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GLOBAL GOVERNANCE AND MULTI-REGIONALISM THE IMPACT OF ECONOMIC INTERNATIONAL INSTITUTIONS: THE CASE OF THE WTO

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GLOBAL GOVERNANCE AND MULTI-REGIONALISM AND THE IMPACT OF ECONOMIC INTERNATIONAL INSTITUTIONS: THE CASE OF THE WTO

I. Introduction

There is a growing debate on globalisation and its impact on economic and social development. Its supporters highlight the positive results of increasing flows of trade, investment and financial capital. Its critics, however, emphasize its many negative effects, including the marginalisation of countries from trade and investment flows, and increasing levels of poverty that exclude people from its promised benefits. Because the process of globalisation is seen as irreversible, critics also suggest that a better distribution of its economic and social gains can only be achieved through a global approach, as individual state efforts are insufficient. One solution is better global governance. The question then is how to coordinate existing global institutions and orient them towards problem solving.

Among the international organisations that exist today, both intergovernmental and private, one plays an important role and is increasing its influence in the international arena - the World Trade Organisation (WTO). It was established in 1995 as the successor of the General Agreement on Trade and Tariffs (GATT), and is the central institution governing the multilateral trading system. While the GATT was established by 23 states, the successor WTO now has 148 members, among developed countries (DCs) and developing countries (DgCs), and a further 20 DgCs that are negotiating accession. These facts attest the importance of the WTO as a global institution.

The GATT and the WTO have pursued the same goals: economic development through trade liberalisation. The history of the multilateral system demonstrates how early concerns with tariffs and non-trade barriers on industrial goods expanded to include agriculture and services. Simple articles on trade rules were transformed into complex agreements on customs valuation, import licenses, technical barriers, sanitary and phitosanitary measures, anti-dumping, subsidies and safeguards. Rules were also negotiated to govern the relationship between trade and intellectual property, and trade and investment. The inclusion of broader agreements on investment and on competition has also been discussed, although a consensus has not been reached. The relationship between trade and the environment has been under analysis for a long time, and a new agreement is being negotiated in the present round.

Many of the questions in the global governance debate are also a WTO priority: how to ensure that trade leads to development; whether the negotiation of multilateral agreements on investment and competition to reinforce trade rules is necessary or not; how the environment can be incorporated into the trade system; where labour standards issues should be negotiated; how intellectual property rights on trade can include concerns of public health; how the bio-diversity of DgCs can be protected; and how to avoid turning quality, sanitary and phitosanitary standards into trade barriers.

Trade rules are not only negotiated in the WTO. Regional trade agreements have been multiplying and new rules agreed among parties. Some of the concerns over globalisation are discussed at the WTO, but many others are addressed only by these regional trade agreements. The results are often considered insufficient and even inconsistent. The debate is not over, but one of the conclusions is that the trading system alone cannot solve all the problems currently posed by globalisation.

The aim of this paper is to raise and discuss some major points about the role of the WTO as a global governance player. It begins with a synthesis of the key questions pertaining to globalisation and the need for better global governance to respond to the challenges it presents. It then examines the WTO and the most relevant trade issues that have either been negotiated or are still under negotiation, with a focus on eight of the main questions related to global governance in the context of the WTO. The aim is to show how the organisation has been dealing with them. Because the trading system is not only formed by multilateral partners but also by regional ones, the 'multilateralism versus regionalism' debate is also examined, particularly the question of which is the best forum in which to address trade rules. Next, the main challenges posed by the global critics of the WTO are examined, namely: the limits of the WTO decision-making process, whether it will be possible to expand the WTO Dispute Settlement Mechanism (DSM) to solve global conflicts, how the WTO is dealing with civil society, and how to improve the interaction between the WTO and other international organisations to facilitate the managements of global issues. The paper ends with some proposals and suggested solutions. To conclude, it also presents how the European Community (EC) and the MERCOSUL may deal with such challenges through their bi-regional relationship.

II. From Globalisation to Global Governance

Globalisation can be understood as an economic process based on technological progress that creates a more interconnected world and growing interdependence among countries. Its effects are the growing integration of trade, production, transport, capital and financial flows.

After many years of debate about the benefits and the costs of globalisation public and academic evaluation of the process has reached an impasse. Supporters of globalisation insist that the full benefits of globalisation will be achieved only after full liberalisation of trade and capital flows, economic deregulation and free access to information. They defend the market against economic intervention. By contrast, the critics of globalisation assert that the promised benefits of globalisation are not shared equally, that the exclusion of millions of people from basic living standards is gathering pace, and that the number of people living below the poverty line is growing. They question the impact of globalisation on development and the ability of DgCs to pursue sustainable economic growth in a context of globalisation. Critics say that state intervention is the only possible way to control market inefficiencies, and so they bring state back in to the foreground.

As a result of the debate on global imbalances, public opinion is pressing for the reform of globalisation, which is considered morally unacceptable, economically unsustainable and politically condemnable. There are strong voices heard at the opening sessions of many international meetings in defence of fairer and more inclusive globalisation. Main critics want to change the path and quality of globalisation so that more people and countries can share the benefits generated by the process. For these critics, globalisation should include not only economic goals but also a new social dimension based on universal shared values such as respect for human rights and cultural identity, the right to education, decent work and democratic government.

The World Commission on the Social Dimension of Globalisation (WC) was created in 2001 by the International Labour Organisation (ILO) to address these problems. Its 2004 report states that the problems of globalisation are not a product of globalisation *per se*, but of governance deficiencies. Global markets have grown rapidly without a parallel development of the kind of economic and social institutions necessary to ensure their smooth

and equitable functioning. There is also the concern about the unfairness of global rules on trade and finance and their asymmetric effects on rich and poor countries. Another concern is the failure of current international policies to respond adequately to the challenges posed by globalisation, with market opening and economic considerations predominating over social ones. The Commission concludes that there is a wide range of issues that must be addressed, but that global governance is merely the apex of a web of governance issues that range from the local level upward, and that the behaviour of nation states as global actors is the essential determinant of the quality of global governance. The degree of commitment of nations to multilateralism, universal values and common goals, their sensibility to the cross-border impact of their policies and the weight they attach to global solidarity determine the quality of global governance.[1]

Some of the recommendations made by the Commission are worth noting: (i) global rules and policies on trade and finance must allow DgCs greater policy autonomy; (ii) fair trade and capital flow rules must be complemented by fair multilateral rules governing the cross-border movement of people; (iii) global production systems have proliferated and generated a need for new rules on investment and competition; (iv) core labour standards provide a minimum set of global rules for labour, but compliance with those rules must be strengthened at the national level; (v) the multilateral trading system should substantially reduce unfair barriers to market access for goods in which DgCs have competitive advantage, particularly textiles and agricultural goods; (vi) a minimum level of social protection for individuals and families – a social economic bottom line for the global economy – is essential, including assistance for displaced worker; (vii) greater market access is not a panacea, and a more balanced strategy for sustainable global growth is essential, including equitable sharing of the responsibility for maintaining high levels of effective demand and enhanced macroeconomic policy coordination among states; (viii) the international financial system should be more supportive of sustainable global growth and stability, allowing DgCs to adopt a cautious and gradual approach to capital liberalisation; (ix) and finally, the implementation of international economic and social policy reforms requires worldwide political support, the commitment of key global actors and stronger global institutions. The United Nations (UN) multilateral system is considered the core of globalisation governance and the spearhead of such a reform process.[2]

The link between globalisation and global governance is well explored by the World Commission. It defines governance as the system of rules and institutions established by the international community and private actors to manage political, economic and social affairs. The Commission argues that good governance should be based on other values such as freedom, security, diversity, fairness and solidarity, and should also ensure respect for human rights, international rule of law, democracy and participation, as well as promote entrepreneurship and adhere to the principles of accountability, efficacy and subsidiarity.[3]

In the view of the Commission, increasing globalisation has generated a need for better global governance. The growing links between countries by trade, investment and capital flows means that changes in economic conditions or policies have strong global spill-over effects, while new global rules also have a strong impact on national policy options and economic performance. In short, growing interdependence among nations has increased the range of issues that cannot be effectively dealt with except through collaborative global action, and so there is a growing need to develop institutional arrangements to support and

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[1] WCSDG, 2004, p.ix-xi.
[2] Ibid., p. xi
[3] Ibid., p.75.

supervise global markets in the interest of all participants, to eliminate abuses and correct market failures.[4]

The Commission also notes differences among countries, noting that there are serious problems with current structure and processes of global governance, among them the inequality in economic power and in the capacity of different states to participate effectively in those processes and structure. These inequalities are compounded by global governance decisions adopted outside the multilateral system. Groups of rich countries make decisions on economic and financial issues that have a global impact. DgCs face a handicap when they attempt to make their influence felt, particularly as global governance involves an ever wider range of increasingly complex technical issues. Growing differentiation between rich and poor countries makes collective action at the global level to compensate for individual weakness even more problematic.[5]

A further problem is the lack of coherence in global decision-making. Global governance negotiations are compartmentalized into separate domains like trade, finance, health, social affairs and assistance. International organisations focus on their specific areas and mandates and the impact of their actions on other domains is often ignored. Actions taken in one field affect outcomes in others. Mechanisms for ensuring coherence in global governance as a whole are either weak or non-existent. This lack of coherence reflects the fact that entities rarely coordinate their actions, each focusing solely on their sphere of global governance. This failing is perpetuated by lack of accountability. These weaknesses in global governance have contributed to the uneven social and economic impact of globalisation.[6]

III. The Role of the WTO in Global Governance

The WTO main objective is to liberalize trade through the negotiation of rules. The WTO has four main functions: to provide a forum for negotiations among its members; to supervise the implementation, administration and operation of the trade rules; to administer the Dispute Settlement Body (the diplomatic-juridical ‘tribunal’ of the system); and to administer the Trade Policy Review Mechanism (to evaluate members’ trade policies). The WTO structure includes around 30 regular bodies supervised by three counsels (goods, services and intellectual property), which are coordinated by the General Council. The WTO is headed by the Ministerial Conference composed by foreign affairs or trade ministers of party states. When negotiating rounds are launched, such as the Doha Round in 2001, negotiating groups or special sessions of regular bodies are set up to discuss proposals and drafts for the new texts.

Some numbers suffice to demonstrate the importance of the role of the WTO in international trade. In 2004, the value of world merchandise trade rose to US$ 8,9 trillion and that of commercial services to US$ 2,1 trillion. Trade in merchandise rose by 9% in real terms, compared to 4% for world economy. As regards exports, the EC (25) represents 13,5% of the total, the US 9,2%, China 6,7% and the MERCOSUL 1.5%. DgCs account for up to 31,3% of the total. As regards imports the US represents 16,6%, the EC (25) 13,9%, China 6,1% and the MERCOSUL 1%. DgCs represent 27,4% of the total.

