle WTO Ministerial Conference, the United States took a hard-line position in the matter and threatened sanctions against those countries that did not adopt labour standards. However, the US track record is more than dubious. Of the seven key ILO conventions that have set out core international labour standards . . . two have been ratified by the US Congress so far!**

is driven by purely humanitarian considerations. At the same time, it is essential for consumers and NGOs in the developed countries to recognize that governments in developing countries do not derive any sort of vicarious pleasure in exploiting their people or in denying their children school education. Indeed, as we have pointed out, overwhelming evidence suggests that trade bans or trade restrictive measures do more harm than good and furthermore,

that labour standards need to be seen in the overall context of poverty and the developmental dimension. This suggests that unless development is put at the heart of the global trading regime and the distribution of gains directly addressed, labour standards cannot be effectively dealt with.

### **EARLY ATTEMPTS TO LINK LABOUR STANDARDS AND TRADE**

It is worthwhile recalling that the attempt to establish a linkage between labour standards and trade policy within the earlier GATT and WTO framework was first made by the United States with some European support at Marrakesh where, in fact, it posed a serious threat to the signing of the Uruguay Round Final Act (1994). The United States and France made a renewed effort, with Norwegian support, at the Singapore Ministerial Conference (1996). Strong opposition from developing countries led by Egypt, India, Malaysia, and Pakistan succeeded in ensuring that the Singapore negotiated text, while expressing support for the observance of “internationally recognized core labour standards” rejected the use of labour standards for protectionist purposes. The text further identified the ILO (International Labour Organization) as the relevant organization to establish and monitor these standards.

Despite Singapore, however, the issue has remained alive and continues to be raised at regular intervals. At the Seattle WTO Ministerial Conference, the United States took a hard-line position in the matter and threatened sanctions against those countries that did not adopt labour standards. However, the US track record is more than dubious. Of the seven key ILO conventions that have set out core international labour standards (nos. 29, 87, 98, 100, 105, 111, and 138), only two have been ratified by the US Congress so far!

Furthermore, Jagdish Bhagwati points out there is a selectivity in the contents of the labour standards. Today,

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labour standards or the social clause are concerned primarily with child labour. Issues such as the enforcement against domestic sweatshops, which is notoriously miniscule and lax in the United States, where they abound in the textiles industry, are not in the social clause. Also not in the social clause are the rights of the migrant labourer, who is subject to quasi-slavery conditions in parts of US agricultural sector, nor indeed the low levels of unionization of the US labour force.

### POST-DOHA

Despite overwhelming logic on the need to keep non-trade issues out of the trade agenda and to avoid insertion of protectionist measures through camouflage or other means, business lobbies would work toward identifying and invoking non-tariff measures and barriers to market access. This is likely to have serious and adverse implications on the credibility of the WTO. Indeed, barely seven years into the WTO's existence, there is growing skepticism with regard to its manner and style of functioning. The Doha Ministerial Conference tried to allay developing country concerns by giving the development agenda special emphasis and agreeing on a work program post-Doha. This could be seri-

**The Doha Ministerial Conference tried to allay developing-country concerns by giving the development agenda special emphasis and agreeing on a work program post-Doha. This could be seriously jeopardized if the causes and consequences of poverty and underdevelopment are not recognized. As Amartya Sen pointed out, the global trading regime is distinguished by acute asymmetries of unprecedented prosperity on the one hand and abject poverty on the other.**

ously jeopardized if the causes and consequences of poverty and underdevelopment are not recognized. As Amartya Sen pointed out, the global trading regime is distinguished by acute asymmetries of unprecedented prosperity on the one hand and abject poverty on the other. It is essential therefore, if trade

liberalization as represented through the WTO is not to be slowed down, for the developed countries to desist from innovative means to deny market access to the products emanating from developing countries. For a global trading regime to succeed, it needs to be truly global and not selective. 

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gricultural policy within Europe and therefore only provided for reductions in export subsidies. "With a view to phasing out" might not have determined the end of this negotiation but it would have been perceived as a signal in relation to decisions the Community has yet to take on some of its regimes, notably those based on high prices but-tressed by quotas. So, to avoid any suggestion that the way in which the agenda was described was intended to prescribe the outcome of the negotiation, it was finally agreed to add the words "without prejudging the out-

come of the negotiations." Although the controversy, which led to this addition, related to the reference to export subsidies, the phrase was inserted into the text in a position, which made it qualify the reference to all three pillars, neither emphasizing nor excluding the words on export subsidies.

### SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES

Interestingly, there was no controversy at Doha over the biggest innovation in the agriculture text compared with arti-

cle 20, the much stronger reference to special and differential treatment for developing countries. It wasn't controversial because all developed countries agree that the new round should improve the position of developing countries, and no developing country would wish to contest this. But how to give effect to this objective may prove to be one of the most difficult and controversial questions in the negotiations. Possibly the widest disagreement may emerge among the various groups of developing countries themselves. 

# One world, many systems: When universal trade rules collide with the need for policy diversity

The Doha Development Agenda, launched at Doha, Qatar in November 2001, may prove to be a watershed moment in the WTO's short history of trade regulation. The essential issue is whether the WTO is to continue imposing its one world—one standard system of governance in which universal standards apply to all members, or opt for a diversity-based approach to rules setting in which differing standards are applied according to the particular needs of individual nations and geographic regions. The benefits of universal standards-as-rules are their equality of treatment for all nations. In contrast, a diversity-based approach responds to the unique characteristics of individual member states and geographic regions. Social deficits arise when this principle of universal treatment exacerbates inequality. These deficits will occur less frequently if the WTO were to adopt increased diversity in its rules-setting principles and adjudication policies and practices.

## THE INTRUSIVE EFFECTS OF TRADE

To date, member states have given the WTO the benefit of the doubt and tolerated their one world—one system approach; countries have permitted international intrusion into areas of domestic sovereignty, such as in food safety, international development programs, and cultural protection. It is unlikely that they will be as complacent in the future for good reason.

The non-economic impacts of trade have become more, not less, important. So far, the legal culture and institutional framework of the WTO have failed to address the growing gap between trade norms and social need. At

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a time of global interdependence, social deficits increasingly arise from either the failure of government to set adequate standards or the failure of markets to address the harmful externalities that are produced when markets overshoot or underperform.

## THREE RECENT TRADE DISPUTES

Three recent trade disputes illustrate these kinds of policy gaps that pose a li-

ability to the integrity and legitimacy of the WTO as an international institution (the entire report is available at [www.robarts.yorku.ca](http://www.robarts.yorku.ca)).

## WHEN STANDARD-SETTING IS SEEN AS A LIABILITY: MEASURES CONCERNING MEAT AND MEAT PRODUCTS (HORMONES) (AUGUST 1997)

Possibly the most dramatic example of the failure of a universal rules-based system is the beef hormone case. A long-running trade dispute involving Canada, the United States, and the European Community (now called the European Union) was recently settled with the European Community refusing to abide by the outcome of the decision. At issue was whether the Community could permanently establish higher safety standards for various chemicals in food. In today's world, where minimal governmental regulation is preferred, it is somewhat a rarity in WTO jurisprudence to observe a member nation pushing for higher standards. On this occasion, the EC was insisting on a higher standard in food safety.

The WTO ruled against the European Community. The ruling was that the precautionary principle—a means of allowing governments to take action to protect human welfare in the absence of certainty regarding potential health risks—could not be employed to permanently establish higher food safety standards than international norms unless it could scientifically prove its concerns. The decision created a policy gap: international norms in food safety were not only minimum limits but became maximum standards as well. The

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WTO in its enforcement capacity turned a basic standard into a universal rule, preventing nations from exceeding the standard even when it applied its higher requirements universally to all nations.

The European Community defied the WTO's decision and continues to incur millions of dollars worth of punitive duties as a consequence. Had the Community complied with the decision, European citizens would have been exposed to the potentially cancer-causing growth hormones found in North American meat and meat products. By refusing to conform to the WTO's decision, the European Community has protected its citizens, but in so doing has raised questions. Should the WTO's basic standards be enforced as *inviolable* rules in the area of food safety, or conversely, are a *diversity* of standards possible provided they meet or surpass basic international norms while supporting the general principle of equality of application?

## **THE CHALLENGE OF ECONOMIC DEVELOPMENT: REGIME FOR THE IMPORTATION, SALE, AND DISTRIBUTION OF BANANAS (MAY 1997)**

The bananas dispute was one of the signature cases emphasizing the diverse development needs of southern countries. At issue was whether economically advanced nations could specifically target less affluent countries for preferential trade benefits. The European Community had historically provided special consideration to some of the world's poorest countries in Africa and the Caribbean in its banana import system.

The European Community established a complex importing system to provide economic assistance to these impoverished nations. The GATT recognized the economic benefits to these countries. Hence in 1989, the Community was granted a special waiver to permit its continued operation in contravention of restrictive GATT rules, allow-

**As US cultural industries have increasingly dominated book and magazine publishing, television, films, music, and the Internet, culture has become a hot-button item for the WTO.**

ing it to use quotas to guarantee ACP countries (African, Caribbean, and Pacific Group of States) a share of the European banana market. Following the establishment of the WTO in 1995, the United States and four Latin American nations challenged the provisions of this waiver. The decision severely curtailed the EC's ability to use economic principles and strategies to enhance the well being of some of the world's poorest countries.

The bananas case is important because the European Community attempted to use market mechanisms to meet development needs. The Lome Convention is in many respects considered an unconventional agreement by free traders because it uses quotas to guarantee a market share for the world's poorest countries. But a non-standard approach can be an innovative one. However, the WTO failed to recognize the limits of theoretical free trade models. From a practical point of view, it believed that the abstract principles of global free trade were more important than an economic assistance program. The bananas case is a powerful illustration of

the ways multinational corporations can use a WTO decision to gain market share at the expense of poorer countries. As a result of this dispute, the European Union has pledged to move to a tariff-only system for its banana imports by 2006.

## **TESTING CULTURAL SOVEREIGNTY: CERTAIN MEASURES CONCERNING PERIODICALS (MARCH 1997)**

The Canadian periodicals dispute exemplifies the WTO's position on the trade-culture relationship. Culture has never been covered by WTO trade codes, although it has not been totally excluded either. Many countries protect their cultural industries while others have adopted a more laissez-faire approach. As US cultural industries have increasingly dominated book and magazine publishing, television, film, music, and the Internet, culture has become a hot-button item for the WTO. On one side, Washington has been aggressive in pressuring countries to regard their industries as simply a commercial opportunity. With such a commanding position, US industries dominate globally, much as McDonald's and Walmart dominate the food and retail sectors. The counter-movement against US cultural imperialism emerged on the streets of Seattle and Quebec City. But as a trade issue, Europe, Latin America, and Canada have taken a lead in demanding that culture not be included in WTO rules and negotiations and that there be a cultural exemption clause.

