THE FUTURE OF THE WTO

Addressing institutional challenges in the new millennium

Report by the Consultative Board to the Director-General Supachai Panitchpakdi

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WORLD TRADE ORGANIZATION

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Any citation of this Report should ascribe authorship to the Consultative Board.

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FOREWORD

A year and a half ago, in June 2003, I sought the help of the eight eminent persons who are the joint authors of this Report to help me start a process of reflection. Each of them have had distinguished careers in government, academia, business, trade and economic policy-making. Their task was to look at the state of the World Trade Organization as an institution, to study and clarify the institutional challenges that the system faced and to consider how the WTO could be reinforced and equipped to meet them. They have all generously contributed their time and expertise to this task on a personal basis and I am deeply indebted to them.

Some of you may recall an earlier exercise in 1983 when the then Director-General Arthur Dunkel established a panel of seven distinguished persons to report on the problems facing the international trading system. The "Leutwiler report", as it came to be known, made 15 recommendations to support a more open multilateral trading system as a counter-measure to the crisis prevailing in the trading system at that time. It was written with the aim of breaking the log-jam in the launch of the Uruguay Round and it sought to influence the negotiating agenda.

The task that I set the members of my Consultative Board shared a similar aim in so far as it sought to reinforce the multilateral trading system, but in another sense it was fundamentally different in character. This Report is not about the Doha Development Agenda. The essential purpose of this Report is to examine the functioning of the institution - the WTO - and to consider how well equipped it is to carry the weight of future responsibilities and demands. Certainly, the conclusion of the current trade round will have implications for the future functioning of the organization but the reflection that this Report is intended to launch should go beyond the Doha Development Agenda.

The origins of this initiative date to well before I assumed the post of Director-General. With the conclusion of the Uruguay Round, the multilateral trading system broadened and deepened its agenda to take account of new realities in international economic relations. The GATT was reincarnated as a fully fledged international organization, the WTO. This new organization became a symbol of the emergence of a more global economic system. Trade was widely regarded as a key catalyst for future growth and prosperity. Those were, rightly, euphoric moments. Yet, even then, it was my sense that there had been too little serious thinking on whether the institutional design and practice that had served the GATT so well would do the same for the WTO.

The WTO was now a major player not only in the conduct of trade relations but in global governance. Partly due to its success, the institution was subject to an array of sometimes conflicting pressures and expectations, internally as well as externally. It was increasingly evident to me, as it was to others, that it was time to look at the working mechanisms of the WTO to see whether or not there was room for improvement.

The failure to launch a new round of negotiations at the Ministerial Conference in Seattle and the later setback at the midway point of the Doha Development Agenda negotiations in Cancún raised for some serious questions about the future of the WTO. Were we starting to see cracks in the structure of the institution? Could the WTO with an enlarged membership at various levels of development continue to deliver results?