Despite the significant number of members, the main actors are the US and the EC, certainly the most active players, followed by Japan, Canada and Australia. Some DgCs are becoming more effective participants, notably Brazil, India, China, South Africa, Argentina, Korea, and the Association of Southeast Asian Nations (ASEAN). Negotiations are organized

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[4] Ibid., p. 75.
[5] Ibid., p. 76
[6] Ibid., p. 78.

by issues and by interest groups aggregating DCs and DgCs in a complex geometry of a variable configuration. There are several groups in negotiations on agriculture (G20, the G10, and the G33). Negotiations on non-agricultural goods and services tend to confront DCs against DgCs. The reform on rules related to defence remedies such as anti-dumping divide many developed and developing partners from the US, the most important user of the instrument.

The main principles governing the trading system are the following: non-discrimination among nations (GATT Article I); adoption of the schedules of concessions negotiated in the rounds (Article II); national treatment or non-discrimination between national and imported goods (Article III); transparency of all trade laws and regulations adopted by each party (Article X); and exceptions related to security reasons, public morals, protection of human, animal and plants health, and conservation of exhaustible resources (Article XX).

The history of the GATT/WTO system consists of successive trade negotiating rounds, the first of which concerned only tariff and non-tariff reductions. The Tokyo Round (1973-1979) negotiated codes for some trade measures such as anti-dumping, subsidies, technical barriers and customs valuation. The Uruguay Round (1986-1993) established rules for agriculture, services and intellectual property and more detailed rules to the old codes. In 2001, a new round was launched in Doha, after impasse at Seattle in 1999. To attract the DgCs to what is the ninth round of the multilateral system the round was called the Doha Development Round. The main issues of the Doha Round can be summarized as follows:

- Agriculture: This was introduced to WTO rules only in 1995. The area is the most important for DgCs but is also the most sensitive issue for DCs because of the high degree of protectionism they give their farmers. There are three pillars under negotiation: export subsidies (to be eliminated), domestic support (to be substantially reduced) and market access (to reduce substantially tariffs and quotas). The major negotiating effort is concentrated in this area because of the complexities and timing of the round.

- Non-Agricultural Goods: Negotiations for tariff reductions (to be substantial) of binding tariffs are traditional issues in all trade rounds. They are of great interest to DCs because they seek new opportunities in developing markets, but they are also of great concern for DgCs that are attempting to preserve their industrial policies. Several new problems are being discussed in this domain, including: the binding of all tariffs for DgCs, a sectoral zero-for-zero negotiation (whether they should be mandatory or voluntary), the reduction of non-tariff barriers (how they should be defined), and the concept of less than full reciprocity for DgCs (how the concept should be incorporated). Progress in this area is connected to advances in agriculture.

- Services: The inclusion of commercial services was negotiated in the Uruguay Round and a new phase of liberalisation for this sector has been accepted. Again, the negotiating interests confront DCs and DgCs, the former disputing new markets, and the latter protecting newly liberalized or state-owned segments. In contrast to goods that are protected at the frontiers, services are protected by a network of internal regulations. The liberalisation of this sector includes four modes of service supply: the transboundary movement of services, consumer movement, commercial presence, and the movement of suppliers. Negotiations in this area are based on a positive approach whereby countries list the segments they wish to liberalize, including the conditions of that liberalisation. The complexities of the agricultural debates also affect these negotiations, with DgCs refusing to go further without clear gains in agricultural liberalisation.

- Rules: As regards anti-dumping and subsidies (industrial and fish) and countervailing measures, those calling for reform of established anti-dumping rules want to

reduce the ambiguities of the existing agreement so as to diminish their discretionary application by the US. DCs and DgCs members argue that all gains in market access are being undermined because of current rules. The debate on subsidies is about the need (or not) to re-address the definition of a subsidy, its classification of prohibited subsidies, permitted subsidies or actionable subsidies. Present in all discussion is the need of DgCs to preserve political space to implement industrial policies.

- Rules: As regards regional agreements, the debate is about the GATT Article XXIV on rules governing the formation of regional trade agreements. To be consistent with GATT, an agreement must eliminate tariff and non-tariff barriers on substantially all trade among parties, and as a general rule cannot establish higher or more restrictive trade with third parties. One old debate is over the definition of what is a 'substantial' portion of trade; another is the concept of non-tariff barriers to be eliminated (whether they should include anti-dumping, subsidies, safeguards, and rules of origin, or only some of the above). The same question arises from Article V of the General Agreement on Trade and Services (GATS), which calls for substantial liberalisation. It is essential to clarify these concepts, given the multiplication of regional agreements and their impact on the multilateral system.

- Development: The issue of development is present in all the agreements negotiated during the various rounds in the form of special and differential treatment. Such treatment gives DgCs more time to implement rules and less stringent limits on their application. One important question is how this clause should be understood (as mandatory or voluntary). After the Uruguay Round, DgCs began to debate the costs of implementing negotiated rules, and a list of around 100 issues was included in the new round as trade implementation issues. In 2004 a new negotiation group was created to discuss trade facilitation measures related to transparency of trade rules, fees and formalities in imports and exports, and freedom of transit. These issues are of great interest to DgCs.

- Other Issues: Some of the questions included in the Doha Round are the relationship between trade and environmental agreements; the revision of some articles of the Trade Related Intellectual Property Rights agreement (TRIPs) (geographic indication protection for food products), and the revision of the DSM.

The outcome of the Doha Round is still uncertain. The main issue at stake is agriculture, and after two referenda against the new European Constitution in France and Holland, it is hard to imagine there will be political space to reform the Common Agricultural Policy (CAP). The protectionist mood in the US is also problematic. And without progress in this sector, many will be reticent to liberalize non-agricultural goods and services. Some progress was made in Geneva in 2004, with the negotiation of the July Framework. Efforts are being made to finalize negotiations on agricultural goods, including formulas for tariff reductions, ways to reduce internal support, and the elimination of export subsidies. In the domain of non-agricultural goods, the discussion is about the coefficients to be used in the formula for tariff reductions. A new ministerial conference is set to take place in December 2005 in Hong Kong.

In summary, the international system is being transformed by the evolution of the GATT/WTO system through successive negotiating rounds, the role that the system is playing in the establishment of trade rules, and the impact of the decisions adopted by the DSM to address trade conflicts and to impose negotiated rules on all WTO members. The WTO is considered one of the most elaborate international organisations and a particular success in the arena of global governance.

IV. Multilateral versus Regionalism in Global Trade Governance

A growing interest in deeper economic integration through regional trade agreements (RTAs) has evolved alongside the development of the multilateral trading system coordinated by the WTO. The first main experience was the EC established in 1957, and the number of regional agreements increased exponentially in the 1990s. The WTO estimates that there are now 300 RTAs, 150 of which have been notified to the WTO.

There is an important controversy among economists about the impact of RTAs on the global economy. Several condemn RTAs for diverting trade by multiplying regional rules and reducing economic welfare. The most distorting instrument is the implementation of preferential rules of origin that oblige regional partners to buy more expensive inputs or components within the area rather than on the international market so as to comply with rules of origin. For these analysts, RTAs are stumbling blocks to the multilateral system. Many economists, however, defend RTAs as building blocks of global liberalisation. RTAs open the markets, starting in the regional level and moving to the multilateral. Some policymakers see RTAs as an incentive to liberalisation and argue that RTAs are step-by-step processes to competitive liberalisation. The controversy is as old as RTAs themselves, and remains unresolved, and it will only end once the process to eliminate tariffs is completed through multilateral rounds of negotiations.

Economic integration has been recognised as an important instrument of economic growth and development since the negotiation of GATT in 1947. GATT Article XXIV was negotiated as an exception to the Most Favoured Nation (MFN). It established rules to the formation of free trade zones and customs unions. The main purpose was to facilitate trade among the parties and avoid raising barriers to trade with other parties. The rules for the formation of RTAs are essentially four: (i) duties and other trade regulations imposed on third parties cannot on the whole be higher or more restrictive than the general incidence of the duties and regulations applicable in the territories prior to the formation of the RTA; (ii) duties and other trade regulations shall be eliminated for substantially all trade between the parties; (iii) RTAs shall include a plan and reasonable time schedule for their formation (negotiated as 10 years); (iv) and parties deciding to enter into an agreement shall promptly notify it the WTO, with all available information to allow the WTO to make any recommendations deemed appropriated. The Enabling Clause negotiated in the Tokyo Round allows a larger degree of flexibility for developing parties, including non-reciprocity on duty preferences, and simple notification of the new trade arrangements to the GATT/WTO.

During the Uruguay Round, the Agreement on Services was negotiated and Article V of GATS established that parties entering into an agreement to liberalize trade should ensure that: (i) the agreement has substantial sectoral coverage; (ii) substantially all discrimination among the parties is diminished or eliminated; (iii) parties to any agreement shall promptly notify the WTO and make available any relevant information so that the agreement can be analysed and its consistency evaluated.

The rules in the two articles above seem to be straightforward but to date there is no agreement about their precise meaning. From the earliest days, members notified GATT about their RTAs, and working groups were created to examine them. However, only the agreement that created the custom union between the Czech and Slovak republics after the break up of Czechoslovakia was considered compatible with GATT rules. To illustrate the difficulties, the conclusion of the working group on the EC (6) was that it was not possible for members to agree on the compatibility of the EC with Article XXIV, because any conclusion about its incompatibility would be politically unacceptable. Several working groups have failed to arrive at a conclusive judgement about notified agreement because of

the complexity of RTAs and the political issues that were raised during their examination. The main problem was the impossibility of agreeing on some basic concepts in Article XXIV, like the measure of 'substantial' (50 or 90% of tariff lines?), and the measures to be considered as 'other restriction on trade' to be eliminated (anti-dumping, anti-subsidies, safeguards, and rules of origin). The debate has continued but even the creation in 1996 of the Committee on RTAs has not produced agreement among members, and the work of the Committee is blocked.

The same questions were raised again and included in the mandate of the Doha round, with the aim of clarifying and improving discipline and procedures under existing WTO provisions on RTAs (Paragraph 29). There are several proposals on the negotiation tables about the concept of 'substantially all the trade in goods' such as 95% of tariff lines and any product representing more then 2% of trade between parties. For services, a range of 5 to 8 sectors among 12 sectors included in the WTO classification of services is being considered. But the most controversial proposal regards the examination process that assesses consistency with WTO rules. According to current rules, the assessment consists of a presentation, questions and answers, and a Committee report about the consistency of each RTA with WTO rules. The new proposal is that the Committee should elaborate a report without conclusions on consistency, giving to the Dispute Settlement Board (DSB) the role of ruling on RTAs consistency. In other words, panellists and appellators are given a task previously in the hands of negotiators. To date, the only progress has been the proposal to create a Trade Policy Review Mechanism to discuss RTAs and to increase transparency.