The dispute involves a challenge by the United States against Canadian measures to protect its magazine industry in order to promote Canadian culture. It is estimated that US magazines account for approximately 80 percent of the shelf space in the Canadian retail market. In an attempt to level the playing field for Canadian magazine publishers, the Canadian government effectively imposed a ban on split-run magazines and prohibited companies from claiming tax deductions for advertising

in non-Canadian publications.

In 1993, *Sports Illustrated* disregarded these measures aimed at protecting Canada's magazine industry. *Sports Illustrated* was able to avoid the Canadian ban because it was produced in Canada even though its editorial content was transmitted from the United States. In 1995, Canada responded by adopting an excise tax of 80 percent on advertising revenue for magazines originating abroad. To avoid the tax, a split-run magazine would have to produce a publication that featured 80 percent Canadian content. The United States objected to the measures as being trade restrictive and protectionist and filed a complaint with the WTO.

The WTO ruled in favour of the United States, concluding that the Canadian government unfairly restricted the sale of US magazines in Canada. The WTO treated cultural goods and services like any other tradable commodity, encroaching on Canada's cultural sovereignty to further its own goal of trade liberalization. By defining what is acceptable and what is not, the WTO has significantly narrowed the scope for cultural diversity and the opportunity for countries to implement national policies and goals aimed at protecting their national cultures in the face of globalizing forces.

### **UNIVERSALITY IS A DIFFERENT KIND OF BARRIER**

From the inception of the GATT in 1947 through to the creation of the WTO in 1995, the foremost purposes of these institutions have been reducing barriers to trade through the creation of a universal set of international trade rules, and the adjudication of trade conflicts between member nations when they arise. The WTO is therefore a necessary institution in order to regulate the field of international trade. However, difficulties are created when the effects of WTO trade rules and decision making in trade disputes are not confined to the realm of business and economics. All too often they spill over into the political and social realms with unintentional and often significant side effects. These effects oc-

## **[W]hat the WTO defines as non-tariff barriers are the very instruments that helped northern countries develop.**

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cur in large measure because of the stringent conformity the WTO places on establishing and enforcing basic trade principles and standards as universal rules.

So far, the WTO has failed to respond to the challenges that result from its narrow view of universality in applying international trade laws. The result is discrimination against diverse domestic policy initiatives, including setting food-safety standards, creating economic development programs, and preserving national culture, which the WTO mistakenly interprets as non-tariff barriers to trade. In the Doha Round, these kinds of non-tariff barriers are targeted to be dismantled. Significantly, what the WTO defines as non-tariff barriers are the very instruments that helped northern countries develop. The international trade system has a short memory indeed. It has lost sight of the continuing importance of these established trade strategies now that industrialized countries require open markets for further development.

The need to integrate the interests and goals of diverse countries more effectively into the world trading system was the main focus of the Doha Development Agenda. The agenda of negotiations include a wide range of such trade-related issues as enhanced market access, balanced rules, and effectively financed technical assistance and capacity building programs.

The Doha Development Agenda is important in bringing to the fore the important and legitimate concerns of developing countries. Future negotiations

will have to address the substantive issues facing developing countries, rather than merely agreeing to review them. Its future success lies in its ability to resolve these challenges in a way that is sensitive to the diverse needs of the developing world. Such sensitivity is crucial in light of the current lack of diversity as exemplified in the above three cases. The WTO seems to have no room for flexibility and rejects national initiatives that go beyond the narrow market model that it promotes.

### **REFORMING THE RULES**

When the leaders of the world's most affluent countries met in Kananaskis, their discussions were supposed to help define the developed world's approach to global economic development. Part of a global rethink must begin from the premise that diverse strategies will be required to address the non-economic effects of global free trade: social issues such as health standards, economic development, and cultural sovereignty.

If the WTO continues to reject rules-based diversity—freedom to set higher international standards, to provide special consideration for economic development within the poorest countries, and to allow global cultural diversity to grow and flourish—it will face growing opposition from the anti-globalization movement. If the institution wishes to increase the economic and social well-being of its member nations, in particular those in Africa, the G8 leaders need to consider how to implement principles of diversity at the WTO. This will require a major transformation in the WTO's legal culture.

Time is short and the WTO ought to stop trying to prevent countries from setting real and meaningful standards. Its binding dispute procedures have become a flashpoint for international civil society. If there is an object lesson here it is that trade negotiators are not the right body to set the rules of the game or interpret them. Public opinion wants better rules all around. It is no wonder that public resentment has hardened and not softened post-Doha. 

# Trade blocs: The steep learning curve

## TRADE LIBERALIZATION TODAY IS ABOUT FAR MORE THAN TRADE

Trade plays a role so important in our economies that it affects, not only economic policy, but also a country's social and political framework. The degree to which a country is able to realize benefits from trade liberalization depends on both the capacities of these frameworks to change and the degree to which policies in these domains are coherent and mutually supporting.

In Quebec City, leaders agreed that the positive energy of free trade would be snuffed out if it were introduced into a policy vacuum or into an unreceptive or unsupportive policy environment. The investments necessary to develop exports will not be attracted or sustained without good governance and good governance is not sustainable in the poverty engendered by a closed economy. Without the fullest participation of citizens as producers, innovators, entrepreneurs, consumers, and social actors, neither economic efficiency nor good government is possible.

Free trade, therefore, is a desirable way of stimulating positive systemic change, but it is of itself no more than an opportunity. The capacity to take advantage of this opportunity lies in the strength, openness, and adaptability of the economy and of the political and social systems. That would be the overriding "lesson" that was drawn by leaders in Quebec City. We must pursue the FTAA (Free Trade Area of the Americas), but not in isolation. It is and must be part of a broader agenda for sustainable, positive change in our societies. Otherwise it could become the scapegoat for failures elsewhere. Free trade is not a panacea. Often far-reaching and politically difficult adjustments are necessary to gain the benefits from a free trade agreement.

Even though we have benefited powerfully from NAFTA, some say that Canada has not made sufficient adjust-

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[T]he very process of negotiating free trade helps everyone think more clearly about trade-related policy. The FTAA negotiations have already been of value as a powerful learning experience.

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ments to benefit fully from it. They argue that our floating currency, for instance, has had the effect of cushioning the economy from the pressure for adjustment. Perhaps the adjustments required of Canada for satisfactory returns were too easy. Mexico, on the other hand, has certainly made painful adjustments, which have been transformative. The industrial economy of northern Mexico has become closely integrated with the North American system. Fiscal policy adjustments allowed Mexico to overcome the '94 peso crisis in short order, while the adjustment in the political system permitted a peaceful, credible, and democratic transition to the Fox administration.

### LESSONS FROM NAFTA

The second "lesson" is that the less (or more) the distance among the parties in terms of their domestic policy frameworks (for the economy, governance, and social organization), the easier (or

tougher) is the politics of negotiating free trade. The Canada/US FTA was politically uncontentious in the United States because Canada was seen to be part of a shared system of values, with credible public institutions and a complementary economy. On the other hand, the FTA was challenged in Canada.

NAFTA proved to be far more controversial in the United States because of the sense of systemic differences that triggered American fears of both policy contagion (for example, with regard to lower, shared environmental standards) and protectionist concerns about loss of jobs in a stilted competitive environment. The transformative benefits of NAFTA for Mexico carried relatively little weight in American public discourse, even though they featured heavily in the administration's calculations. If NAFTA was a tough political sell in the United States, the FTAA is likely to be tougher still given the diversity of systems and the less obvious nature of US interest engaged in the hemisphere.

### FRAMEWORK DIFFERENCES

It is clear that part of the FTAA bargain, as it was for NAFTA, has to be an agreement to address the framework differences on issues like environmental protection and labour standards. This does not necessarily have to be done within an FTAA, and certainly not in a way that involves sanctions, but the issues have to be addressed somewhere for three main reasons.

First is the need to satisfy public opinion in the United States, Canada, and Mexico that free trade does not mean the dilution of existing national frameworks in these areas or the perpetuation of two standards, one for the North and one for the South. The second reason is tactical. Southern parties could use the concessions they make here to satisfy northern demands for higher standards in these areas for constructive bargaining on a comprehensive agreement. Such concessions

would, after all, also be in their long-term social interest. Third is that however they are formulated, agreements in favour of improved standards can be used to lever cooperation and to stimulate the North/South transfer of resources in these areas.

There is one final observation directed at those who think that “side” agreements cause more trouble than they are worth. They do not. Labour standards and environmental protection were addressed in NAFTA side agreements. Doing so calmed public criticism and the provision calling on NAFTA states to respect their own national legislation, while a useful discipline, has not been troublesome for the parties. Secretariats are in place to handle disputed cases, but there have been none. In the case of Canada and Mexico, the side agreements have led to an intensified cooperation in improving Mexican governance capacity and the United States and Mexico established the North American Development Bank to finance environmental improvements in the border region between them.

This then is the second “lesson” from NAFTA that systemic differences inevitably intrude in the politics of free trade. We need to accept this fact and deal with it.

The third “lesson” is that the impact of free trade on different parties varies according to the degree of difference in size relative to the dominant party. The fragile capacity of small states to accept FTAA disciplines, and there are some very small states involved, must be respected. They need special and differential treatment, something that was recognized at Doha. They also need technical assistance both in negotiating the agreement (learning and applying the rules to their own situation) and in implementing it.

The fourth lesson is that the very process of negotiating free trade helps everyone think more clearly about trade-related policy. The FTAA negotiations have already been of value as a powerful learning experience for all the parties. Support for learning will con-

## [B]uilding free trade is like riding a bicycle—it is essential to keep moving forward to avoid the risk of falling off.

tinue to be needed, and there will be opportunities for the legal profession to share in providing it.

The fifth “lesson” is that, even for mature trading relationships, free trade agreements do not remove all of the problems. The areas not covered by the agreement, are, by definition, those that are politically the most contentious. They will continue to be so until either the level of integration is so high that there are no systemic differences left that would justify protection, or compensating mechanisms have been provided to offset the political power of those interests demanding protection.

### UNINTENDED CONSEQUENCES

The sixth “lesson” derives from our experience with chapter 11 of NAFTA, where sophisticated litigants turned an instrument intended to assist one partner to apply the necessary disciplines for investor protection into a commercial tool. The lesson here is to be careful about the law of unintended consequences.

The NAFTA experience teaches another lesson. Free trade is a process and based on present experience, at least, one that is irreversible. Success demands more success. Opened access demands more access. As Helmut Schmidt described the European construction process, building free trade is like riding a bicycle—it is essential to keep moving forward to avoid the risk of falling off.

This has certainly been the case in

North America where the success of NAFTA has increased our interdependence. To put it another way, it has raised our mutual vulnerability. NAFTA allowed us to manage a certain level of trade interdependence well. That success has encouraged our economies to commit to long-term investment and other strategies that assume guaranteed unimpeded flows within North America. Whatever safety net might have existed for the Canadian economy “in case free trade fails,” it is now gone. Given the lack of real options, the economy demands new instruments to provide greater certainty within the North American economic zone.