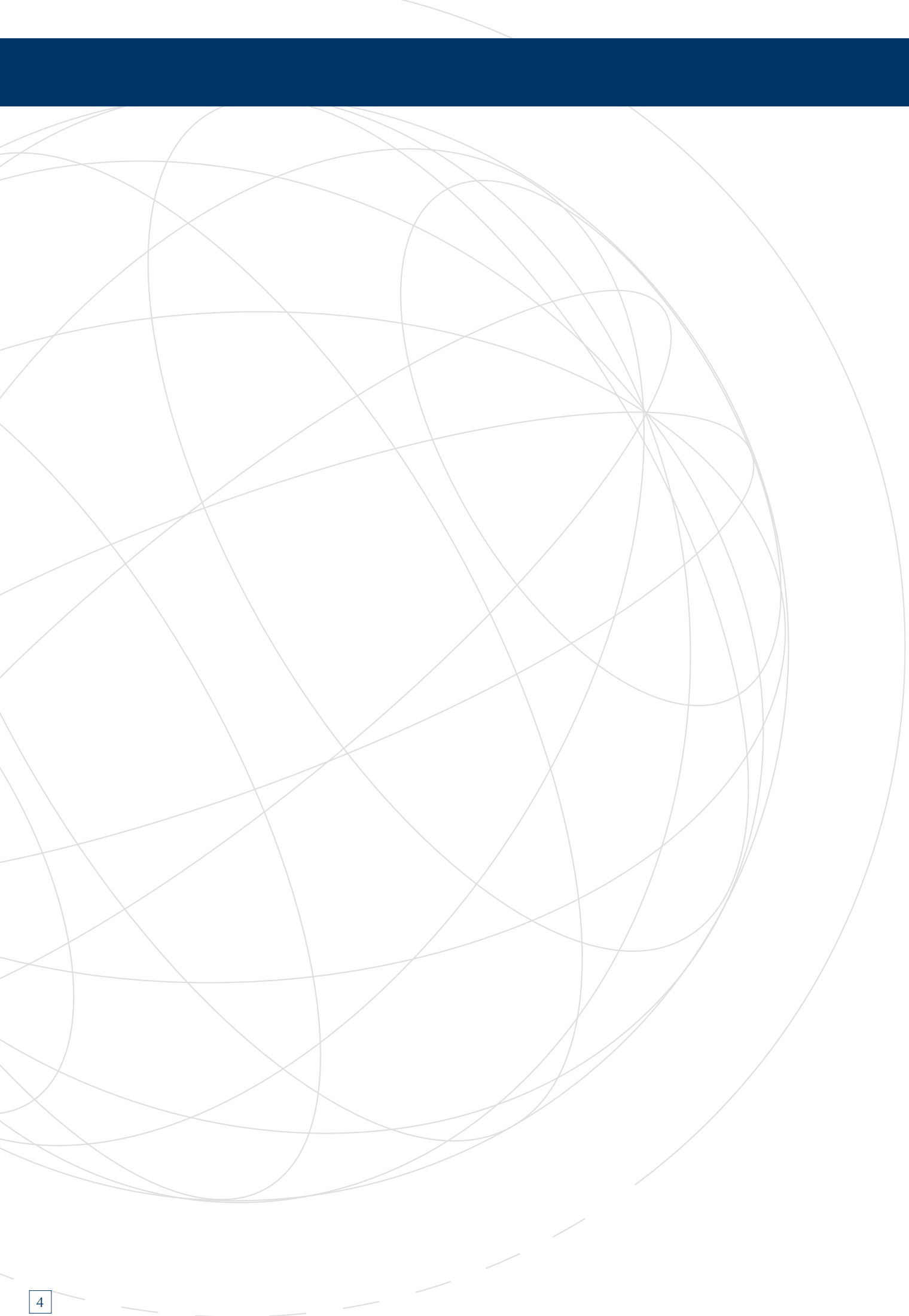
Every Ministerial Conference is encumbered with expectations and every setback is subject to serious scrutiny. Seattle and Cancún, even though setbacks of varying magnitude, were no exceptions. There is often a tendency in coming

to grips with disappointment to lay responsibility on perceived procedural and institutional inadequacies. Whether or not this is justified is a matter for debate. We should not lose sight of the fact that Seattle and Cancún were separated by the success of the Doha Ministerial Conference. In retrospect, one could even view Cancún as an important turning point in the negotiations with the undoubted progress which was made there in several areas and the more assertive role played by developing countries. Events since have also proven the resilience of the institution and its ability to continue to deliver results. But we should not underestimate the growing pressures on the institution or ignore the lessons of history. There is undoubtedly a need for serious reflection on how to improve our functioning while safeguarding the strengths of this institution. It was in this spirit that I asked the members of my Consultative Board to undertake this work and they have responded to this challenge in full measure.

The Report stands on its own and it needs no further introduction on my part. Let me just say, lest it should be misconceived, that it is not academic analysis nor does it pretend to provide all the answers. What it does is to take a careful look at the issues that, in the opinion of the authors, must be considered and acted upon to secure the continued and effective realization of the objectives of this organization. Some may see the centrepiece to be the set of recommendations, but to focus solely on these proposals is to do the Report a major disservice. This is a work of deep reflection and there is much in it that diagnoses the origin and state of the fundamental tensions that the institution faces. Understanding these tensions is an important part of the answer the Consultative Board has given in this Report.