Members have been negotiating rules to analyze the consistency of RTAs for more than 50 years and a consensus has yet to be reached. Over this period, the WTO has been notified about an increasing (and uncontrolled) number of RTAs. Not only are countries of the same region establishing economic integration arrangements, but countries of different continents are also beginning to make arrangements that integrate DgCs and DCs. The central rule in all cases is that WTO rules should be part of the founding law of RTAs, but there is no framework for new or deeper rules. This means that as multilateral rules are insufficient, parties establish conditions that can be more stringent than those demanded by the WTO. Without multilateral rules, new rules are negotiated without external control.

The results at present are that: (i) RTAs are undertaking negotiations in market access on agricultural and non-agricultural goods and services that are more ambitious than those of the WTO; (ii) rules on export subsidies and domestic support in agriculture, and on anti-dumping, subsidies and safeguards for goods and services are being left to the WTO, since the negotiations of certain rules must involve all international parties to avoid circumvention of established regulations; (iii) and RTAs are developing rules in areas over which there is no consensus to begin WTO negotiations (investment, competition, environment and social standards). This raises a number of problems. First, there is the question of how to ensure that multiple regional rules are compatible with WTO regulations. Second, there is the issue of ensuring that third parties are not discriminated against. Third, there is the question of how to estimate that trade integration gains are greater than trade diversion and thus justify the RTA. Fourth, new regional rules are being negotiated and provisions are multiplying without concern for internal consistency. Overall, multilateral rules are being undermined by regional regulations and the whole system is being jeopardised.

One of the most complex problems arising from the multiplication of regional agreements and preferential arrangements is related to the determination of rules of origin, which serves to ensure that only RTA parties receive the negotiated preferences. The multiplication of RTAs is creating an incompatible network of preferential rules of origin. The existence of two kinds of rules of origin systems (added value (EC) or classification shift

(US)) is creating many obstacles, particularly for DgCs that export to both places. Because there is no political will to harmonise the rules, preferential rules of origin applied to RTAs, Preferential Trade Agreements (PTAs) and the Generalised System of Preferences (GSP) are becoming instruments of significant trade distortion.

Another important issue results from the desire of DgCs to maintain a degree of policy space or autonomy to protect economic development strategies. Some of the most recent RTAs among DCs include provisions that DgCs refuse to accept in the multilateral arena. Policymakers argues that the size of new markets can compensate for some of the costs, but economists worry that non-trade aims included in RTAs to 'sell' agreements to domestic audiences will overburden the multilateral system with non-trade objectives and put the trading system at risk.

To summarise, one of the most important principles of the multilateral system, the principle of non-discrimination among nations (MFN) as established in Article I of the GATT (and which requires that the best tariff and non-tariff conditions be extended to any party to the agreement) is being undermined. The spread of RTAs and PTAs (non-reciprocal preferences) are turning the MFN principle from a rule into an exception. The complexities of rules created by RTAs can reverse all the progress with trade liberalisation achieved by the WTO and create a new world of trade barriers.

V. Main Global Governance Issues in the WTO

Trade matters are at the core of WTO debates, but trade is not just about tariffs and quotas on goods. Issues such as agriculture, services and intellectual property have made their way into the multilateral trade system. And with globalisation, more information and the communications revolution, world consumers have become much more aware of the quality and safety of goods and the impact of food on health. Socially, political and environmentally aware consumers worry about the environmental quality of final products and also want production methods that do not pollute public goods like water, land and air; they discuss labour rights and children's rights as they apply to traded good; and they debate the role of trade in promoting economic growth in poor countries and the best way to eliminate poverty and hunger. So these issues are permeating the WTO not only through the main negotiating door but also through the Dispute Settlement Mechanism (DSM). They are provoking heated debate about the impact and consequences of trade liberalisation, its links with development, and the limits of the trading system. This section discusses some of these issues and the challenge of dealing with them within the WTO. They are global issues that are trade related but not simply 'trade issues', namely: development, investment, competition, environment, labour standards, public health, bio-diversity, quality standards, and sanitary and phitosanitary standards.

1. Trade and Development

Trade is considered a key factor in economic development. Trade liberalisation, the main goal of the multilateral trading system, has a direct impact on development policies. Some results are positive (increased market access with tariff reduction and the elimination of quotas; preferential treatment on imports from DgCs to DCs; reduced subsidies and support for agricultural production in DCs and open markets for the export of food products from DgCs; the elimination of quotas on textiles imports to DCs; rules to allow defensive action against imports from DCs; and DCs markets opening to import services from DgCs). The Preamble of the GATT 1947 recognized that the relationship between trade and economic

development could raise standards of living, allow full employment and increase real income, a vision reiterated in the 1995 Preamble of the Marrakech Agreement that established the WTO, which states that parties recognize that *their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services...* That Preamble also voiced a new concern with the environment as follows ... *while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development* (Paragraph 2).

The history of the GATT/WTO shows how the debate on trade and development evolved with the negotiation of provisions designed especially for DgCs. When GATT was first established the main concern was market access. With the creation of United National Conference on Trade and Development (UNCTAD) in 1964 the issue became how to allow for policy space to sustain import substitution policies. New articles were incorporated in the GATT (Part IV on Trade and Development), the central aim of which was to introduce the principle of non-reciprocity allowing DgCs from the need to comply with measures inconsistent with their development, financial and trade needs (Article XXXVI). During the Tokyo Round (1973-1979) the concern became limiting the extent to which the new Codes on non-tariff measures would affect DgCs. In 1979, the Decision on Differential and More Favourable Treatment (Enabling Clause) provided legal cover for special and differential (S&D) provisions, the GSP, and regional preferences among DgCs. The Uruguay Round negotiations included more countries, and new commitments for DgCs were introduced in new areas such as agriculture, textiles, services and intellectual property. The single undertaking principle created called on DgCs to deepen their commitments, although new obligations were balanced by S&D provisions incorporated in all new agreements. The main focus was to give DgCs more time to meet their obligations and more flexibility in rule implementation. Technical assistance and capacity building was also introduced to close the gap between countries at different levels of development.

From 1995 onwards, DgCs began to face difficulties with the implementation of their new obligations and claimed that some provisions did not support development policies or were too restrictive to maintain any policy space. These countries demanded more flexibility and changes in some provisions. The issue of implementation was introduced to the new round and goes a long way to explain the impasse at the Seattle ministerial meeting to launch a new round of negotiations. A more successful attempt was made in 2001 leading to the initiation of the Doha Development Agenda, the aim of which was to introduce development as a centrepiece of negotiations. After all, two thirds of the 148 members were DgCs, and a significant number of them had failed to become integrated successfully into the global economy.

The Doha mandate focused on the contribution of the WTO to economic growth, development and employment while sustaining reform and liberalisation of trade policies. Ministers recognized the need for all peoples to benefit from the increased opportunities and welfare gains generated by the trading system and agreed to continue trying to ensure that DgCs secured a share in the growth of world trade commensurate with their economic development needs (Paragraphs 1 and 2). The main development issues included in the round were: increased access to markets in agriculture and non-agriculture goods and services; the elimination of export subsidies on agriculture and the reduction of domestic support for agriculture; the negotiation of new rules to restrict the use of anti-dumping and anti-subsidies

measures; the clarification and improvement of rules on RTAs; a focus on the relationship between trade and the environment; and also trade facilitation. The conditional mandate to start negotiations on trade and investment, competition and transparency on public procurement was dropped in July 2004 because of the concern voiced by some DgCs over the effects of these new rules on their policymaking space. There were also some issues introduced specifically to respond to the concerns of DgCs as follows:

- Implementation Issues: The DgCs elaborated a list of issues related with the agreements negotiated in the Uruguay Round, so as to increase opportunities and flexibility for themselves. Some of these issues were decided at the Doha meeting and incorporated into a Ministerial Decision. Other issues are being negotiated either in the negotiating bodies or in regular WTO bodies. They are considered an integral part of the round (Paragraph 12). The concerns voiced by DgCs over implementation include: the impact of agricultural reform on net-food importing countries; the application of sanitary and phytosanitary measures by DCs that affect exports from developing nations; use of defence instruments by DCs against textiles; the participation of DgCs in international standard setting bodies; the creation of more policy space to apply subsidies to agricultural and industrial sectors; strengthening cooperation between customs administration; and flexibility to use measures that may be a TRIM (Trade Related Investment Measure), such as a prohibited incentive.

- S&D: The aim is to make Special and Differential (S&D) provisions more effective by making them mandatory instead of voluntary. The mandate is to review all S&D provisions with a view to strengthening them and making them more precise, effective and operational (Paragraph 44). Important questions being discussed include whether or not S&D is an acquired political right; whether DgCs should maintain privileged access to developed country markets; whether DgCs should have greater rights to restrict imports than DCs; whether DgCs should subsidize exports more than DCs; and whether DCs should have more time and greater flexibility in the application of WTO rules, and for how long. S&D provisions are present in all WTO agreements on agriculture, market access, services, textiles, trade defence rules, TRIPs, and dispute settlement. The question is whether they should remain best endeavour or become mandatory clauses, whether they should exist only in separate agreements or be subject to a single agreement, and whether a special body to supervise such an agreement should be created.

- Technical Cooperation and Capacity Building: These activities are considered core elements of the development dimension of the trading system. The WTO Secretariat was instructed to cooperate with other agencies to support the transitional adjustment and implementation of WTO rules and discipline.

The effects of the expansion of trade on development are profound and widespread, but they vary across economic sectors and countries. The expected rise in welfare and poverty reduction through increased growth rates has not been achieved. Many studies point out that the results of trade liberalisation have not been as positive as hoped. Some countries are being marginalized in their attempt to enter the global economy, growth rates have been unevenly distributed across countries, and the income gap between the richest and poorest countries is increasing. Some countries have been more successful in expanding their exports and attracting large investment flows because they have relatively better initial conditions in terms of industrialisation, human resource levels and infrastructure. To sum up, according to WTO and UNCTAD reports, the participation in global trade and investment of most DgCs

from Africa, Latin America and Asia (except China) is declining in comparison with that of DCs.[7]

The above cited studies all conclude the same thing, and that is to deal with the problem of transforming trade into an instrument for development, since trade liberalisation is not enough. There are other essential factors such as the modernisation of the productive sector, the adaptation of infrastructure, more investment and credit, the stabilisation of developing economies, debt relief and better education systems. The role of international organisations like the World Bank (WB) and the IMF are essential to help these countries participate effectively in the global economy. The WTO has an important role to play, but its task is to make rules. It is not a credit institution. Nonetheless, policy coordination between the three organisations is essential to achieve development goals. Their participation in the 1996 Integrated Framework is an important, albeit insufficient, step in this direction.

The relationship between trade and development is the main focus of the WTO Committee on Trade and Development. This forum may also be the right place to begin discussing development as an important global governance issue. Ongoing and systematic and coherent cooperation among international organisations responsible for development and trade is essential to transform trade into a more efficient promoter of economic development.