Mexico and the United States are now attempting to advance the liberalization of labour markets between them to take advantage of and sustain increased economic activity. Mexico is arguing for a shared approach to regional development to spread the benefits of open markets. For their part, Canada and the United States are building an “area of mutual confidence” to safeguard their shared security in the face of global challenges. In part, this is to ensure that the border between them does not become a barrier to the flows that now unite the two economies. In merchandise trade alone, these flows amount to \$1.5 billion per day. In this effort, Mexico would also become a partner. In short, while free trade needs plateaus of time during which the effects of liberalization are absorbed, the process cannot stop without catastrophic disruption.

### THE QUID PRO QUO OF THE FTAA

Free trade, to be sustainable, requires a clean *quid pro quo*. The trade-off between partners with modest systemic differences is relatively straightforward and will focus on issues of access. Although it was tough to define the Canada-US FTA *quid pro quo*, ultimately, it involved a narrow range of policies and has been easy to sustain. The case is very different among econo-

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mies with significant systemic differences and great asymmetry in size.

The *quid pro quo* in the case of NAFTA was very different and it is far more complex still in the FTAA. The FTAA process is based on a bargain articulated in 1990 and codified in Miami in 1994. In exchange for free access to US markets, the countries of the hemisphere will liberalize their economies and democratize their societies.

While the FTAA negotiations have advanced since Miami, there has been a significant time lag in the parties' fulfilment of their commitments. Countries of the Americas have moved unevenly toward liberalization and embedded democracy. The United States has only recently demonstrated the political will to provide guarantees of free market access. Even now, the Trade Facilitation Authority that the House has provided falls short of fully achieving this goal. Firm and comprehensive guarantees of access are needed to support sustained reform in the often tenuous economies and poorly integrated societies of the Americas. Access in sensitive sectors like citrus, sugar, and textiles, as well as trade remedies will have to be on the table.

The US partners need to approach the negotiations as "negotiators." They cannot demand pre-agreement on US concessions before they engage. It won't work. Canada's experience in the FTA is illustrative. "Nothing is agreed until everything is agreed" and that might not happen, quite literally, till the last minute. The FTAA *quid pro quo* then will be a challenging one to strike when Brazil and the United States assume responsibility for the final stage of negotiations.

## THE ROLE OF CIVIL SOCIETY

A final "lesson" is that the parties cannot wish away the involvement of "civil society" in the negotiating process. Civil society actors claim, for better or worse, to be the vocal proxy for public opinion. They are organized, have access to mass media, and they do exercise politi-

# Civil society opposition to free trade, and more generally to "globalization," is based on fear and the mistrust of governments, whom they suspect of colluding in an agenda to diminish sovereignty and the state's capacity to protect national societies.

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cal power, although we should not exaggerate it.

The questions "Who is civil society?" and "Whom does civil society represent in a democratic society?" are both interesting, but are ways to avoid the real issue. Civil society has to be engaged. Canada has had considerable experience with civil society's involvement in public policy. Some have been very painful, for example in the MAI (Multilateral Agreement on Investment), some positive, and some both (Quebec City Summit). We have learned from the experience. Civil society opposition to free trade, and more generally to "globalization," is based on fear and the mistrust of governments, whom they suspect of colluding in an agenda to diminish sovereignty and the state's capacity to protect national societies. Civil society represents a spectrum of constituencies including protectionist lobbies who transmute narrow self-interest into the language of altruism and the marginally violent for whom international conferences provide a sanctioned opportunity for self-indulgent thuggery. But the majority are well intentioned individuals and organizations concerned about real issues.

We address ourselves to this majority with a coherent message and in the spirit of the greatest possible transparency. Free trade is instrumental to but only a part of much broader efforts at change in favour of economic freedom, political

democracy, and social equity. That *was* the message of Quebec City, and the message, clearly articulated there, simply washed away the confused rhetoric of the critics. We also saw the impact of transparency after the trade ministers' breakthrough agreement to release the draft FTAA text in Buenos Aires.

The gesture, which would have been even more effective if it could have been acted on immediately, took the wind out of the critics' sails. It obliged them to assume responsibility to engage the issues, rather than exercise their prerogative to criticize without regard to the facts. For the FTAA to move forward now, and to be sustainable for the longer term, we will continue to have to act in this spirit.

## ECONOMIC LIBERALIZATION, GOOD GOVERNANCE, AND SOCIAL PARTICIPATION

Others will undoubtedly draw on their experience for additional "lessons" for the FTAA. The most important is that public policy making cannot be compartmentalized. Economic liberalization, good governance, and social participation are three legs of one stool. Pursuing any one, independent of or unmindful of its impact on the others is a recipe for failure. Ignoring one similarly unbalances the system. The consequences of failure are no less tragic today than in the past. They include losing the real progress the hemisphere has made on all three fronts in two decades of determined effort. 

# The Doha Development Agenda and global governance

## FROM DOHA, TO MONTERREY, TO JOHANNESBURG

Doha has set an agenda for a version of globalization that also benefits the poor. But the European Union clearly recognizes that a free world market alone will not lead to equitable and sustainable development. Official development assistance (ODA) remains crucial to support the autonomous efforts of developing countries, notably the poor ones. The international community must be ready to take concrete steps in fulfilling its longstanding financial promises.

The European Union is well placed to assume a leading role in the pursuit of global sustainable development. It is the world's largest donor of development aid, the world's biggest trading partner, and a major source of foreign direct investment (FDI). Moreover throughout its own evolution, the European model of integration has been based on pursuing mutually supportive strategies for stable economic growth, social development, and environmental protection.

### THE INTEGRATION APPROACH

The Doha Development Agenda does, in fact, represent the integration approach promoted by the European Union to harnessing globalization. The inclusion in the agenda of negotiations on a wide range of trade-related issues should ensure that market liberalization takes place in a broader regulatory framework helping countries to manage and maximize the benefits of reforms. The negotiations that have been launched in Doha and the emphasis on integrating developing countries more effectively into the trading system will take the WTO into a new era, which will allow the organization to play a fuller role in the pursuit of economic growth, employment, and poverty reduction and in the promotion of sustainable development.

BY CARLO TROJAN

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**The most important result from Doha was the very fact that the WTO, after the failure of Seattle, was capable of launching a new round of trade negotiations.**

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From Doha and Monterrey, the multilateral diplomacy agenda moves to Johannesburg in September for the World Summit on Sustainable Development. Johannesburg should result in a balanced, coherent, and action-oriented agenda simultaneously addressing the economic, social, and environmental problems of this world and incorporating other relevant processes including Doha.

Doha, Monterrey, and Johannesburg together constitute a formidable challenge for a more coherent approach in global governance and in managing globalization. The input in this process of the industrialized countries will be crucial. Hence, the importance of the G8 Summit in Kananaskis hosted by Canada.

### STRENGTHENING THE MULTILATERAL TRADING SYSTEM

The most important result from Doha was the very fact that the WTO, after the failure of Seattle, was capable of launch-

ing a new round of trade negotiations. Yet another failure would have constituted a fatal blow to the multilateral trading system and to the WTO as an organization. Moreover, in the aftermath of September 11 and in the context of a worldwide recession, a failure to agree would have generated a negative impact on the marketplace. The year 2001 was marked by a considerable downturn in world trade and a dramatic fall in FDI. The prospect of further market liberalization and international rules on investment should contribute to reverse the trend.

While developed countries might have promoted further trade liberalization within regional free trade agreements, most developing countries do not have this fallback position. They will depend heavily on a new round of trade negotiations for improved access to markets for their agricultural products and textiles. At the same time, strengthened special and differential treatment provisions, as well as a comprehensive strategy for trade-related technical assistance and capacity building, should address their specific constraints.

### A MORE INCLUSIVE PREPARATORY PROCESS

Much of the success of Doha is due to the strong emphasis on development in its preparatory process, both on substance and on the process itself. On process, we have learned quite a few lessons from the inadequate preparations of Seattle. This time the Geneva process has been far more transparent and inclusive. We have been at pains to include the entire membership in the preparatory process. Even more importantly, ministers and senior capital-based officials have been involved at an early stage in the preparations.

Both the United States and the European Union have been seen building

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bridges, not only between themselves as major trading partners, but more importantly with developing countries. At the same time, we have seen the phenomenon of a much more structural and enhanced coordination between developing countries. Their common positions and the growing assertiveness with which they were presented constituted a coming of age of developing countries within the WTO system and much to its benefit.

We have to build on this experience in the actual negotiations, which are off to a good start. The momentum of Doha was not lost and members managed to agree on the structure of the negotiations and the chairs of the different negotiating bodies. They also agreed on the principles and practices of the negotiating process with due emphasis on inclusiveness and transparency. Yet it will continue to be quite a challenge for a consensus-based and member-driven organization of 144 members to conclude within three years such a wide-ranging negotiation as was launched at Doha. It will call for a lot of confidence building in the initial phase up to the 5th Ministerial Conference and above all delivering upfront on the promises for increased and better coordinated technical assistance and capacity building.

## THE DOHA DEVELOPMENT AGENDA

Developing countries obtained a meaningful implementation package. Since Seattle, implementation had become the overriding development issue, indeed, going well beyond the strict notion of implementing the Uruguay agreements. In fact, it has become a kind of re-balancing exercise of the WTO rights and obligations, in favour of developing countries. The overall result may even have exceeded their own expectations. The immediate results of the implementation exercise were, by all means, positive; moreover the remaining implementation issues will now be part and parcel of the ne-

**A main achievement of Doha is that it moves the WTO away from being a forum focusing simply on trade liberalization to a rule-making organization in an area essential for global governance.**

gotiating agenda of the new round.

The declaration on TRIPS and Public Health can be considered as a landmark agreement in terms of public relations vis-à-vis the developing world. While it preserves the rights and obligations of the TRIPS agreement, it clarifies the flexibility of the agreement in such a way as to provide greater confidence that developing countries will be able to promote access to medicines for all.

The negotiating agenda also caters very extensively throughout to the interest and concerns of developing countries: tariff peaks, agriculture and trade defence measures are all chapters that will open new opportunities for these countries. The declaration contains specific commitments to the integration of the least-developed countries (LDCs) into the global economy. WTO members also agreed to innovative work on the specific situation of small and vulnerable economies, as well as the examination of inter-relationships between trade, debt, finance, and technology transfer.

Last but not least, throughout the declaration, particular emphasis is

given to special and differential treatment and the need to enhance technical cooperation and capacity building. As far as the latter is concerned, direct links have been established between capacity building and the assumption of new obligations as a result of the negotiations. On a broader note, WTO members now explicitly recognize and support efforts to make trade a coherent part of the development strategies and programs.