It is especially appropriate that this Report is issued in early 2005. This year marks the 10th anniversary of the WTO. It is a time for celebration but it is also a time for reflection and renewed commitment. It is in this spirit of reflection that I hope this Report will be read. I look forward to the dialogue it is meant to generate on the options available to reinforce this vitally important institution for the future.

Supachai Panitchpakdi
Director-General



PREFACE

When the Director-General of the World Trade Organization, Dr. Supachai Panitchpakdi, asked me to chair a Consultative Board to prepare a report on the future of the organization he assured me of the independence of our group in this task and he has strictly observed this assurance. So the responsibility for this Report is ours and ours alone! Additionally, he made it clear that we were not being asked to comment on the Doha Development Round but on the long-term future of the WTO.

I have been more than fortunate in the choices made in the selection of the Board members; collectively they bring great experience and exceptional expertise to the task that we have undertaken. Although sometimes our perspectives have diverged and everyone may not agree with every word in the Report, the differences have never been substantial nor divisive and we all find ourselves able to endorse this Report without a minority dissent on any issue. We have been motivated by a common conviction that the WTO in its creation and substance is one of the greatest achievements in multilateralism and stands as testimony to the capacity of the world community of nations to undertake substantial obligations and legal responsibilities that foster interdependence.

It is clear that, for the first time in history, the world can embrace a rules-based system for economic coexistence, the essential principles of which are generally agreed. Even the inspired period of institution building that followed the Second World War did not result in such a truly common endeavour. No longer divided by the Iron Curtain, or any other fundamental ideological difference, in economic matters at least, a large community of WTO Members has given practical expression to an understanding that institutions of a multilateral character have an indispensable role in maintaining this unique cohesion. In the past, noble experiments in multilateralism have not always been sustained or developed as their founding fathers intended; but this time it is our conviction that we can truly aspire to creating and sustaining a depth of connection in economic affairs under a rules-based system. It will be increasingly apparent that to undo or resile from this system will carry a significant price. However this provides only a limited assurance about the future at a time of intense challenge and competition between states. Institutions can fail too through neglect.

So globalization has created both the opportunity and the challenge. The intensification of competition in trade matters broadly defined is both inevitable and is evidenced by new and positive dynamics for growth. The institution that in significant respects protects this potential is not by any means fully equipped for its tasks. There is a real need for institutional reforms to, and increased support for, the WTO.

Our Report follows two tracks. One is practical and focused on institutional improvements. The other - not unrelated to the first - revisits some of the fundamental principles of the trading system that, in our view, have been greatly misunderstood or misrepresented.

We have tried to propose realizable reforms rather than more substantial changes that could not, in our view, have commanded the degree of support necessary for them to be effected. We believe that what we propose are important changes and that the issues we explore require serious consideration leading to changes in approach, attitude and practice. We do not contend that our conclusions are the only ones that might be reached but we hope that we can stimulate a constructive debate.

I would like to thank Hoe Lim and Katie Waters in particular from the Secretariat for the support provided by them.

Peter D. Sutherland

CONSULTATIVE BOARD

Peter Sutherland (Chairman of the Consultative Board) is Chairman of BP p.l.c. and Chairman of Goldman Sachs International. He currently serves on the Boards of Investor AB and the Royal Bank of Scotland Group plc. Prior to his current position, he served as Attorney General of Ireland, European Commissioner responsible for Competition Policy, and Director-General of GATT and then the World Trade Organization.

Jagdish Bhagwati is University Professor at Columbia University and Senior Fellow in International Economics at the Council on Foreign Relations. He has been Economic Policy Adviser to the Director-General of GATT, and Special Adviser to the UN on Globalization. He has been honoured with many honorary degrees and prizes, including the Freedom Prize which he shared with Sir Leon Brittan. His latest book, "In Defense of Globalization", was published in March 2004.