2. Trade and Investment

Investment negotiations were introduced to the WTO at the First Ministerial Conference in Singapore in 1996, with the creation of a Working Group on the Relations on Trade and Investment. At the Fourth Ministerial Conference that launched the Doha Round (2001), the WG mandate was revised, with ministers agreeing that negotiations depended on an explicitly decision by consensus on modalities of negotiation to be adopted at the Fifth Ministerial (Cancun 2003). The WG worked according to the Doha Mandate (Paragraphs 20-22) and focused its activities on the clarification of several concepts to be included in the new agreement, such as the scope and definition of investment (portfolio or direct investment); the definition of investor; transparency (notification of all laws and regulations related to investment); non-discrimination among nations; non-discrimination between foreign and domestic investors (for pre- and post-establishment); modalities for pre-establishment (market access based on a GATS-type positive list approach); development provisions (policy flexibility, flexibility in the provisions, and special provisions or exceptions for development); exceptions and balance of payment safeguards; consultations and the settlement of disputes (*de jure* and/or *de facto* conflicts); support for technical assistance; and capacity building.[8]

Following an impasse at Cancun in 2003, the decision to include investment in the mandate was postponed, and members decided to exclude the issue from the mandate during the negotiation of the July 2004 Framework. This was because the impasse was attributed to the opposition of DgCs to a new agreement that would diminish their industrial policy space. WTO investment negotiations were preceded by negotiations in the Organisation of Economic Cooperation and Development (OECD) in 1995-1998, but OECD members failed to conclude the Multilateral Agreement on Investment (MAI) in that period because of French opposition to US proposals regarding cultural industries, and the opposition of many non-government organisations (NGOs) to the agreement on environmental grounds. Both initiatives aimed to harmonize the more than 1500 dispersed bilateral investment treaties

[7] WTO, World Trade Report, 2005; UNCTAD, Trade and Development, 2005

[8] The results of debates on these questions are well documented in the WG annual reports to the General Council of the WTO (2000-2003)

among developed and DgCs, and to secure greater predictability for investors. Further, while there was already an investment agreement on services (GATS, mode 3 on commercial presence), there was no agreement on investment related to goods, a gap that DCs wished to fill.

What explains the failure to reach an agreement? One contentious issue was performance requirements (export performance, local content, technology transfer, local research and development and employment generation clauses) demanded by DgCs and resisted by DCs (some forbidden by TRIMs and others not). Another conflict was over the inclusion of incentives such as tax exemptions or reductions, or grants to attract investment to special areas or places. DgCs argued that the playing field had to be levelled to attract investment and use incentives as development instruments, but DCs did not agree with this view. A third conflict was over the use of the WTO Dispute Settlement to solve conflicts not only between states but also between foreign investors and host countries, which DCs considered unacceptable. The impasse in OECD and WTO negotiations gave countries the freedom to sign bilateral agreements or negotiate regional investment rules. Specialists noted that the key problem is that DCs are imposing conditions on DgCs in exchange for market access. The result is the reduction of policy flexibility for DgCs in this domain. Another problem is that conflicts can arise when economic policies are approved by the IMF or the WB, including subsidies to attract investment or incentives for investment measures, which may or may not be consistent with WTO rules but are inconsistent with bilateral or regional rules. The multiplication of investment rules negotiated at different levels and the absence of harmonisation and a coherent framework can undermine the gains achieved in the trading system. The effects of overlapping of investment rules on trade deserve more attention. With the impasse at the OECD and the WTO the trade-investment link has no global sponsor. The UNCTAD, which is responsible for the World Investment Reports, is the natural candidate to continue monitoring in this domain. Coherence and cooperation among international organisations in charge of this area is an important step towards improved global governance.

3. Trade and Competition

Competition policy negotiations were initiated at the First WTO Ministerial Conference of 1996, with the creation of a Working Group on the Interaction between Trade and Competition Policy. The WG mandate was revised at the Fourth Ministerial that launched the Doha Round, on which occasion ministers agreed that negotiations would depend on a decision about negotiation modalities adopted by consensus at the Fifth Ministerial at Cancun (2003). Until that time, the WG worked according to the Doha Mandate (Paragraphs 23-25), debating several issues to be included in the new agreement: core principles (transparency, non-discrimination, and procedural fairness); prohibition of hard core cartels; modalities for voluntary cooperation (among investigating authorities); and support for the progressive reinforcement of competition institutions in DgCs through capacity building. The overall aim was to develop a multilateral framework on competition, incorporating core elements to ensure that the gains from liberalisation were not undermined by the anti-competitive behaviour among private actors. A significant number of developing members have no competition laws, so the aim was not to harmonize national laws but rather to propose a set of principles, including common values and promoting cooperative approaches to law enforcement. Flexibility for DgCs was discussed (including exceptions and exemptions, transitional periods and capacity building). [9]

[9] The main results of the debate can be seen in the WG reports to the General Council (2000-2003).

With the impasse at Cancun, the decision to include competition in the mandate was postponed and during the July 1994 Framework negotiations members decided to exclude the issue from the mandate, since DgCs considered a new competition agreement a non-priority and feared that the new agreement might affect their policy making space in the industrial domain. There was also a conflict over which compliance mechanism to apply to the new agreement (the DSM or a peer review system). Questions were raised about the possible interference of the new rules with domestic legal systems and with basic obligations subject to Dispute Settlement. The issue of a *de jure* or *de facto* approach was also discussed. The debate about competition is already included in the TRIPs and TRIMs Agreements. It was also debated in the context of the DSM, where national law was the basis for a final decision (the case of films in Japan and telecommunications in Mexico).

As with investment, the failure to include competition in the WTO round has led DCs to include competition in regional agreements. Again, the economic power of these countries allows them to impose conditions that affect DgCs' development policy space. Another problem is the possible conflict with measures accepted by international organisations (the financial and economic packages coordinated by the IMF or the WB for example) that allow some measures that are considered incompatible with competition rules agreed among countries in regional groups. The examples of the impact of non-harmonized rules of competition on trade are well known. The conflicts over competition provisions among major investment partner countries and their effects on trade is another question that deserves further analysis. The WTO impasse has also deprived the 'trade and competition´ issue of a global sponsor. Again, the UNCTAD is in place to continue monitoring, but cooperation among international organisations is essential to promote global governance in this domain.

4. Trade and the Environment

The GATT debate on trade and the environment is not new. It began in 1971 when the Council of Representatives agreed to create the Group on Environmental Measures and International Trade (EMIT) (later re-launched in 1991). During the Tokyo Round, environmental measures in the form of technical regulations and their effect on trade were discussed, and the Agreement on Technical Barriers to Trade was negotiated including the principle of non-discrimination when preparing, adopting and applying technical regulations and standards. In 1989, the Working Group on the Export of Domestically Prohibited Goods and Hazardous Substances was created. Environmental issues were also discussed at the Uruguay Round, and changes were introduced to the Standard Code. Certain issues were addressed in the Agreements on Services, Agriculture, the Agreement on Sanitary and Phytosanitary Measures (SPS), Subsidies and TRIPs. However, the environment debate took place mainly in other forums like the Stockholm Conference (1972), the Brundtland Report on Environment and Development (1987), and the 1992 UN Conference on Environment and Development (the programme of action of Agenda 21 addressed the issue of promoting sustainable development through international trade, amongst other means).

Near the end of the Uruguay Round in 1994, a Committee on Trade and Environment (CTE) was established by Ministerial Decision, with a mandate covering a broad range of issues, including the relationship between trade and environmental measures to promote sustainable development. At the 2001 Doha Ministerial Conference it was agreed to launch negotiations on some trade and environment issues including: the relationship between existing WTO rules and specific trade obligations set out in Multilateral Environmental Agreements (MEAs); procedures for regular information exchange between MEA Secretariats and relevant WTO committees; the reduction or elimination of tariffs and non-

trade barriers to environmental goods and services; to monitor the effects of environmental measures on market access; and to examine relevant TRIPs provisions, and labelling requirements. The mandate was that this should neither add to nor diminish rights and obligations under WTO agreements, or alter the balance of those rights and obligations (Paragraphs 31-33). [10]

The debate is now split into two camps: on one side, DCs are subject to increasing pressure from interest groups that want to reconcile trade and environmental protection policies; on the other, DgCs are worried that environmental concerns will affect trade through market access conditionalities and new discriminatory measures. Also contentious are the potential environmental benefits of trade liberalisation, with some arguing that trade liberalisation is a primary cause of environmental degradation, and others that trade liberalisation secures resources needed to protect the environment. The question of agricultural subsidies also divides members. Some say that trade reform is necessary because the use of subsidies is an incentive for intensive farming practice, and others that subsidies are necessary to conserve and manage land, forest and water resources.

Although WTO members have not yet been able to negotiate an agreement on trade related environmental measures, there are several WTO rules on the environment. The principle of non-discrimination among nations (Article I), on imported and national goods (Article III), on the elimination of quantitative restrictions (Article XI) are relevant, the latter opposing the imposition of bans on the importation of certain products for environmental reasons. Rules of general exceptions to GATT in Article XX are also important (member can be exempted from GATT rules, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination. Two items of the Article are relevant: item b) measures necessary to protect human, animal or plant life or health; item g) relating to the conservation of exhaustible natural resources. GATS also contain a general exception clause in Article XIV similar to GATT Article XX.[11]

The Agreement on Technical Barriers to Trade (TBT) seeks to ensure that product specification through mandatory regulations or voluntary standards, and procedures to assess compliance with these specifications, do not create unnecessary obstacles to trade. The SPS Agreement recognizes the rights of WTO members to adopt SPS measures, and stipulates that these must be based on a risk assessment, applied only to the extent necessary to protect human, animal and plant life or health, and should not discriminate arbitrarily or unjustifiably against countries where similar conditions prevail.

A sensitive issue that is in the TBT Agreement is eco-labelling. Standards are not based only on the final product but also on the Process and Production Method (PPM), which means examining methods of production as a whole to see if there are any traces in the final product. The question is whether some trade measures taken to protect the consumer, even for a non-PPM related product (such ensuring there are no traces of pesticide in final products) are inconsistent with WTO standards. Further, there is the issue of where to discuss product-based or process-based regulations and standards (whether in the TBT or the CTE Committee), and also the question of how to address equivalence and mutual recognition of differing national environmental standards.[12]

Regional and global agreements are considered the most appropriate to deal with transboundary environmental problems, and the WTO endorses negotiations of MEAs. However, it is unclear how to address the trade provisions contained in several MEAs as they apply to parties and non-parties alike. One source of conflict is the possibility that an MEA

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[10] The evolution of the debate can be followed in the reports of the CTE to the General Council (2002-2004).
[11] WTO, Trade and the Environment, 2004, pp. 49-58
[12] WTO, Trade and Environment, 2004, pp. 16-20.

may violate a WTO non-discrimination rule. There are approximately 200 MEAs in force and 20 of them contain trade provisions. The question is whether MEA disputes over trade measures can be brought to the WTO DSM or settled within the framework of the relevant MEAs, a question that is particularly hard to resolve when both parties are WTO members but only one is party to an MEA. Although it was impossible for WTO members to agree to an Agreement on Trade and Environment, the WTO DSM is actively engaged in ruling on the issue. There are several cases examined under GATT or WTO proceedings and are important because they show how panellists and appellators are dealing with conflicts over environmental measures. These cases are important because they are creating jurisprudence on the basis of WTO rules on the application of trade environmental measures even before a consensus has been reached in Doha. Some examples are:

- Under GATT: Conflicts between: US-Canada over tuna (import prohibition by the US on Canadian tuna under a fishery conservation act); Canada-US herring (export prohibition by Canada on herring to the US based on fishery resource management); Thai-US over cigarettes (prohibitions by Thailand on imports of cigarettes while authorizing sales of domestic cigarettes); US-Mexico over tuna (prohibition on imports of tuna by the US based on the prohibition of tuna caught with technology resulting in the accidental killing of mammals, in accordance with the Marine Mammal Protection Act); US-EC over tuna (embargo on imports); and US-EC over automobiles (examination of the auto luxury tax).
- Under WTO: US-Venezuela and Brazil over gasoline (US Clear Air Act considered unjustified under Articles III and XX); US-Malaysia, India, Thailand over shrimp (prohibition on imports of shrimp harvested with technology that affects sea turtles under the US Endangered Species Act); EC-Canada over asbestos (ban on imports from Canada under human health protection legislation).