## TECHNICAL ASSISTANCE AND CAPACITY BUILDING

The Doha agenda contains a strong commitment to a comprehensive strategy for trade-related technical assistance (TRTA) and capacity building (CB) both in relation to existing agreements and in support of full participation in future negotiations, as well of the implementation of their result. Technical assistance and capacity building activities should be designed to assist developing countries, LDCs, and low-income countries in transition

- to adjust to WTO rules and disciplines, implement obligations, and exercise the rights of membership;
- to enhance the negotiating capacity (in particular on Singapore issues and trade and environment);
- to build capacities for formulating and implementing trade policies;
- to mainstream trade-related technical assistance in the national poverty reduction programs (integrated framework);
- to facilitate and accelerate negotiations with acceding LDCs;
- to enhance technical assistance to non-residents in Geneva; and
- to make full use of information technology and technical assistance tools.

The challenge is not so much one of funding. It will be one of speedy delivery of TRTA/CB, of its quality, of its relevance to the WTO agenda, and of the objective and unbiased nature of policy advice that developing countries will be offered in TRTA/CB programs.

This will call for collaborative initiatives with other multilateral agencies and an effective coordination between them and donor countries. Particular attention should be given to the identification of the needs of recipient countries.

## **GLOBALIZATION AND GLOBAL GOVERNANCE**

As far as the European Union was concerned, it had two major strategic objectives for Doha. It sought comprehensive trade liberalization, not least to restore business confidence, but at the same time it wanted a strengthening of the rules-based trade system. In other words, more market access on the one hand, but balanced by more rule making in order to harness the overall process of globalization.

Second, the European Union did want a round that focused on *development*, not just the direct trade interest of developing countries but sustainable development in the system. No doubt, our strategic objectives were much more ambitious than those of most of our major trading partners, including the United States.

A main achievement of Doha is that it moves the WTO away from being a forum focusing simply on trade liberalization to a rule-making organization in an area essential for global governance. Doha will contribute crucially to improved governance by expanding trade-related matters subject to global rules in such areas as investment, competition, trade facilitation, and government procurement.

Both in the Geneva process and in Doha itself there has been much to do about the so-called new issues, particularly about investment and competition. The major difficulty was not the opposition of countries that had substantive difficulties in including these items in the negotiating agenda. In fact, there were only very few developing countries that were not *willing* to engage in this direction. The overwhelming majority of the so-called opponents recognized the merits of a multilateral framework for both investment and competition

**One cannot contemplate WTO reform without addressing the question of external transparency and accountability. Both have to start at home through a greater involvement of civil society and national parliaments in WTO matters, which call nowadays for a much broader constituency than the traditional trade policy community.**

policies but did not feel ready to engage in negotiations due to the lack of institutional capacity and human resources.

### **A MULTILATERAL FRAMEWORK**

A multilateral framework for foreign direct investment will ultimately benefit developing countries while preserving the right to regulate by the host government. It is likely that most WTO members will be ready to comply with the principles to be included in the investment framework (transparency and non-discrimination) and that the GATT-type bottom-up approach for the admission of investors will allow for the necessary flexibility.

As far as competition is concerned, the Doha Declaration rightly focuses attention on the need to respond to the particular interests and concerns of developing countries. It explicitly recognizes the need for flexibility and enhanced technical assistance. Most developing countries will acknowledge that the introduction of competition policies, sooner rather than later, would be to their benefit and enhance competitiveness of their industries. Moreover, one has to recognize that competition policies and competition authorities aim principally to protect the weaker within the economic system: be it consumers, small- and medium-sized enterprises, or developing economies.

Doha will also contribute to increased international policy coherence

as it provides for negotiations leading to clarification of the status of multilateral environmental agreements (MEAs) in relation to the WTO. The Development Agenda will contribute to improved global governance by addressing the concerns of developing countries on implementation and by mainstreaming the development dimension into all individual negotiations. This will ensure that developing countries are integrated equitably into the world economy and help them to reap the benefits of trade and investment liberalization through complementary policies.

The preparation of Doha has also been instrumental in triggering the ILO process on the social dimensions of globalization. The establishment of the World Commission will provide a useful global framework for moving this issue forward in a way that other international organizations, including WTO, can contribute to this process.

### **WTO REFORM**

As far as WTO reform is concerned, it will be more and more difficult to combine the fiction of a member-driven organization with 144 members and the need for efficiency. Internal transparency and inclusiveness are by all means important features of any organization. Within the WTO we have come a long way in this respect since Seattle. But it has to go hand in hand

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# Doha and after

BY SYLVIA OSTRY

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## A crazy quilt of preferential trade agreements in an increasingly globalized economy and polity is not a comforting vision of the future.

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### SUCCESSSES AND FAILURES

The Uruguay Round transformed the multilateral trading system, a misnomer since the system is less about trade than about domestic policy and institutions. The round had a number of unintended consequences: a serious North–South divide; a rise in the profile of the multinational enterprises due to their key role in ensuring the agenda included services and intellectual property; a similar rise in the profile of NGOs rallying around anti-corporate globalization; and the strongest dispute settlement system in the history of international law enforcing and interpreting WTO rules in domestic domains such as food safety and the environment.

In effect, the Uruguay Round initiated one small step in the creation of a global single market. The WTO is a minimalist, member-driven institution with a serious asymmetry between its extremely weak legislative and executive powers and its extremely strong, judicialized dispute system. Clearly, the system is in dire need of reform. Yet at the Ministerial Conference in Doha, reform was the dog that didn't bark. However, Doha initiated another potential transformation of the system.

### THE "DEVELOPMENT AGENDA"

It's more than symbolic that the outcome of Doha was termed a "development agenda" and not a round. While it's true that the Doha Declaration was a masterpiece of creative ambiguity and the devil remains in the details of negotiation, the major objective of the meeting was to avoid a repeat of the Seattle débâcle, which ended with a walkout of virtually all southern countries. Thus, the great success of Doha was that it didn't fail and this involved convincing developing countries, especially the poorest in Africa, that trade was good for development. Both the United States and the European Community visited Africa to woo ministers and the declaration repeatedly refers to technical assist-

ance and capacity building now called, only half in jest, the new conditionality. Pushed by the successful NGO campaign about aids in Africa, the Americans were willing to antagonize Big Pharma. The Europeans were most skilful in securing a waiver for their preferential arrangement with the ACP (African, Caribbean, and Pacific) countries by wily deal making with the Latin American banana exporters. So Doha was unique in its focus on the South and on development.

But Doha, of course, included many other agenda items. Market access for industrial products; agriculture and services; rules such as countervail against subsidies and anti-dumping; as well as the so-called Singapore issues of competition policy, investment, government procurement and trade facilitation. And for the first time in the history of the trading system, environment was specifically added to the agenda. Most of these items have a North–South dimension and negotiations will be complex and difficult. Indeed the ambiguous drafting—for example in agriculture and the Singapore issues—leave considerable uncertainty about how the negotiations

will proceed and whether the target date of 2005 is feasible or even realistic.

But that uncertainty rests on more than the usual difficulties of complex negotiations. After all, the outcome of the Uruguay Round in 1994 could certainly not have been forecast at the launch in Punta del Este in 1986. By adding another layer, that is development, to the already weak and strained infrastructure of the WTO, there is a significant risk that the system will become marginalized. The alternatives to prolonged and contentious negotiations in Geneva are bilateralism, regionalism, and, if necessary, unilateralism. A crazy quilt of preferential trade agreements in an increasingly globalized economy and polity is not a comforting vision of the future.

So what could be done to begin an incremental process of reform to strengthen the WTO? The incremental aspect is emphasized because there is no possibility of major institutional redesign in the foreseeable future despite the endless stream of literature on global governance. Indeed, even incrementalism may be an overreach.

### SUGGESTIONS FOR REFORM

Although the subject of WTO reform recently evoked some interest in the academic community, the same is not true in national capitals. After Seattle there was some desultory discussion on internal and external transparency of the WTO—internal reform to make the governance of the institution more open and inclusive, and external reform, including more access to information and more opportunity for stakeholder participation. After a few meetings of the General Council, which revealed strong opposition from many member countries, especially southern, to even discussing the issues, the subject was dropped, and silence has prevailed.

Nonetheless, if the Doha negotiations flag or if the US steel safeguard measures provoke a wave of tit-for-tat protectionism, perhaps there could be

some renewed efforts to re-launch a discussion on some modest reforms.

The priority should be the establishment of a *policy forum*, a locus for discussion and debate of basic issues, such as the definition of domestic policy space to be safeguarded in the international system or the relationship between trade, growth, and poverty in developing countries or the linkages between the trading rules and environmental rules to cite a few examples. Then policy options could be proposed and, if a consensus is achieved, the proposal would be sent to the General Council, the governing arm of the institution. There was, indeed, such a forum in the GATT, called the CG18 (Consultative Group of 18), but an attempt to establish a successor at the end of the round failed.

### **A POLICY FORUM FOR THE WTO**

The CG18 was established in July 1975, not by trade ministries, but as a result of a recommendation of the Committee of Twenty Finance Ministers after the breakdown of Bretton Woods. The Committee of Twenty also established the IMF's Interim Committee. Its purpose was to provide a forum for senior officials from national capitals to discuss policy issues and not to, in any way, challenge the authority of the GATT Council. The composition of the membership was based on a combination of economic weight and regional representation, but there was provision for other countries to attend as alternates and observers or by invitation. Each meeting was followed by a comprehensive report to the GATT Council.

Because it was a forum for senior officials from national capitals, it provided an opportunity to improve coordination of policies at the home base. This is now far more important because of the expansion of subjects under the WTO. Indeed, there is no minister of trade today, but there are a number of ministries with concerns covered by the WTO. The CG18 was the only forum for a full, wide-ranging, often contentious debate on the basic issues of the Uruguay Round. There was an opportunity to

**Just imagine what would have happened in the 1980s debt crisis if the head of the IMF had had the authority of the head of the GATT! There would have been a series of meetings to discuss meetings and so on while Latin America went down the drain.**

analyze and explain issues without a commitment to specific negotiating positions. Negotiating committees inhibit discussion because rules are at stake. Words matter and might be used, for example, in a dispute settlement ruling as was a report by the Committee on Trade and Environment with a predictable chilling effect on constructive dialogue. Thus, the absence of direct linkage to rules is essential to the diffusion of knowledge, which rests on a degree of informality, flexibility, and adaptability.

### **INCREASING THE WTOS RESEARCH CAPACITIES**

While establishing the policy forum would be a great step forward, it is unlikely to function effectively without an increase in the WTO's research capability. Analytical papers on key issues are needed to launch serious discussions and to improve the diffusion of knowledge in national capitals. To keep up to date and because of its reasonably small size, the WTO could not possibly generate all its policy analysis in-house. The WTO Secretariat would have to establish a research network linked to other institutions. This knowledge networking should include academic, environmental, business, labour and inter-governmental organizations such as the OECD, UNCTAD, Bretton Woods, and environmental institutions. This becomes even more essential since Doha because the capacity building for developing countries will require complex and extensive coordination with the World Bank and other institutions. Moreover, establishing a research or

knowledge network can enhance the ability of the WTO director general to play a more effective role in leading and guiding the policy debate. This will be politically contentious but is essential. Just imagine what would have happened in the 1980s debt crisis if the head of the IMF had had the authority of the head of the GATT! There would have been a series of meetings to discuss meetings and so on while Latin America went down the drain.

A key difficulty in establishing the forum would be to determine the membership. One formula already exists in the former CG18, which was never officially terminated. But it would probably be necessary to include the policy forum as part of a North-South trade-off. And that would require the big powers to agree that institutional reform is essential to the sustainability of the system. *Au fond*, the *raison d'être* of the forum would be to energize and facilitate the rule-making capability of the WTO. Perhaps members should be reminded that there is another route to rule change, that is litigation. The reality of that alternative might clarify some minds.

### **CONSULTATION AND COOPERATION WITH NGOS**

A second priority for reform is to improve external transparency. At the April 1994 Ministerial Conference in Marrakesh, which concluded the Uruguay Round, article V:2 of the agreement stated: "The General Council may make appropriate arrangements for consultation and co-operation with non-govern-

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mental organisations concerned with matters related to those of the WTO.”

In order to clarify the precise legal meaning of this broad directive, the General Council on July 18, 1996 spelled out a set of guidelines covering transparency including release of documents, *ad hoc* informal contracts with NGOs, etc. Guideline 6 is most pertinent in the context of this present discussion:

Members have pointed to the special character of the WTO, which is both a legally binding inter-governmental treaty of rights and obligations among its Members and a forum for negotiation. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and co-operation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.

At several meetings after the Seattle débâcle, there was no agreement on either internal or external transparency, even though, interestingly, the United States suggested that it would be useful and informative if members provided information on their national policy-making approaches. The same countries that opposed increasing transparency at the WTO level were also opposed to discussing the policy process at the national level. There has been criticism about the more powerful well-financed northern NGOs demanding two bites of the apple. Fair enough, the charge merits discussion. But how realistic is it, in light of the current state of affairs, to suggest *no* bite of the apple?

## THE VALUE OF A PARTICIPATORY POLICY-MAKING PROCESS

Realism aside, research undertaken at the OECD and the World Bank demonstrates that participatory policy-making

**[E]nhancing capacity to improve and sustain a more transparent trade policy process, which will not be a one-size-fits-all model but will vary according to a country's history, culture, institutions, etc., sounds like a good investment.**

processes, now called ownership in World Bank/Monetary Fund circles, allow governments to tap new sources of policy-relevant ideas, information, and resources. Equally important, they contribute to building public trust and enhancing credibility of government and hence the legitimacy of the policy. The latter is especially important in international policy because of the anti-globalization movement, which reflects a broader decline of confidence in government and political institutions since the 1970s. Participatory processes are not costless, of course, which is one reason many countries are wary. They make the process more costly, complex, and messy. And most negotiators would prefer operating in secrecy or, at least, with as little interference as possible. But when weighing costs and benefits, it might be wise to factor in the systemic costs from doing nothing, including most importantly the erosion of the multilateral system. This will affect the weaker countries more than the stronger ones because the only alternative to a rules-

based system is one based on power.

What could be done to launch a project on domestic policy making? One of the outcomes of the Uruguay Round was the creation of the Trade Policy Review Mechanism (TPRM). It was designed to enhance the effectiveness of the domestic policy process through informed public understanding—in other words, through transparency. Section B spells it out:

### *Domestic Transparency*

Members recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Members' legal and political systems.

The TPRM's origins and objectives clearly embrace the policy-making process and thus seems the logical venue for launching this project, on a voluntary basis and as a pilot to be assessed after an agreed period. If the pilot took off and a number of developing countries became involved, the TPRM Secretariat would have to be strengthened and civil society capacity building in some countries would be required. But enhancing capacity to improve and sustain a more transparent trade policy process, which will not be a one-size-fits-all model but will vary according to a country's history, culture, institutions, etc., sounds like a good investment. It's hardly a new idea. In the 1970s, during the Tokyo Round, an American official remarked to an academic researcher that the advisory committees established under the 1974 Trade Act were working extremely well because "when you let a dog piss all over a fire hydrant he thinks he owns it." That's a rather less felicitous version of today's concept of ownership. 

# Global economic governance: The WTO's ongoing crisis of legitimacy

BY TONY CLARKE

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There seems to have been a great deal of talk about the global trade system and its effects. But, so far, little has been said about the political implications of the WTO as a system of global economic governance. Yet, if one wants to understand why many are actively opposed to the WTO, then one needs to take a closer look at the WTO as a political regime that has a crisis of legitimacy.

## GLOBAL GOVERNANCE

Seven years after the launching of the WTO, it is time to ask what kind of global institution was put in place in 1995. After all, the WTO is much more than simply an international trade system dealing with imports and exports. It is no less than a global economic regime with binding enforcement powers that have profound political implications. At the core of the WTO, as a political regime of global economic governance, is a vast body of trade rules. These range from the inherited GATT rules to the agricultural agreements, the TRIPS, the SPS (Agreement on Application of Sanitary and Phytosanitary Measures), the TBT (Technical Barriers to Trade Agreement), and the GATS.

Taken together, this body of trade rules comprises what the former director general of the WTO, Renato Ruggiero once described as the making of “the constitution of the global economy.” Increasingly, political scientists and law professors are referring to this as the “new constitutionalism.”

The WTO was largely designed to enforce this new “constitution” for the global economy. Given the binding enforcement tools of its dispute settlement mechanism, the WTO was equipped to enact judicial, legislative, and executive powers of global governance. Through panels of unelected trade experts set up to adjudicate claims under its dispute settlement mechanism, the WTO has the *judicial* powers to hand out eco-

[F]or the most part, government representatives at the WTO table act on behalf of their corporate clients, not the majority of citizens in their own countries. When it comes to the WTO, it is big business interests by far that wield the most clout with their governments.

nomic punishment to countries that violate its trade rules.

In turn, these WTO tribunals have the *legislative* powers to, in effect, compel member state governments either to strike down domestic laws, policies, and programs judged to be in violation of the WTO rules and/or to establish new laws, policies, or programs in conformity with the WTO rules. If nothing else, the threat of escalating economic sanctions creates a “chill effect,” compelling governments to comply with the WTO rulings. Furthermore, the QUAD (composed of

the United States, the European Union, Japan, and Canada) increasingly appears to operate as the WTO's *de facto* executive. Although not formally recognized as the WTO executive, the QUAD, by its very composition, is able to informally exercise real *executive* power.

## CORPORATE MODEL

It is argued, of course, that the WTO is a legitimate form of global economic governance. After all, it is government ministers and their representatives who sit at the table of the WTO General Council. But, for the most part, government representatives at the WTO table act on behalf of their corporate clients, not the majority of citizens in their own countries. When it comes to the WTO, it is big business interests by far that wield the most clout with their governments. The name of the game is to open up markets for their transnational corporations (TNCs).

Moreover, since the world's largest transnational corporations are overwhelmingly home-based in the QUAD countries (that is, 450 of the Global Fortune 500), it follows that big business coalitions like the US Business Round Table, the European Round Table of Industrialists, the Japanese Keidanran, and the Canadian Council of Chief Executive Officers (formerly the Business Council on National Issues) are in a position to exercise enormous influence and power at the WTO. As a result, the WTO is global governance *of, by, and for* transnational corporations.

What's more, many of the recent WTO trade rules have been and are being written by the TNCs themselves. Take, for example, the TRIPS agreement. It is well known that the Intellectual Property Rights Committee, composed of 13 leading US corporations (for example, Bristol Myers Squibb, DuPont, Pfizer, Monsanto, and General Motors) effectively wrote, word for

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word, the TRIPS agreement that was adopted at the Uruguay Round of the GATT negotiations and subsequently became part of the WTO body of rules.

The Financial Services Agreement was largely written by a coalition of over 50 leading US and EU bank, insurance, and investment corporations (for example, Barclays PLC, Chase Manhattan, Bank of America, Dresdner Group, Citigroup, and Goldman Sachs). Together called the Financial Services Group, they worked hand-in-glove with US and EU government officials to apply a full court press on Asian and Latin American countries to sign-on by December 1997.

Similarly, there is mounting evidence that the current GATS negotiations for new rules governing cross-border trade-in-services, are largely being driven by the US Coalition of Service Industries and the European Forum on Services. These both comprise leading for-profit corporations trying to access new markets in public services like healthcare, education, electricity, and water, to name only a few.

## LEGITIMACY CRISIS

It is this corporate-dominated model of the WTO that has become a central target of the growing crisis of legitimacy concerning the institutions of global economic governance today. "By what authority" does the WTO govern the global economy? For many peoples, including Canadians, the question of the WTO's legitimacy goes back to its origins. Who, if anyone, can recall when and how the Canadian Parliament decided, let alone debated, the replacement of the GATT with the all-powerful WTO? Certainly, there was no consultation with concerned civil society organizations and no public discussion and debate in Canada before the WTO was ratified by Parliament. At least, in countries like India, the Philippines, and even the United States, there were open and vigorous public debates over WTO ratification.

Since 1995, the WTO's legitimacy has come under increasing public scrutiny,

**As the prime institution of global economic governance, the WTO mainly functions to serve the interests of member governments in the North, acting on behalf of their corporate clients.**

especially as the corporate domination of this institution became more and more evident. By the Seattle Ministerial Conference in late 1999, the WTO's crisis of legitimacy had reached new levels, provoked not only by the uprisings in the streets but also by the use of strong-armed "green room" tactics against developing countries in the convention centre, as well as the failure to reach agreement on a new round of global trade negotiations. While the outcome of Doha two years later may have succeeded where Seattle had not, the control exercised by the QUAD, the "twisting arms" process, plus the continuing use of bullying tactics such as the threat of aid withdrawal and stronger SAP (Structural Adjustment Program) measures have served to further fan the flames of the WTO's crisis of legitimacy.

At the core of the WTO's problems of legitimacy is, of course, the crisis of democracy itself. As the prime institution of global economic governance, the WTO mainly functions to serve the interests of member governments in the North, acting on behalf of their corporate clients.

Developing countries, which comprise the vast majority of the planet's population, are largely marginalized and penalized by the WTO's governing structures. What's more, virtually all citizens of the world and the civil society organizations that represent their interests, are systematically excluded. Instead, the WTO's body of rules are designed to uphold the "rights" of transnational corporations and investors, not the rights of citizens encoded in the Universal Declaration of Human Rights and its accompanying covenants. Indeed, the WTO's constitution for the global economy effectively supplants the Universal Declaration and the covenants, along with the fundamental democratic rights and freedoms they enshrined.