There is intense international debate about the multiplication of regional, plurilateral and multilateral agreements on the environment and the inability of parties to harmonise provisions. One divisive and significant issue is whether a World Environment Organisation should be established. Some DCs – the biggest world polluters – are opposed to the idea, but others favour it. And while some DgCs favour the idea, others fear that DCs will use environmental rules to create trade barriers, and so prefer UN coordination. Anther important problem is that in the absence of multilateral rules on trade and the environment, DCs are imposing environmental rules in regional, preferential and GSP agreements, and without multilateral rules, environmental clauses can create trade barriers. Negotiations in the WTO are an important example of how members are creating rules to find a global solution to what is a global problem. The CTE and the United Nations Environment Programme (UNEP) are privileged forums in which to continue discussions on the matter, and to ensure the coherence and cooperation necessary for global governance in this domain.

5. Trade and Labour Standards

The debate on international labour standards goes back to the foundation of the ILO in 1919, which provides tripartite representation for governments, employers' organisations and trade unions and aims to promote the implementation of international labour standards and settle compliance controversies. The implementation of ratified conventions is monitored in annual reports presented by governments and discussed in plenary sessions by employers and union associations, and compliance is monitored by an independent Commission of Inquiry that issues conclusions and recommendations.

Over the years, the ILO has negotiated 182 conventions on labour standards, and from 1998 onwards when the Declaration on Fundamental Principles and Rights at Work was adopted, all ILO members had to respect and promote certain fundamental rights even if in the absence of ratification of conventions. There are eight conventions affecting core labour rights: freedom of association and protection of the right to organize; the right to collective bargaining; the suppression of forced or compulsory labour; the abolition and prohibition of all forms of forced or compulsory labour; the elimination of discrimination in respect of employment and occupation; equal remuneration; abolition of child labour and minimum age for admission; and condemnation of the worst forms of child labour.

Despite its efforts the ILO effective enforcement of conventions through political persuasion has not worked. In the 1970s the ILO and OECD attempted to establish multilateral codes of conduct for transnational enterprises, and later MAI negotiations included several proposals to incorporate labour clauses, but these efforts produced unsatisfactory results. The 1948 draft of the International Trade Organisation (ITO) included a linkage between trade and social standards (Chapter II). However, no such provision was included in GATT, which simply extended the right to discriminate against prison labour products (Article XXe). The US and the EC have since proposed the introduction a GATT social clause but this was opposed by DgCs. In the 1980s, the US and the EC began to introduce labour rights clauses into trade legislation, particularly in bilateral and preferential agreements such as the GSP. In the 1990s, both supported the creation of a WTO working group to examine the links between trade and social standards. Although this was rejected at the First Ministerial Conference, ministers nonetheless affirmed their commitments to the observance of the core labour standards, underlining that such standards could not be used for protectionist purposes or put at risk the comparative advantage of any country.[13] A further attempt by the US to introduce a labour clause at the 1999 Seattle Ministerial Conference was rebuffed (the intention of DCs and various NGOs has been to allow trade sanctions to be applied to those failing to respect core standards). In 2001, the ILO created a Commission on the Social Dimension of Globalisation, and that same year another failed attempt was made to introduce labour standards at the Fourth Ministerial at Doha. An agreement to allow the WTO DSM to settle such issues has also been opposed by DgCs, which feel that labour standards should arise naturally as a consequence of a broader development agenda and not as a way to introduce new trade barrier.

Given the lack of consensus for a WTO Agreement on Trade and Labour Standards, labour supporters have pressed some DCs, mainly the US, to use its market as leverage to negotiate labour standards in regional and preferential arrangements. The US has done this in the US-GSP, the African Growth and Opportunity Act (AGOA), with the North America Free Trade Agreement (NAFTA) Agreement on Labour Cooperation, and in the free trade agreements signed with Cambodia, Jordan, Australia, and Vietnam, and with the Central American Free Trade Agreement (CAFTA) and in the Andean Free Trade (AFT) agreement. The EC is negotiating labour standards in preferential arrangements like EC-GSP, the Cotonou Agreement, and the Economic Partnership Agreements with ACP countries. South Africa, Mexico and Chile also recognize ILO conventions but make no linkage with trade and focus instead on human rights.[14]

To date there has been no conflict between WTO and regional and preferential agreement labour standards, but if members decide to bring a case to the WTO, the DSM will be faced with an interesting challenge. There are solutions under debate, with some groups supporting the introduction of labour standards as a trade issue, through measures such as

[13] Singapore Ministerial Declaration, 1996

[14] Greven, 2005, Social Standards in Bilateral and Regional Trade Agreements.

creating incentives for ethical consumer and fair trade initiatives, rating businesses for environmental and social as well as financial and economic performance; and using labour standards as marketing points. Another proposal is to have labels stating that core labour standards are respected in the production of any given product, but it is unclear which organisation would develop and monitor labelling.

Labour standards will remain on the agenda for the foreseeable future. New initiatives to create 'fair labour' purchasing incentives for conscious consumers will emerge. The inclusion of labour standards in regional agreements needs supervision and further analysis. The ILO is the best forum in which to continue to work on this vital global governance issue, and to pursue the debate about how other international organisations can cooperate to ensure good global governance in this domain.

6. Trade, TRIPs and Health

Negotiations on international intellectual property rights agreements are the objective of World Intellectual Property organisation (WIPO). However, the latter has no dispute settlement provisions akin to those of the WTO and so some DCs called for intellectual property rights (IPRs) to 'enter' the WTO during the Uruguay Round in the form of TRIPs, the aim of which is to promote effective and adequate protection of IPRs and to ensure that measures to enforce such rights do not become trade barriers. Following an DgC transition period, some DCs began to resort to the DSM to enforce aspects of TRIPs, particularly in the area of medication and on the use of patents without right holder authorisation (compulsory licensing provisions), which are used by governments in emergencies for public non-commercial use to supply domestic markets (TRIPs - Article 31).

With the spread of public health problems in many DgCs, especially HIV/AIDS, some DgCs have negotiated reductions in the allegedly abusive prices charged by patent holders for key medication. The alternatives are to use the compulsory license provision or to import active ingredients from other DgCs. These practices were adopted by South Africa and Brazil at the end of the 1990s to support national HIV/AIDS programmes, leading some DCs (the US, the EC, and Switzerland) to initiate consultations and use the DSM to defend their interests. Following extended public debate in the press and with NGOs the controversy was settled and DSM consultations were suspended. In 2001, a Doha Ministerial Declaration on TRIPs and Health was approved, that stresses the importance of implementing and interpreting the TRIPs Agreement to support public health, by promoting access to existing medication and the creation of medicine. It was emphasized that the TRIPs Agreement does not and should not prevent governments from acting to protect public health, and the right of government to take advantage of the flexibility of the Agreement was affirmed, particularly compulsory licensing and parallel importing. It was also stated that the Agreement should be interpreted in a way that supports governments' right to protect public health, and provide guidance to individual members and dispute settlement rulings. Each member has the right to determine what constitutes a national emergency. The TRIPs Council was asked to solve the pending problem of countries with too little or no pharmaceutical manufacturing capacity. This point is problematic because of the provision that compulsory license must be used predominantly for the domestic market and not for export. Members are discussing the issue, but a solution has yet to emerge.

TRIPs and public health demonstrate how DCs used WTO DSM rules to enforce IPRs in the pharmaceutical area, and how DgCs widened the interpretation of compulsory licensing to fit their development needs. The WTO negotiation of the Declaration on TRIPs and Public Health is a particularly good illustration of how countries can achieve results in

the domain of trade and health. This issue is far from resolved, and the TRIPs Council of the WTO, the WHO and the WIPO are the three international organisations that will play a key role in promoting cooperation and coherence to resolve the problem and thereby promote multilateral global governance.

7. Trade, TRIPs and Bio-Diversity

Another contentious issue that confront DC and DgC interests is the relationship between TRIPs and the 1992 Convention on Biological Diversity (CBD). TRIPs determines that members can exclude from patents inventions and prevent the commercial exploitation of patents that are necessary to protect public order or morality, including human, animal and plant life or health, or to avoid serious environmental damage. Members may also exclude from patents: (i) diagnostic, therapeutic and surgical treatment methods; (ii) plants and animals other than micro-organisms and biological process other than non-biological microbiological processes. Members shall provide for the protection of plants varieties either by patents or by an effective *sui generis* system (Article 27). This effectively means that non-biological and microbiological process can be subject to patents. The issue is being discussed in the Doha Round under the rubric of implementation of provisions of existing agreements. The question remains as to whether or not there is a conflict between TRIPs and the CBD, and whether TRIPs must change to ensure that the two instruments are applied harmoniously.[15] DgCs argue that there is a conflict, because TRIPs requires that genetic material should be patentable or protected by *sui generis* plant variety rights, and does not prevent the patenting of genetic material. These conditions allow the appropriation of genetic resources by private parties in a way that is inconsistent with CDB, as they established three important principles: sovereign national rights over genetic resources, prior informed consent before use, and benefit sharing (CDB Articles 15 and 16). It has been suggested that patent applicants should disclose the origin of any genetic material used in inventions, demonstrate that they have obtained prior information consent from the competent authority in the country of origin, and entered into appropriate benefit-sharing arrangements. The position of DCs, by contrast, is that TRIPs and the CBD have different aims and that granting patents does not prevent compliance with CBD provisions. Others argue that there is no inherent conflict but considerable interaction between the two agreements, so that there is a need for enhanced international action to ensure their harmonious implementation. Similar arguments are made regarding the relationship between TRIPs and CBD provisions on traditional indigenous and local community know-how.[16]

There are many other pending questions, including: whether obligations should be substantive and whether formal requirements are necessary to obtain patents; what level of use of resources in inventions should trigger obligations; the cost and administrative burden of such obligations; the legal effect of the application of granted patents in cases where biological resources or traditional knowledge used in inventions are insufficient, wrongful or undisclosed; the penalties and time limits for the withdrawal of applications; the where the burden of proof should lie. The problem is important because there are many examples of bio-piracy and misappropriation actions of patent holders. This debate is raising important question about the compatibility and consistency between two key international treaties. Negotiations will continue in the WTO TRIPs Council and in WIPO. They provide another good example of the importance of coherent and cooperative global governance.