## POST-SEPTEMBER 11

Furthermore, the WTO's crisis of legitimacy has taken on a new twist since September 11, especially in the light of US Trade Representative, Robert Zoellick's statements, equating the war on terrorism and the neoliberal agenda on trade. "Fighting terrorism through trade" is the new agenda, declared Zoellick. Well, as it turns out, the only legitimate role of governments that is fully protected by the WTO rules, has to do with military operations. According to the so-called security exemption clause (article XXI of the GATT), the WTO rules do not apply to government activity in providing military engagement and police enforcement. This includes actions "relating to the traffic in arms, ammunition and implements of war and such traffic in other goods and materials as is carried on directly for the purpose of supplying a military establishment [or] taken in time of war or other emergency international relations." In effect, massive government subsidies that fuel the arms industry and military build-up are fully protected under this WTO clause.

Finally, the popular resistance against corporate globalization and the WTO's **Global economic governance, page 64**

# The state of the anti-globalization movement: Challenges ahead

## THE DYNAMICS OF THE ANTI-GLOBALIZATION MOVEMENT

Three important inter-related processes are key for determining the dynamics of the anti-globalization movement. While there are of course many others, these three are “recognition, accommodation, and challenges.” These processes and their inter-relationships shed light on the changing political understandings within the anti-globalization movement on different issues, institutions and processes. Furthermore, an analysis of these processes helps to evaluate the activity of the anti-globalization movement on the maturity curve and provides critical inputs to identify impending challenges.

### THE PROCESS OF “RECOGNITION”

The process of “recognition” has two important dimensions that are relevant to the anti-globalization movement. The “internal” dimension can be linked to the growing recognition within the movement of the political gains associated with particular avenues of mobilization. Some of these internal “recognitions” include acknowledging the importance of understanding and relating to issues, institutions, and processes on various planes. For example, many groups increasingly realize the importance of challenging the value framework governing neoliberalism while institutions like the World Bank (WB), the IMF, and the WTO continue to proliferate these values.

They have also come to recognize the importance of articulating clear positions with respect to the “anti-globalization” movement’s opposition to terrorism of any form as well as to “militarized globalization,” especially in the wake of the September 11 crisis. As well, they recognize the advantage of carrying out “alternative” research that not only questions the value framework governing the politics of implementation but also the

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The established press no longer treat organizations and individuals seeking a reversal of globalization as “cranks.”

politics of existence with respect to institutions and processes.

The movement has also recognized the necessity of forming coalitions at various levels, which accommodate the concerns of different interest groups in order to build alternative perspectives to the neoliberal framework and further deepen outreach. These coalitions and mass movements create awareness of the heterogeneity of the anti-globalization movement.

### THE EXTERNAL DIMENSION OF RECOGNITION

The “external” dimension of the process of “recognition” is linked to the way in which the anti-globalization movement is perceived by different sections of society, the media, and most importantly, by other social movements—for example, student movements, trade union movements, the human rights movement, and the women’s rights movement.

Anti-globalization forces are perceived differently in developing and developed countries and within countries. In India, the middle and the upper-middle classes are not very vocal

against globalization because it has not affected their disposable incomes, employment opportunities, or the price of essentials. In the United States, on the other hand, the middle class is increasingly vocal as a growing number of pink slips are handed to employees as the result of mergers or the drive to make firms globally competitive. It is also interesting to note, at least in the Indian context, that middle- and upper-middle-class families, who have been negatively affected by neoliberal globalization, are not critiquing the value framework governing the phenomenon.

The mainstream media, who used to aggressively equate “anti-globalizers” to “anarchists” are becoming more balanced in their presentation of the issues raised by the movement. The established press no longer treat organizations and individuals seeking a reversal of globalization as “cranks.” This change in the media’s perception could be considered a reaction to the US stance after September 11, especially in context of the Doha Ministerial Conference, the collapse of Argentina’s economy, coupled with the Enron debacle and other events that have exposed the crisis of legitimacy in institutions like the WB, IMF, WTO, and the US Treasury.

The participatory nature of demonstrations at the Seattle Ministerial Conference (1999) and at subsequent events of the WB, IMF, Asian Development Bank, and the G8 have shown that other movements do recognize the strategic importance of being a part of an “anti-globalization movement.” This brings us to the process of “accommodation.”

### THE PROCESS OF “ACCOMMODATION”

The endorsement of “Our World Is Not For Sale” (OWINFS), a statement against the current form of globalization being pushed by institutions like the IMF, WB,

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and the WTO, by social movements, civil society organizations, NGOs, academic institutions, and others worldwide clearly shows that a process of “accommodation” if not “integration” has begun.

Another striking example of the growing level of accommodation, at least among the “left” within the anti-globalization movement is reflected in the level of participation the World Social Forum (WSF) has witnessed since its creation two years ago. The WSF has attracted a “wide spectrum of political views within the left: from the reform agenda, to abolitionists and even between.” As Melanie Gillbank notes in her article, “Other worlds are possible, 60,000 can’t be wrong.”

In spite of these growing successes, it would be premature to say that the process of accommodation has come of age. But, it would not be wrong to say that statements like the OWINFS or events like the WSF go a long way with respect to infusing confidence among organizations and movements opposed to neoliberalism to discuss their differences on specific issues more constructively.

## DEVELOPING AN ALTERNATIVE AGENDA

It is important to increase the pace of these constructive discussions for three reasons. First, with the endorsement of the Doha Declaration of the Fourth Ministerial Conference of the WTO, the “linkage between trade and environment,” an issue that had remained on the sidelines of the WTO, is now going to be on the mainstream agenda. This mainstreaming of environmental concerns could be used by factions of civil society, especially the right-wing trade liberalizers, as well as by certain governments to re-ignite the debate on “environment protection” versus “environment protectionism.”

Second, the linking of trade liberalization to labour standards continues to reappear if not in the mainstream at least in the sideline discussions of the WTO ministerials. It is, therefore, very impor-

tant for organizations and movements to have a range of opinions on these issues and to start understanding each other’s concerns in a more constructive manner before any harmful language gets inserted into the official WTO text on these issues. Some efforts are already being made in this direction. In 2001, Focus on the Global South and Friedrich Ebert Stiftung organized a roundtable for trade unions to discuss their differing positions on linking trade liberalization at the WTO to labour standards and to create a better understanding of the implications for development of such a formal linkage.

Finally, the World Social Forum 2002, organized under the banner of “Another World Is Possible,” has initiated discussions on the various elements that could develop into alternative models to neoliberalism. It is critical that a basic level of understanding is generated among groups on the issues and processes that could be important with respect to defining the value frameworks governing alternative systems.

## THE PROCESS OF “CHALLENGE”

One of the most challenging questions for the anti-globalization movement is whether it is against the concept of globalization or against the current form of globalization being pushed within the neoliberal framework.

The argument is often not against trade but against indiscriminate liberalization that destroys the capacity of national economies. Many want managed trade that would allow countries maximum flexibility in dealing with the international market in order to adopt strategies that would allow them to integrate into the international economy in ways that strengthen the capacity of their economies rather than destroy them. Thus, whether to protect or to liberalize is not a doctrinal matter but a decision that is taken with national economic interest in mind.

It is indeed encouraging to note that these different positions are being

discussed at events like the WSF. Understanding the nuances associated with discussions on globalization is significant and will continue to be so as the “anti-globalization movement” initiates the processes of constructing alternatives.

A further challenge for the “anti-globalization movement” is to see how opposition to the neoliberal agenda at the international level is linked to national and local debates. This is important not only for developing a better understanding within the international movement of local issues, but also to generate mass support for the movement and its actions in different regions of the world. In fact, a problem that generally haunts discussions between NGOs, civil society groups and mass movements is that each of the three are discussing the same problem often without providing adequate inputs for strategies of the remaining two.

## HOW LONG SHOULD WE KEEP MOBILIZING?

Another intriguing set of questions that is being raised by many grassroots movements is, “How long should we keep on mobilizing?” and “How long should we keep on struggling?” There is a growing feeling at the grassroots level, at least in the Indian context that mobilizations at the national and the international level are not having the desired impact of stopping the “bicycle” of neoliberalism and, more importantly, on preventing its disastrous impacts on their livelihood opportunities. This should not be taken to mean that they are losing interest in the struggles. Rather, what they are losing interest in is finding “democratic” and “peaceful” solutions to their problems.

This raises serious questions with respect to the kind of interventions that actors involved in anti-globalization struggles will make next at national and local levels. Should they only put road-

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# The future of civil society opposition to neoliberal global economic governance

## THE END OF ANTI-GLOBALIZATION ACTIVITY?

Recent years have witnessed substantial activity by a so-called anti-globalization movement of opposition to prevailing regulatory arrangements for the world economy. Manifestations of these challenges have included street demonstrations alongside multilateral conferences (at Seattle, Prague, and Genoa) and targeted issue campaigns (against the MAI, for debt relief, against the FTAA). Other initiatives in the movement like the World Social Forum have sought to develop alternative frameworks for global economic order.

Last autumn some commentators announced that September 11 had put an end to this activity. Two months later the streets of Doha were indeed quiet. Recently, however, the World Economic Forum brought protesters back to New York City, while Porto Alegre attracted several times more participants than a year before. Civil society mobilization against what is variously dubbed “neoliberal,” “corporate-led,” or “imperialist” globalization looks set to continue for the time being. Therefore, the question is not whether these challenges will persist, but on what scale, in what shape, with what aims, with what impacts, and with what credibility?

## SCALE

Opposition to existing mechanisms of global economic governance has recently attracted a considerably enlarged following. Before 1998, these actions rarely involved more than several hundred people at a time. Now the main protest events regularly draw thousands, if not tens of thousands of participants. For example, the ATTAC (Association for the Taxation of Financial Transactions for the Aid of Citizens) movement has rapidly expanded to encompass 26 countries, with around 23,000 active members in a hundred lo-

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Given that most citizens . . . feel some degree of concern about negative implications of existing forms of globalization, the potential constituency for the movement is huge.

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cal branches in France alone. Some 50,000 to 60,000 people attended the second World Social Forum, February 2002, with more than 700 program events on offer. In this country the Council of Canadians has likewise attracted tens of thousands of supporters to its opposition to neoliberalism.

## WILL THE ANTI-GLOBALIZATION MOVEMENT CONTINUE TO GROW?

One key question for the future of this movement therefore concerns scale. Will growth continue on its steeply ascending line of the past several years and, if so, for how long and to what ultimate proportions? Or has active participation reached a plateau, so that the movement will stay vociferous and occasionally influential, but remain at the

fringes of politics? Or is current anti-globalization activity merely an ephemeral burst of mass political energy that will recede as quickly as it rose, leaving behind a small core of dedicated activists on the sort of scale that sustained critiques of neoliberalism during the 1980s and early 1990s?

The current situation seems sufficiently fluid that any of these scenarios could unfold. Given that most citizens across the world feel some degree of concern about negative implications of existing forms of globalization, the potential constituency for the movement is huge. On the other hand, a prevailing climate of political passivity and cynicism inhibits greater activism, and most people direct their limited political energy to local and national politics. In addition, most school and university curricula give, at best, passing consideration to the global economy, and the mass media gives critiques of neoliberalism little serious attention. Moreover, the principal civil society organizations that promote this opposition face severe resource constraints. Hence, considerable forces both encourage and discourage an expansion of the movement.

In these circumstances, heavily contingent factors will determine if, when, and where discontents with global economic governance will turn into added force for the anti-globalization movement. In particular, it depends on whether the relevant civil society associations can secure more staff, funds, office facilities, etc. It also depends on whether the movement can attract a larger following with effective civic education, *inter alia*, through public meetings, publications, the mass media, and the Internet. And it substantially depends on whether additional shock events in the global economy will trigger further mobilization, as the Asia financial crisis did in 1997-98, for example.

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## ORGANIZATIONAL SHAPE OF THE MOVEMENT

General forecasts about the future organizational shape of the “anti-globalization movement” are easier to make than those about its scale. On the one hand, the recent upsurge in activism has involved formal civil society associations like churches, labour unions, NGOs, and think tanks. On the other hand, it has encompassed informal groups like anarchist cells, listserv subscribers, and unaffiliated students. Coalitions between these different circles have been generally loose and often fragile. Attempts to forge a unified, centrally directed movement under a single, precisely articulated platform have thus far come to naught.

This situation seems unlikely to change in the foreseeable future. Trade unions and NGOs have a long history of mutual suspicion, as do secular and faith-based groups. Practitioner–researcher divides are also strong in some, though by no means all, countries. Many free-floating anti-globalization activists have no appetite for the disciplines of hierarchies and manifestos. Moreover, the vagueness and openness of the “globalization” theme has been crucial in attracting many malcontents to the movement. Efforts to narrow, specify, and impose agendas would drive away many of these people and keep countless more from joining in the first place. It seems far more likely that the movement will retain its present form—that is, a fluid network of networks with multiple campaigns and no fixed leadership.

## AIMS

A third key issue for the future of civil society mobilization against neoliberal global economic policies concerns the type of change pursued. The movement has always had to negotiate tensions between rejectionism, reformism, and transformism. The first of these strategies has aimed to unravel globalization processes and dissolve global economic governance. The second line has sought

incremental adjustments to institutions and policies, while the third stream has advocated comprehensive transformation of the prevailing order. The situation has been further complicated inasmuch as the approaches of many individual activists and associations have shifted over time and between settings.

These debates are bound to continue in the months and years to come. Will it be rejectionist refusals to repay debt, or reformist programs of partial and conditional debt relief, or transformist designs of comprehensive and unconditional debt cancellation coupled with a new system of development finance? Will it be a rejection of all structural adjustment, or market reforms with social safety nets, or a new paradigm of socially and environmentally sustainable economic restructuring? Will it be mercantilism, or global social democracy, or a post-capitalist mode of production? Arguments between rejectionism, reformism, and transformism have a long history that well predates the current anti-globalization movement, and it seems highly unlikely that today’s activists will get beyond their shared opposition to neoliberalism to a common vision of what should replace it.

## STIMULATING PUBLIC DEBATE

Yet such a consensus is unnecessary and, in an important sense, undesirable. A key contribution of this civil society mobilization has been to stimulate public debate about global economic governance. In its heyday, the so-called Washington Consensus left little space for the expression of dissent and the exploration of alternative policies. Such an unhealthy situation invites complacency and mistakes in ruling circles, if not outright authoritarianism. The pluralism of the anti-globalization movement has provided a vital democratic antidote that should be nurtured rather than, as many in official circles would prefer, neutralized with cooptation.

Hence, the challenge is not to forge a common strategy for all civil society op-

position to neoliberalism, but rather to ensure that opposition (whether rejectionist, reformist, or transformist in orientation) is pursued on non-violent lines. Street battles and other scenarios of destruction bode ill for all sides. Maintenance of constructive politics requires restraint and readiness to listen among activists and authorities alike.

## IMPACTS: POLICY PROCESS, CONTENT, AND DISCOURSE

Moving from aims to impacts, civil society activism is likely to persist in influencing three general aspects of global economic governance—namely, policy process, policy content, and policy discourse. The precise forms and extents of these effects are difficult to specify in advance; nor is it ever easy to separate the significance of civil society from that of other forces in play. However, experience of the last few years suggests that the impacts can be considerable.

On the first count, policy process, civil society activities will probably continue to shape a number of the mechanisms by which rules and programs of global economic governance are formulated, implemented, and reviewed. Such developments are no minor matter, of course, inasmuch as the ways that decisions are taken often significantly affect the substance of the resulting measures. Already, pressures from civil society quarters have encouraged many governments and multilateral economic institutions to create new offices, to undertake public consultation exercises, to implement measures for greater public transparency, and to develop independent official policy evaluation procedures. In addition, a number of civil society critics of neoliberal globalization have moved to the inside of policy processes as advisers to official circles. Key challenges for the future will be to further develop mechanisms of effective civil society engagement in global economic governance and to ensure that, in contrast to the present situation, they are available in all countries

and for all multilateral agencies.

On the matter of policy content, countless specific instances in recent history have seen civil society opposition help to initiate, propel, amend, or block measures of global economic governance. One need only mention the MAI, the HIPC Initiative (Heavily Indebted Poor Countries Initiative), the Sardar Sarovar-Narmada dam project, the series of UN global conferences, increased attention to the Tobin Tax, the proliferation of multilateral environmental agreements, etc. Broader issues for the future include the degree to which civil society critics of neoliberalism might reinforce recently observed moves in global economic governance toward: more proactive social policies; greater sensitivity to cultural, economic, and political context that is away from “one-size-fits-all” approaches to global policy; and increased attention to international human rights law.

### **ALTERING REIGNING IDEAS**

Beyond shifts in policy measures lies the question whether civil society critiques of neoliberalism will alter reigning ideas and mindsets in global economic governance. As suggested earlier, civil society opposition has already played a part in denting confidence in ultra-liberal market capitalism as the guiding principle for the global economy. Even most former bastions of *laissez faire* have accepted at least some need for institutional and regulatory infrastructures that allow markets to perform to their optimum. Agencies of global economic governance have also adopted civil society language concerning “participation,” “transparency,” “poverty reduction,” “gender,” and “sustainable development,” although skeptics argue that these notions have become neutralized in the process. So it remains to be seen whether challenges from civil society and other quarters will push the so-called “post-Washington Consensus” beyond “neoliberalism with knobs on” to global social democracy or some other qualitatively different policy framework.

### **CREDIBILITY**

As civil society groups pursue a variety of reformist and radical agendas for change in the processes, decisions, and discourses of global economic governance, they will face continuing—probably growing—questions about their legitimacy. Given the enlarged proportions and influences of civil society opposition to neoliberalism, it is right and proper for sympathizers and skeptics alike to scrutinize the competence and democratic credentials of these political actors.

On the matter of competence, civil society associations face important challenges to raise their general standards of knowledge about global economic governance. Senior veteran campaigners often hold a sophisticated awareness of the issues, but they form a minority in the overall movement. Most civil society opponents of neoliberal globalization need to build on their, usually honourably held, moral positions with more precise understanding of relevant legal instruments, institutional arrangements, empirical data, and dominant and alternative theoretical frameworks. In this regard the activists would do well to develop more training exercises, to enlarge their research capacity, and to build more bridges with academic circles.

### **DEMOCRATIC CREDENTIALS**

In terms of democratic credentials, civil society opponents of neoliberalism need to ensure that their associations maximize possibilities for participation. To date, the movement has largely conformed to hierarchies of opportunity that mark world social relations as a whole. Thus, the activists have been disproportionately northern, white, urban, and middle class. True, women and youth have arguably had more chances of participation in these campaigns than in politics at large; yet the leading figures have still been predominantly male and middle-aged. Even when these associations explicitly disclaim any pretension to be “representative,” they continue to have obligations to engage with and create space for the subordinated circles whose fates they purport to promote.

As well as problems of maximizing participation in the politics of the global economy, civil society associations face challenges of democracy in their own operations. Thus, for example, the movement needs to retain and promote pluralism and vigorous internal debate, avoiding impositions of orthodoxy and arbitrary, sometimes even physically violent, suppression of alternative opinions. In addition, many groups in the movement can be far more transparent about their membership, leadership, aims, decision-taking procedures, finances, and so on. In terms of democratic accountability, many associations can be much more rigorous about informing supporters of the results of campaigns, subjecting leaders to periodic and open selection, etc.

### **ENGAGEMENT WITH POPULARLY ELECTED LEGISLATURES**

Finally, civil society critiques of neoliberal globalization must take care not to subvert other democratic mechanisms such as parliamentary processes. On the contrary, examples in Brazil, France, the United States, and elsewhere suggest that the anti-globalization movement can gain important reforms of global economic governance through engagement with popularly elected legislatures. The protesters have rightly highlighted the limitations of territorial-state mechanisms as a means of democratic global governance, but some have tended to let the baby go with the bathwater.

The foregoing critical reflections on the credibility of anti-globalization activities are not an argument for official regulation of the groups involved. National and transnational codes of conduct can never adequately respect the diversity of organizational forms and cultural contexts that mark—and enrich—this activism. Nor does the answer lie in accreditation procedures that allow global economic institutions to select favoured civil society “part-

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# Facing the legitimacy challenges in the WTO

## A LIGHTNING ROD FOR PROTEST AND DISSENT

Although the WTO was established only in 1995, it has very quickly become a focal point for public opposition to globalization and trade liberalization generally. This is surprising, especially as its predecessor, the GATT, toiled in relative obscurity for almost 50 years before the birth of the WTO. Why has the WTO become the lightning rod for protest and dissent? Some argue that it is because of its “judicialized” and binding dispute settlement system, which is more effective and efficient than the rule-making mechanisms of the GATT. A more cogent explanation is that the agreements resulting from the Uruguay Round are considerably more intrusive into domestic sovereignty, reaching deeper into areas of domestic regulation, such as intellectual property, food safety, environment, services, and investment, than did the “shallow integration” model of the GATT.

## LEGITIMACY CHALLENGES

The WTO faces two major challenges to its legitimacy. The first is to make its internal rule-making and decision-making mechanisms more transparent, effective, and inclusive. This is “the *internal* legitimacy challenge.” The second is to respond to criticisms from outside the WTO, from NGOs and “civil society,” that the WTO is a closed, bureaucratic supranational entity that is not transparent, democratic, or accountable. This is “the *external* legitimacy challenge.”