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[15] WTO, 2002, IP/C/W/368,369

[16] WTO, 2002, IP/C/W/ 370.

8. Trade and Standards

Product standards are about specifying product characteristics, including size, weight, safety, energy and environmental performance, materials used, and production processes. The role of standards is to provide buyers, users and consumers with compatibility and information. Standards are becoming increasingly important with the increased globalisation of production and trade, and their effects on trade are also becoming more discernible as trade liberalisation and multilateral and regional tariffs and quota reductions evolve. Increased standardisation reflects consumer demands for safer and higher quality products, the introduction of technological innovations, and increased concern with environmental and social issues.

Standards are produced by public and private institutions. They can be legally mandatory or voluntary, and can be implemented through labelling. Institutional standards are defined by committees and formally adopted, while informal standards are developed by firms and can represent proprietary designs. Depending on the country, standardisation is either undertaken by governmental agencies or governments limit themselves to elaborating mandatory regulations and allow the private sector to develop technical regulations. There are about 50 international standard setting bodies, the most important of which are the International Organisation for Standardisation (ISO, with 15,000 international standards), the International Electro Technical Commission (IEC, with 5,300 standards), the International Telecommunications Union (ITU), the *Codex Alimentarius* Commission of the FAO/WHO (with 214 standards), World Organisation for Animal Health (formerly the Office International des Epizooties, IOE), and the International Plant Protection Convention (IPPC of the FAO, with 21 standards).[17]

Standards also apply to trade. Export operations include conformity assessments, which guarantee that products or processes are measured up against specific requirements and tested and examined in laboratories to obtain a certification declaration. To reduce the time and cost of exports, countries are negotiating agreements for the mutual recognition of conformity assessment. However, standards can also be a form of trade protectionism and have a discriminatory impact on trade flows. Acknowledging the importance of standards in trade, the GATT/WTO negotiated several rules with provisions on standards: GATT Article III on national treatment, the elimination of quantitative restrictions in GATT Article XI, and general exceptions in GATT Article XX.

The first TBT Agreement was negotiated during the Tokyo Round and revised during the Uruguay Round in 1994. The SPS Agreement was also negotiated during that last Round. Both these WTO agreements aim to reconcile the legitimate public policy use of standards with an open, non-discriminatory, and non-protectionist trading system. They also seek to ensure that governmental non-trade related policies that use standards have the least possible disruptive effect on trade. The TBT and SPS Agreements preambles state that members cannot apply standards in a manner that constitutes a disguised restriction on international trade.

The TBT Agreement acknowledges that governments can employ technical regulations to legitimately protect national security, prevent deceptive practices, protect human, animal and plant health or safety or the environment. But technical regulations cannot be prepared, adopted or applied such that they create unnecessary obstacles to international trade: they cannot be more trade-restrictive than is strictly necessary for the attainment of legitimate government aims. The TBT Agreement defines technical regulations in documents that outline mandatory product characteristics and productive processes and methods.

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[17] WTO, 2005, World Trade Report, Trade, Standards, and the WTO

Standards are defined in documents approved by a recognized body that provides non-mandatory product rules, guidelines or characteristics and related production processes or methods. Conformity assessment is defined as any procedure used to determine that relevant regulatory requirements or standards are fulfilled. The TBT Agreement provides a set of principles that must be used in the preparation, adoption, and application of technical regulations by central government bodies. Most of these principles also apply to voluntary standards covered by the Code of Good Practice, and are relevant to the preparation of conformity test guides.

The SPS Agreement imposes several obligations on members using sanitary and phytosanitary measures that can affect international trade. SPS measures include: rules to protect animal or plant life or health, within a national territory, from risks arising from the entry, establishment or spread of pests or diseases; from additives, contaminants, toxins or diseases in foods; from diseases carried by animals, plants or products or pests; to prevent or limit other damages arising from the entry or spread of pests. The SPS Agreement also states that members must ensure that their SPS measures do not arbitrarily or unjustifiably discriminate against other members where similar conditions prevail, or disguisedly restrict trade. Measures are to be applied only to the extent necessary to protect human, animal or plant life, or health, and must be based on scientific principles and not maintained without sufficient scientific evidence.

The SPS Agreement encourages harmonisation among members' regulations, and calls on them to base their SPS measures on international standards, guidelines or recommendations (the Codex, the IPPC, and the OIE). When there are no relevant international standards, members may adopt different measures but must ensure that they are based on an assessment of the risks to health. Members must accept the SPS measures of other members as equivalent to their own if the exporter demonstrates to the importer that its measures are up to the importers' level of protection. Members may introduce or maintain measures that results in higher standards than those at the international level if scientific research proves this is appropriate. The SPS Agreement also establishes the procedures and criteria for the assessment of risk and for the determination of appropriate levels of protection. When scientific evidence is insufficient, members may adopt provisional emergency or precautionary measures but must also obtain additional evidence for an objective risk assessment.

Voluntary standards imply the use of labels to differentiate between complying and non-complying products. Producers that do not meet the standards can be obliged by governments to label their products. Producers can also choose to label their products to inform consumer about the quality of their products. Labelling schemes can have an important effect on trade flows because they affect both consumers and producers. There are public and private and mandatory and voluntary labelling schemes. The difference between mandatory and voluntary schemes is that in the former a minimum level of safety is determined while the latter adopt the top range, allowing consumers to choose products at a higher or lower level of safety and quality. With voluntary schemes, producers decide whether or not to participate in the various possible schemes in place. Labelling is becoming an important instrument not only to certify compliance with a standard, but also as an instrument to promote a product, since advertising alerts consumers of the consequences of purchasing any given product.

There have been various TBT and SPS related cases presented to the DSM. Disputes over standards are less about disagreement over the legitimacy of the policy per se and more about desirable degrees of protection. Conflicts emerge when there is a link between a tradable good and a policy objective, or over how effectively a policy instrument is achieving

its stated aims. Disputes also arise because the preambles of both agreements state that members are free to determine what they consider an appropriate level of protection, which means that scientific evidence is the only way to resolve such disputes.[18] Among the various cases put to the DSB over TBT and SPS provisions are those presented by Korea (various measures on beef, concerning the dual retail system of sale); the EC-Canada (on asbestos, related to the preservation of human life and health); the EC-Peru (on sardines, regarding the prohibition on the use of the term sardines); Australia-Canada (over quarantine measures for salmon); the EC-US and Canada (over hormones and the prohibition on import of meat); and by Japan-US (over apples and the transmission of disease). These cases are examples of how members defend themselves against measures they perceive to be inconsistent with WTO rules.

To summarise, the use of standards is becoming an important instrument in international trade. Because standards are substituting tariffs as trade protection measures this has been discussed in the GATT/WTO for many years. Parties to regional agreement are negotiating conformity arrangements to reduce certification costs. The DSM has dealt with several cases involving the abusive use of standards in trade. However, many questions remain unanswered, including: the gap between the evolution of the standards to satisfy the needs of DCs consumers and the capacity of producers from DgCs to meet those needs; the participation of DgCs in various standard-setting institutions that is reinforcing the gap between DCs and DgCs; and the DC use of risk assessment and the precautionary clause to the detriment of DgCs. There are no easy answers to these problems but they are central to the functioning of the trade system. The increasing use of standards in multilateral trade as well as regional and preferential settings is being converted into the spread of dangerous trade barriers and undermining the gains of trade liberalisation. Again, standards in trade provide another example of how the relevant international organisations must urgently work to promote coherence and cooperation in the name of effective global governance.

VI. Key Challenges for a WTO Role in Global Governance

The debate on key trade related global issues and the search for global solutions to them presents the WTO and global governance with an enormous challenge because these are not problems that can be resolved in isolation. The WTO must adapt and respond to some challenges in particular: the limits of the decision-making process of the WTO, the limits of its Dispute Settlement Mechanism, the participation of civil society in the WTO, and the interface between the WTO and other international organisations.

1. The Decision-Making Process

The WTO is a negotiating machine. Its most important function is to negotiate rules for trade and for trade related issues. Negotiation rounds, bargaining and a balancing of costs and gains are essential features of the organisation. Unlike other institutions, such as the IMF or the WB, there are no grants, credits or loans available to enforce objectives. The success of the WTO depends on member consensus so that no member opposes a decision either because it agrees with it or because it decides not to oppose, in exchange for gain elsewhere. This system was instituted with GATT, is a key feature of the WTO, and has been successful because the economic power of different members is balanced. Voting by special majorities is provided for by the Marrakech Agreement (Article IX) but is rarely used.

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[18] WTO, 2005, World Trade Report, Trade, Standards and the WTO

However, negotiation fatigue has set in after eight rounds of negotiations, the increasing number of members and the complexities of the trade agenda, the difficulties with the implementation of existing agreements, overburden of panels, and complex accession and trade policy review processes. The feeling is that it can be impossible to succeed with the new round. This raises the question of whether the WTO decision-making process is out-dated and needs modification. Key concerns about the WTO decision-making system can be summarised thus: member blockage of the decision process both in systemic measures or fundamental changes but also in procedural or adaptation measures; the challenge of variable geometry in an organisation with members at very different levels of economic development and with very different needs; the necessity to address the needs of least developed countries and to bring them into the organisation with less commitments, special treatment and technical assistance; the possible paralysis of the system with the negotiations of the new or more detailed trade issues present in regional agreements or other regional institutions; and the progressive use of the DSM to modify unclear measures, which means that negotiation is being replaced by a juridical process. These questions are related to the WTO decision-making process and its limits as a negotiating machine. They are also increasing the complexities of negotiations and undermining the multilateral system.

New proposals to solve some of these problems were advanced by the Report of the Consultative Board to the Director-General of the WTO, established in 2004 to address institutional challenges in the new millennium. Its main recommendation is that the consensus based decision-making process should be maintained but reformed. Some key suggestions are that: (i) members should distinguish more clearly between systemic and procedural issues when assessing the consensual decision-making process; (ii) the General Council should adopt a declaration to the effect that when a member considers blocking a measure that is otherwise broadly supported, it should declare its intention in writing and state its reasons, which must be of 'vital interest' to it; (iii) re-examine the plurilateral approach to WTO negotiations and the possibility of members who wish to advance more than others use it; (iv) adopt the GATS approach of positive lists to develop new disciplines in certain circumstances; (v) and that new agreements should include contractual rights, including funding for technical assistance to DgCs. [19]

Another important concern is that while the WTO is a member driven organisation, its decision-making process is considered inefficient. Delegates living in Geneva depend heavily on instructions from capitals to advance with negotiations. Negotiations are becoming so complex that only ministers can reach agreement even on technical matters. The practice of holding mini-ministerial meetings is becoming increasingly necessary (and frequent) to push ahead with negotiations. Ministerial conferences are becoming overloaded because the agendas are lengthy and more complex. Members are relying less on the Secretariat to help them to seek guidance and achieve results. In comparison with the last round, there are some new ideas: ministers are holding mini-ministerial meetings outside Geneva, and high officials are coming more frequently to Geneva. The criticized practice of green-room meetings, to which only a very small number of members is invited to participate, is being replaced by small bilateral groups and open-ended consultations with the chairs of the negotiating groups. But this is considered insufficient. To pursue reform further the Consultative Board proposes the institutionalisation of some of these practices and the adoption of other new ones, including: (i) holding ministerial conferences on a annual basis; (ii) holding a summit of world leaders every five years; (iii) establishing a partly rotating consultation body of senior officials; (iv) increasing the presence and power of the Director-General and the Secretariat in negotiations; (v) the General Council spelling out clearly the power and duties of the

[19] Sutherland Report, 2004, pp. 61-68.

Director-General; (vi) and encouraging members and the Secretariat to produce greater intellectual output to contribute more effectively to public debate on trade policy matters.[20]

The Consultative Board initiated the debate on the WTO decision-making process when it presented its recommendations to the General Council in 2005. The Doha Round negotiations provide a good opportunity for members to adopt some of these recommendations on an experimental basis. It is important to note that whatever the acknowledged problems, the decision was to maintain the consensus based system.

2. The Settlement of Global Disputes

The Dispute Settlement Mechanism (DSM) is one of the most important features of the WTO. Its goal is to provide security and predictability to the rule-based trade system. The previous GATT mechanism, which allowed blocking votes by dissenters, was changed in the Uruguay Round, so that a decision can only be reversed by consensus. The DSM consists of panels of experts and a legal review by an Appellate Body. It is administered by the Dispute Settlement Body (DSB) integrated by all WTO members.

To date there have been more than 300 cases under review, of which 100 have reached the phase of adopted reports. Around 70 cases were appealed and reached the final report stage. Many cases have been settled by the members themselves. DSB reports constitute jurisprudence and are used as precedents in new cases. The participation of DgCs is increasing and the adoption of reports by DCs shows how the mechanism is powerful. There are some cases of non-compliance by loosing parties, although most are among DCs (mainly the US and the EC) and concern issues at the fringes of WTO rules, such as financial engineering (subsidies), environmental measures (species protection), and sanitary and phitosanitary measures (hormones, genetically modified organisms).

The DSB is a central element of the multilateral system, and serves to preserve the rights and obligations of members under the covered agreements, as well as to clarify existing provisions in accordance with the customary rules of interpretation of public international law. DSB recommendations and rulings cannot add to or diminish the rights and obligations in agreements and cannot nullify or impair benefits accruing to any member under the agreements, nor impede the attainment of any of the aims of those agreements (Article 3 of the DSU). Panels must objectively assess the matter before them, including the facts of the case, the applicability of and conformity with relevant agreements (Article 9). Panels have the right to seek information and technical advice from any individual or body they deem appropriate (Article 12). When recommendations and rulings are not implemented within a reasonable period of time (15 months), compensation or the suspension of concessions (raised tariffs) or other measures (non-protection of intellectual rights) can be pursued (Article 22).

Members are presently reviewing some of these rules, and considering, among other things, the establishment of a roster of panellists rather than nomination by members and the Secretariat, the creation of a remand authority to allow the Appellate Body to send a case back to a panel, allowing third parties to participate in all phases of the process, and allowing civil society and non-governmental entities to participate through *amicus briefings* and public hearings or via the presence of civil society groups in panels and appeal sessions. There are also concerns being raised by members and academic experts about key sensitive issues, which call for further discussions and new approaches to deal with: (i) the standard of review and deference to government decisions, or the question of the extent to which the DSB should not interfere with national policies (cases involving anti-dumping and countervailing

[20] Ibid., pp. 69-78.

measures); (ii) the use of precedent in new decisions and the fact that many members do not have a common law system; (iii) the possibility of compensating DgCs rather than going for retaliation in cases of non-compliance; (iv) the existence of a liberal bias that does not take into account DgC need for greater policy space.

Another problem is gap-filling by panellists and appellators when legal texts are unclear or non-existent. Since the system cannot refuse a case, the mechanism is interpreting the rules of agreements beyond what was originally intended by negotiators. Criticism arises because only the ministerial conferences can interpret agreements (Article XI Marrakech Agreement) and because panellists and appellators adopt the role of negotiators. The argument is that if a text is unclear is because members want it that way so that a consensus can be reached. It is up to members and not the DSM to fill in the gaps. There have been cases that have raised this problem regarding safeguards (conditions of use), regional arrangements (the adoption of measures that affect third parties), and the enabling clause (the application of non-discrimination principle to DgCs).

However, the most complex issue is the role of non-trade law in disputes and the interference of other international organisations. The question is how to interpret WTO rules in cases involving other international treaties, such those covering financial, environmental, health, social standards, and the weight they should have in DSB decisions. Some academics have argued that some human rights issues should be taken on board, and others that the WTO should become a World Economic Organisation.[21]

The Consultative Board has discussed the matter and concluded that the DSB is limited in terms of horizontal coordination. Given the nature of the WTO, it is necessary to protect both the creation and interpretation of WTO rules from undue external interference. Special care has been taken even in the agreement between the WTO and the IMF and the WB to preserve the autonomy of the panels to exercise their legal competence when interpreting WTO rules, including rules related to linkages between financial and trade matters. According to the Board, the DSM is jurisdictionally self-contained and offers no legal space for cooperation except on a case-by-case basis (the right of panels to seek outside information). The same considerations apply to law-making and standard setting. The WTO legal system is part of the international legal system but it is a *lex speciallis* that cannot be changed from the outside by other international organisations with different membership and rules.[22] The debate about the DSB is only just beginning, and the pressure to introduce all international law in its interpretation activity is growing, with intense debate between supporters and critics.

3. The Role of Civil Society

Globalisation and free access to information awakens civil society and its participation in global issues – all key features of the modern world. Students, academics, trade unionists, intellectuals, and members of a variety of social movements are debating existing global problems, ways to solve them and demanding a more participatory, democratic and transparent system of global governance on the grounds that problems can only be solved by governments and non-governmental actors acting together. The great mobilising capacity of non-governmental actors is increasingly forcing the public to focus on global problems, particularly the relationship of trade, economic development, environmental degradation, social crises, poverty and human rights. The number of NGOs that gains press

[21] Cottier, 2002 and Guzmán, 2004 respectively.
[22] Sutherland Report, 2004, pp. 38-39.

coverage and participate in international conferences is increasing, and they not only criticize international organisations but also want to influence their activity.

The WTO dialogue with NGOs is a sensitive issue. Some WTO members say that the organisation is intergovernmental and that governments should develop relationships with NGOs; others say that the WTO must allow more NGO participation because of their increasing role in social crises, environmental disasters, during famine and in public health crises. NGOs are the major critics of the single focus of the WTO on trade liberalisation to the detriment of work to mitigate the social consequences of liberalisation. Some NGOs are also playing economic or social advisory or technical assistance roles to DgCs because of the growing complexities of trade negotiations, and elaborating proposals in defence of their interests. NGOs not only defend DgCs, but also play the role of delegates for some governments in ministerial meetings. This raises questions like who funds these NGOs, who participates in their boards, what interests they defend, and what are their real objectives may be. Further, while the number of NGOs from DCs is increasing, their DgC counterparts have only just begun to emerge, and those from the poorest DgCs are almost non-existent.

The WTO has done much to address this complex situation in recent years. One of the most important initiatives was to increase external transparency by making documents available to the public on the WTO site, with accompanying explanatory material. Attentive reader can now follows the regular activities of the organisation and the activities of all negotiating bodies in the new round. Several conferences are being organized by the Secretariat to discuss issues of concern for NGOs, and many of them are attending the plenary sessions of ministerial conferences. There are about 800 NGOs that are in permanent contact with the Secretariat.

The Marrakech Agreement authorizes the WTO General Council to make appropriate arrangements for consultation and cooperation with NGOs concerned with WTO matters (Article V). The question is how to accredit and select candidates, and there is an increasing concern with the legitimacy, representation, and accountability of these candidates. There is intense debate about how to increase NGOs participation in WTO activities beyond participation in ministerial plenary sessions. Some members defend the attendance of NGOs in panels and through *amicus briefings*, as well as the transmission by internal TV of panels, trade policy reviews, and sessions of the General Council. Other members oppose these proposals and argue that NGO participation in decision-making processes is incompatible with the intergovernmental nature of the organisation, and that trade negotiations require a certain degree of confidentiality if compromise solution are to be found.

The Report of the Consultative Board has made some recommendations, notably: (i) that the primary responsibility for engaging civil society in trade policy matters rests with the members; (ii) that members should develop a set of clear objectives for the relationship between the Secretariat, civil society and the public at large; (iii) that the Secretariat should be under no obligation to engage with groups whose objective is to undermine or destroy the WTO; (iv) that special effort should be made to assist local civil society in trade issues in DgCs; (v) and that the administrative capacity and financial resources of the Secretariat need to be scaled up to deal with these new demands.[23] The debate on NGOs participation is far from consensual. Given the increasing need for global solutions to global problems, the interest of NGOs in WTO activities will continue to rise. Much had been done to address their concerns, but some of the new proposals might be adopted on an experimental basis to further improve relations between WTO and civil society.

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[23] Ibid., pp. 47-48.

4. Interaction with other International Organisations

The WTO is not alone in the international system and nor can it act independently of the global context. Globalisation has led to an increase in the number of international organisations and the interdependence of economic, social, and political policies means that these organisations have to coordinate their work and seek inter-institutional coherence. The Marrakech Agreement provides the legal basis for WTO cooperation with other international organisations. It gave the General Council the mandate to make appropriate arrangements for effective cooperation with such institutions (Articles II, III, V, and VIII). Further, many agreements include special provisions for relations between the WTO and such organisations.

The WTO grants international organisations observer status at many WTO body meetings, so that these can enhance the performance of the WTO. Observer status is not automatic and differs in accordance with the responsibilities and functions of WTO bodies. The list of participants is impressive and includes the WB, the IMF, UNCTAD, the WIPO, the OIE, the WCO, the ILO, the ITU and several MEAs. There are also special funds to financially support DgC technical assistance and capacity building, the most important of which is the Integrated Framework, involving the WTO, the WB, the IMF, UNCTAD, the ITC, with the UNDP tasked with the coordination of the work of these institutions and agencies in trade related initiatives.