The WTO has become a “universal” organization. It now has a membership of 144 countries, over 100 of which are developing and least-developed countries. The developing countries do not feel “included” in many of the decision-making processes that affect them. In addition, the rule-making procedures of the WTO, which operate largely on the principle of consensus decision making, are cumbersome, slow, and, some would argue, unworkable. The chal-

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Countries have brought more cases to the WTO than to any other international tribunal or dispute settlement mechanism.

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lenge of “internal legitimacy” is to improve the rule-making mechanisms of the WTO to make them more effective and efficient, while ensuring that the smallest and poorest countries have a real voice in decision making.

## THE DISPUTE SETTLEMENT PROCESS

The WTO dispute settlement system has attracted a lot of attention in the last few years, in part, because it has been extremely busy and prolific. Countries have brought more cases to the WTO than to any other international tribunal or dispute settlement mechanism in operation in the world today. The Uruguay Round *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“the DSU”) ushered in a new, more “judicialized” dispute settlement system, which represented a major shift from the previous “diplomatic” model of dispute resolution that had characterized the GATT. Three major reforms moved the system significantly toward a judicial model: compulsory jurisdiction, “binding” decisions, and the establishment of the Appellate Body.

Unlike most international dispute resolution mechanisms, a complaining

party in the WTO has a right to the establishment of an arbitral panel after a mandatory 60-day period for consultations has expired. In the WTO, the consent of the parties to the jurisdiction of an arbitral body is not required to initiate panel proceedings. Under the GATT, the contracting parties had to “adopt” or approve a report of an arbitral panel by a consensus decision of the GATT Council. Under the WTO, Panel and Appellate Body reports are “automatically” adopted by the Dispute Settlement Body, unless there is a “reverse” consensus against adoption, which is not likely to occur since the winning party will not join in such a decision. Furthermore, under the GATT, when a losing party failed to implement the rulings of a panel, in order to retaliate, a winning party would have to obtain the authorization of the contracting parties, again by a consensus decision. Now, under the WTO, authorization to retaliate is also granted by the Dispute Settlement Body “automatically” upon the request of the winning party when a losing party has failed to implement the rulings of the Panel or the Appellate Body (unless the Dispute Settlement Body decides by a “reverse” consensus not to authorize retaliation).

## A JUDICIALIZED MODEL

The *quid pro quo* for “automatic” adoption of panel reports and authorization of retaliation was the establishment of the Appellate Body, a standing tribunal that hears appeals from legal findings of panels. The Appellate Body is clearly the most “judicial” part of the WTO dispute settlement system. Although the panels still have many trappings of the “diplomatic” model of dispute settlement, the Appellate Body acts as a court in all but name. It is composed of seven members, appointed by the Dispute Settlement Body (made up of all WTO member countries), who are senior jurists, independent from any affiliation with governments. To date, a very high

percentage of panel decisions have been appealed to the Appellate Body, and the Appellate Body has developed an impressive jurisprudence, both on procedural as well as on substantive legal issues, which is having a major influence on panels and the WTO members.

These reforms have driven the dispute settlement system dramatically toward a “judicialized” model, but elements of the “diplomatic” model remain, particularly in the composition and operation of panels. These “diplomatic” elements work to make the dispute settlement system more acceptable to WTO member governments, and thus contribute to its “internal” legitimacy. But, these very same elements detract from the perceptions of accountability and credibility of the WTO in the outside world—that is, from its “external” legitimacy.

### THE BATTLEGROUND FOR LEGITIMACY

There is a struggle for legitimacy in the WTO, and the dispute settlement system has become the battleground. There are conflicting pulls on the system. From *within* the WTO, member governments perceive the system as essentially “diplomatic” and want to keep the system closed in order to maintain control over it. From *outside* the WTO, NGOs and representatives of “civil society” maintain that the dispute settlement system must become more open and allow participation by all its stakeholders, including members of the public.

“Confidentiality” is a hallmark of WTO dispute settlement. The DSU requires that written submissions, evidence, and oral argument presented by parties; Panel meetings and Appellate Body hearings; deliberations of Panels and the Appellate Body; and all other aspects of dispute settlement proceedings be kept confidential. Even other WTO members, who are not parties to the dispute, may not see any of the record of the proceedings before panels or the Appellate Body. This emphasis on secrecy of proceedings is a vestige of the “diplomatic” model of dispute settle-

ment. Most governments continue to maintain that documents and proceedings must be kept confidential to allow the parties maximum negotiating flexibility to resolve their disputes mutually at any stage in the process. The DSU itself states that the primary aim of dispute settlement is for the parties to achieve mutual resolutions of their disputes.

### THE EXTERNAL LEGITIMACY CRISIS

However, nothing works against the legitimacy and acceptance of WTO decisions and rulings vis-à-vis the outside world like the closed nature of the dispute settlement system. There is simply no excuse, given the gravity of the decisions made by WTO Panels and the Appellate Body, for a dispute settlement system that operates in secret, behind closed doors. Members of the WTO that are parties to the disputes may feel that they control the process if NGOs and other representatives of “civil society” are not allowed to submit *amicus curiae* briefs or to appear in meetings of the Panels and hearings of the Appellate Body. However, the WTO faces a very serious threat to its “external” legitimacy, a threat that is fuelled by a lack of understanding and trust of a system that operates largely in secret. Opening up the dispute settlement system would help to inform the outside world about how the WTO actually functions, and would help to ensure that Panels and the Appellate Body have all of the relevant information and arguments available when they are making their important decisions. This is a necessary, but not a sufficient, first step in making the WTO more transparent and accountable to civil society.

### EMPLOYING ALTERNATIVE DISPUTE RESOLUTION METHODS

Short of allowing non-state actors standing to bring complaints against member governments (which the failure of the negotiations on the OECD Multilateral Agreement on Investment and the experience with chapter 11 of the NAFTA have demonstrated is not a good idea), there is much that WTO members can do to

make the dispute settlement system more transparent, better understood, and more accountable. If the WTO is to deal with its “external” legitimacy crisis, which is real and threatens the credibility and ongoing viability of the multilateral trading system, it must move, and be seen to move, decisively in the direction of greater “judicialization” and enhanced transparency and openness. Parties should be encouraged to make use of alternative dispute resolution options such as mediation, conciliation, and arbitration in addition to the “judicial” process of Panel and Appellate Body proceedings. Not every dispute calls for a judicial decision—interpreting and applying provisions of the WTO agreement. Some disputes are better resolved through diplomatic means. Governments should recognize this and make use of alternative dispute resolution methods. The Panel process could be significantly professionalized and improved by establishing a standing body of panelists (a lower instance standing tribunal) with detailed rules of procedure and rules of evidence. Submissions to Panels and the Appellate Body should be made available to the public; Panel meetings with the parties and Appellate Body oral hearings should be open to *observation*, not *participation*, by NGOs and representatives of “civil society”; and Panels and the Appellate Body should be allowed to accept and consider *amicus curiae* briefs where they deem it pertinent and useful to do so.

Governments will not lose control over the WTO if non-state actors are permitted access to information, to attend meetings of Panels and hearings of the Appellate Body as observers, and to submit *amicus curiae* briefs, when authorized to do so, by Panels and the Appellate Body. If these reforms are made, not only will public interest groups become more informed about the functioning of the WTO, but governments, which after all comprise the WTO, will be observed and held accountable by their own constituents. This will contribute, in significant measure, to the “external” legitimacy of the WTO. ❁

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ners” and exclude “troublemakers.” For the moment, civil society bodies have ample positive incentives to enhance their credentials, including increased access to and influence on governance institutions, increased support from the wider public, increased backing from funders, and increased internal cohesion within the associations themselves.

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blocks in the path of the neoliberal engine, which in fact is getting its fuel from local polity and bureaucracy? Or should anti-globalization activists be a part of the process in a way that influences the terms of reference defining the movement and pace of the neoliberal engine?

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with enhanced efficiency. A rule-making organization such as the WTO should have more resources, both human and financial, and should be more management driven. It should have mechanisms that allow for routine decisions, both on management and on substance without going through the cumbersome process of the General Council. It should also allow initiatives to be taken by the director general on substantive issues. Last but not least, the organization should be able to take decisions in improving, adapting, and clarifying rules outside a round or a single undertaking.

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global governance is, in all likelihood, bound to grow and intensify. After 9/11, most observers concluded that the movements’ resistance had reached its peak at the G8 meetings in Genoa, in August 2001. But, by March 2002, the movement had rebounded with over 500,000 protestors on the streets of Bar-

### THE CHALLENGE

Civil society agitation has grown in recent years to become a prominent feature of the politics of the global economy. Already, this activity has had notable policy impacts, and it could go on to acquire a much more substantial role. If and as this happens, it will be all the more important for the movement to have capacities for critical self-regard

### HOPE, JUSTICE, AND EQUITY

It is always difficult to conclude with respect to movements, happenings, and situations in a state of flux. One can offer only an opinion about the level of maturity of this flux, the rate of change, and the type of energy that this change creates. The anti-globalization move-

and proactive self-improvement.

So neither implacable skeptics nor romantic enthusiasts have had it right regarding civil society engagement of global economic governance. This development has considerable positive potentials along with substantial negative possibilities. The challenge will be to maximize the benefits and minimize the harm. 

ment and the processes that are significant in defining its dynamics are indeed in a state of flux. What one can conclude from the discussions above is that this flux is indeed maturing and its momentum is spreading positive energies of hope, justice, and equity at local, national, and international levels. 

One cannot contemplate WTO reform without addressing the question of external transparency and accountability. Both have to start at home through a greater involvement of civil society and national parliaments in WTO matters, which call nowadays for a much broader constituency than the traditional trade policy community. We need to find the ways and means for a greater involvement of civil society and parliaments in Geneva as well. Otherwise transparency will be limited and accountability will suffer.

We are not likely to get there in the immediate future but we should reflect

on it. The globalization process should be matched by the capacity of the rule-making body to live up to it. At the same time we have to realize that the WTO on its own cannot eradicate poverty, ensure sustainable development, or promote our labour standards. The Doha Declaration usefully reminds us of this.

Other international organizations—Bretton Woods and the UN—will need more coherence and complementarity between themselves and with national governments. Only then can we respond to the challenges of globalization and address the needs of the developing world. 

celona at the European Union summit. Despite the anti-terrorist legislation and the concurrent criminalization of dissent that is sweeping across the world, the resistance is escalating, particularly in Europe and parts of the third world. Here, in North America, the events of 9/11 and the anti-terrorism legislation

has, for the time being, cast a cold blanket over this kind of protest activity. Undoubtedly, this will affect the G8 protests in Kananaskis this summer. But, even here, the crisis of legitimacy swirling around the WTO’s global governance will continue to spark new waves of resistance in the future. 