Despite positive developments, coordination and coherence is still some way off. There is a problem with the selection of organisations that can attend meetings as the process has been politicized and the US is blocking some regional bodies representing Arabic or Islamic countries. A second concern is the effective participation of these organisations, since they are invited only to formal and not informal meetings where real discussions occur (particularly in the Doha Round). Finally, there is the impact of the decisions of other international organisation on WTO rules. As regards the first two problems, it is necessary to negotiate rules about outside contributions to WTO activities to solve the question of the participation of international and regional organisations in the WTO. Because many of these organisations help the WTO to understand the proposals under debate, they should also attend informal meetings. As regards the last problem, the Consultative Board has debated the limit on WTO cooperation with the IMF and the WB. The WTO was created as a *sui generis* organisation and as such cannot subordinate itself to IMF or WB policies; rather it should insert its agenda into that of the latter two organisations through horizontal cooperation. Conditionalities imposed by the IMF or WB should be supportive and consistent with WTO obligations, since they can be challenged in accordance with the DSU.[24]

Although the debate has evolved, the participation of international organisations must increase and be made more effective. Only through discussions of the main problems involving all interested parties can the work of these organisations contribute to resolve global problems. Only a complete understanding of the varied and disparate concerns of such organisations can negotiated solutions be achieved. Cooperation and coherence requires concrete action.

VII. From the Identification of Global Issues to a Search for Solutions

Almost all activities in the modern world are interconnected as a result of the process of globalisation based on information technologies, a global production system, and the liberalisation of trade, investments and financial capital flows. This also favours the growing interdependence of economic and social systems. The results of globalisation as shown by

[24] Ibid, pp. 38-39.

various improving economic indictors are positive, but negative results are also spreading as shown by the exclusion of many countries from the mainstream of development, increasing levels of poverty and negative impacts on the environment. It appears that globalisation is generating an unbalanced result and affecting countries and peoples in different ways. It is also creating 'global problems' that call for cooperative and coherent action. These problems are not the result of globalisation as such, but of inefficient global governance and the insufficiencies of the international organisations in charge of global governance.

The ILO World Commission that analyzed the social dimension of globalisation reached an important conclusion: global markets have grown rapidly without the parallel development of economic institutions that can ensure their smooth and equitable functioning. It also points to the failure of current international policies to respond adequately to the challenges posed by globalisation, and concludes that global governance is not a lofty, disembodied notion, but the apex of a web of governance that stretches from the local level upward, and that the behaviour of nations as global actors is the essential determinant of the quality of global governance. The commitment of nations to multilateralism, universal values and common goals are vitally conditioning the quality of global governance. The Commission states that the implementation international economic and social policy reform of the kinds it recommends require worldwide political support, the commitment of key global actors and the strengthening of global institutions. It considers that the UN multilateral system constitutes the core of global governance and is already equipped to spearhead the reform process. And it also proposes a new operational tool to upgrade the quality of coordination between international organisations on issues where mandates intersect and policies interact. This new proposed tool is the organisation of several Policy Coherence Initiatives among international organisations and a UN Globalisation Policy Forum that will issue periodic Reports on the State of Globalisation.[25]

The WTO has an important role to play in this context. Its focus on trade liberalisation through rules negotiated among members and its DSM makes the WTO a core global governance international organisation. The main trade related global problems have long been debated within the organisation and the links between trade and development are now at the heart of the organisation. It is agreed that trade is not the only factor contributing to development, which depends of issues that are under the aegis of other international organisations such as the IMF and the WB, as well as credit and investment from the international financial system. Global investment and competition have also been debated, although members opted to exclude them from the WTO. The question remains about the best place to deal with them, and how to address them as it is agreed that the gains of trade can be undermined by anti-competitive behaviour and investment discrimination. Other global issues included in the new round mandate such as environment, TRIPs and health and bio-diversity also raise questions. The DSM is paving the way for combining trade and environmental protection. The issue of trade and standards is evolving in the regular bodies of the WTO and periodic reviews are included in the respective TBT and SPS Agreements. DSM decisions are also helping to generate a better understanding of these new rules. Meanwhile, given member dissent, trade and labour standards issues have remained under the aegis of the ILO.

The different approaches to all these global issues in the WTO are the result of the debate between opposing interests of DCs and DgCs. When multilateral solutions are not possible, DCs take them to the regional level, and including them in regional agreements. This is the case with the environment, labour standards, investment and competition. The different solutions offered by myriad regional agreements to these issues are generating

[25] World Commission Report, 2004, pp. xii-xiv.

inconsistencies that only a multilateral solution can overcome. They are certain to come back to the DSB or the WTO in the future. However, all these relevant global problems cannot be solved by the WTO alone. They involve trade-related concerns that are being dealt by other international organisations. But because they are interconnected problems, only a negotiation among representatives of members of all related organisations and a constant dialogue among them can create the conditions for global agreements.

The WTO is considered a successful international organisation, but some in house problems need to be resolved for it to face current global challenges. First, it must reform the decision-making process of its negotiating machine. Some members want a qualified majority system by trade volume akin to that of other international organisations, while others refuse to abandon the principle of consensus. The mini-ministerial method that allow for more frequent meetings at the high official level, and the multiplication of smaller meetings with representatives of different interest groups may accelerate the negotiation process, but a better solutions must be debated and found.

Second, experts are intensely debating the DSM, with some calling for the introduction of all international law into the interpretation of the trade rules (including human rights, international security and even provisions of treaties negotiated by other international organisations on health, the environment, labour, and other international matters), and to transform the DSB into a World Economic Organisation. Other experts argue that dispute settlement should be based solely on negotiated trade rules, defending that the expansion of the scope of the WTO will lead to its failure as panels are blocked and implementation postponed indefinitely. A better understanding of the costs and benefits of each approach is necessary before there can be agreement.

Third, it is necessary to negotiate clear rules for the participation of civil society. NGO reports on the subject, particularly when sponsored by members, can add a new dimension to debates in panels and meetings. Controlled digital transmission of some meetings to some NGOs and academics (including the trade policy reviews) may be worthwhile. But again, we need a better understanding of what is happening inside the WTO for such initiative to bear fruit.

Fourth and finally, the relationship between the WTO and other international organisations is a problem. Several such organisations participate in WTO activities but many others with an interest in the negotiations do not because of opposition of sometimes a single member. Politicisation does not help the organisation achieve one of its main goals – spreading knowledge and understanding about trade rules, a task to which other international organisations can contribute. The next step should be to allow all such organisations to participate in all formal and informal WTO meetings to help DgCs understand what is being negotiated.

The debate has begun and it will be essential to work towards a negotiated solution to all these challenges to ensure the survival of the organisation as a key global governance actor. The proposal of the World Commission on the Social Dimension of Globalisation is worth remembering in this context. Only constant dialogue about the various dimensions of globalisation can lead to solutions to the main global problems we face. Only constant cooperation and a search for inter-organisational coherence can bring about viable solutions. It is urgent to get on with this immense task if nations and societies are to solve current global problems before new ones appear on the horizon.

VIII. The EC and MERCOSUL in the Debate: How to Move Forward

The EC and the MERCOSUL differ in the debate on global governance and trade-related issues because they include countries at different level of development and because each has different interests in the multilateral and regional arenas.

As regards trade and development, the MERCOSUL wants a round that includes development and substantial gains in market access for agriculture and traditional goods such as textiles and footwear. It wants a phasing-out of agricultural export subsidies and a substantial reduction in domestic supports. It also favours the negotiation on all implementation issues and more effective differentiated treatment for DgCs. The EC also wants a development round but the agriculture issue impedes greater progress. Concerning implementation and S&D, the position of the EC is that it accepts special treatment for DgCs but only if further differentiation is made between them. The EC wants a 'free for all round' for the poorer, and a graduated round for the more developed DgCs. This position is unacceptable to the MERCOSUL, which refuses any differentiation among DgCs. Progress will depend on finding a good trade-off: concessions in agriculture in exchange for market access on goods and services. Another regional level trade-off is possible. Development is a core issue in all trade negotiations, and the debate will continue in future rounds, with the two partners playing an important role in the search for a negotiated solution.

The EU was the first *demandeur* regarding trade and investment and trade and competition in the Doha Round and the MERCOSUL has actively participated in the debates. It was the Asian DgCs that fought against the inclusion of these issues. The postponement of a multilateral negotiation on investment and competition is not a solution and pressure to negotiations will increase because of increasing investment flows and globalised production systems. In the absence of a multilateral negotiation, the topics will certainly be addressed in inter-regional negotiations. The most sensitive investment issue is the dispute between investors and host country, and the expansion of TRIM-type prohibitions; Competition requires an agreement for a cooperative approach among investigating authorities. In is unclear for both parties how to make compatible the clauses they are negotiating in different regional agreements. A multilateral debate will be needed here. These two issues show how the EC and the MERCOSUL can cooperate on global governance issues.

The EC has been a *demandeur* where trade and the environment are concerned for some time. It wanted to include the topic in the Doha Round and in preferential agreements. The MERCOSUL has participated in debates about the environmental trade measures and MEAs and is interested in environmental goods, but there are disagreements over labelling, the definition of terms (who should decide?), and environmental measures in PPMs. The concern of the MERCOSUL is that these measures may be used as trade barriers and discriminate against export from DgCs. Despite the differences, the area is so complex and the interests so diversified that there is scope for significant cooperation. The relationship between trade and the environment is certainly one of the most urgent issues posed by globalisation and an urgent solution is required from a global governance perspective.

The EC has called for trade and labour standards to be included in a multilateral agreement and, opposition from DgCs notwithstanding, it wants the ILO to deal with the issue. It has also attempted to include such concerns in preferential and regional negotiations. The MERCOSUL, by contrast, worries about disguised trade barriers and also about who will be responsible for the investigation of abuses. The accession of China to the WTO may shift the parameters of the debate, given the aggressive expansion of Chinese exports, mainly textiles and footwear, and work conditions in that country.

The EC and the MERCOSUL are in opposition over TRIPs and health and TRIPs and bio-diversity. While the EC wants protected medical patents and only reluctantly accepted the Declaration on TRIPs and Public Health, it also and argues that there is no contradiction between TRIPs and the Convention on Bio-diversity. The MERCOSUL not only stands by the Declaration but also wants compulsory licensing to produce medication for HIV/AIDS and other public health threats, and further wants a new kind of protection to prevent bio-piracy (a particular interest for Brazil).

Trade and standards offer significant scope for cooperation. The MERCOSUL is deeply interested in standards for industry and in sanitary and phytosanitary measures. Given the difficulties of participating in the ever growing number of committees in standard-setting organisations, the MERCOSUL may benefit from cooperation in this area. The MERCOSUL interest in exploring the food market in a context of increased demand for quality and safety means allows partners to analyze the possibility of negotiating a new set of mutual recognition agreements.

To conclude, the debate about global issues and the need for global governance can open a new area of cooperation between the MERCOSUL and the EC. Although bilateral negotiations for agreements on these issues are possible, both parties are aware that bilateral solutions are only temporary. The spread of bilateral and regional solutions will only exacerbate conflicts and inconsistencies and a multilateral approach is therefore necessary. The WTO is the place to negotiate a multilateral solution for all trade related global challenges.

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