Kwesi Botchwey, currently Executive Chairman of the African Development Policy Ownership Initiative (ADPOI), was Minister of Finance of Ghana for 13 years. He joined the Harvard Institute for International Development (HIID) in 1996 and, later, Harvard's Center for International Development (CID). He has served on a number of distinguished panels, including the chairmanship of the Commonwealth Expert Group on Good Governance and the Elimination of Corruption in Economic Management, and the Panel of Eminent Personalities on the Independent Evaluation of the UN New Agenda for the Development of Africa in the 1990s (UN-NADAF).

Niall FitzGerald is Chairman of Reuters. Previously, he was Joint Chairman and CEO of Unilever. He also serves as President of the Advertising Association, Chairman of the Conference Board, co-Chairman of the Transatlantic Business Dialogue (TABD), member of the Foundation Board of the World Economic Forum, member of the International Advisory Board of the Council on Foreign Relations, Trustee of The Leverhulme Trust and Fellow of the Royal Society of Arts. He also serves on the U.S. Business Council and the International Business Council. He is a member of various advisory bodies, including the President of South Africa's International Investment Advisory Council and the Shanghai Mayor's International Business Leaders' Council.

Koichi Hamada moved to Yale University as Professor of Economics in 1986, after having served as Professor of Economics at the University of Tokyo. His field of research includes international economics, macroeconomics, and law and economics in Japan. He was President of the Economic and Social Research Institute (ESRI) of Japan's Cabinet Office (2001-2003). He has also served as an external evaluator of the ESAF program in the IMF.

John H. Jackson is University Professor of Law at Georgetown University Law Center, Director of the Institute of International Economic Law at GULC, and editor in chief of the Journal of International Economic Law. Previously, he has been Hessel E. Yntema Professor of Law at the University of Michigan, General Counsel of the U.S. Trade Representative's Office, and Associate Vice President of the University of Michigan. His honours include the Wolfgang Friedman Memorial Award (Columbia University) for contribution to international law; an honorary degree from Hamburg University, Germany; and delivery of the Hersch Lauterpacht lecture series at Cambridge University, England in November 2002.

Celso Lafer is a professor at the Law School of the University of São Paulo. He was the Brazilian Minister of Foreign Relations (2001-2002), and led the Brazilian Delegation to the Doha Ministerial Meeting of the WTO, that launched the Doha Development Round. From 1995 to 1998 he was the Ambassador, Permanent Representative of Brazil to the WTO, the UN and the specialized agencies in Geneva. He was the Chairman of the WTO Dispute Settlement Body in 1996, and of the WTO General Council in 1997. He was also Minister of Development, Industry and Trade in 1999 and had previously been Minister of Foreign Affairs in 1992.

Thierry de Montbrial is President and founder of the French Institute of International Relations. He has been Professor of Economics at the Ecole Polytechnique since 1974 and Professor of Economics and International Relations at the Conservatoire National des Arts et Métiers since 1995. He launched the French Ministry of Foreign Affairs' Policy Planning Staff which he headed from 1973 to 1979. He has authored several books in economics and international affairs, and is a regular columnist at Le Monde.

CHAPTER I

Globalization and the WTO - the case for liberalizing trade

1. The creation of the World Trade Organization (WTO) in 1995 was the most dramatic advance in multilateralism since the inspired period of institution building of the late 1940s. The Uruguay Round of negotiations had taken over four years to prepare and seven more years to complete. It was the most ambitious worldwide trade negotiation ever attempted. As the official history[1] of the Round suggests, it might well be viewed as the most far-reaching negotiation ever on any economic subject.

2. In the mid-1980s, when the crucial decisions were taken to launch the eighth set of multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT), few participants had envisaged the dimensions of the final agreement that they would reach, or that a new international organization would be a major part of the result.

3. At their conclusion, the negotiations involved over 120 governments and their results are contained in 26,000 pages of legal texts and national commitments. Why were so many countries prepared to take on such an extraordinary range and depth of obligations? The consensus amongst the contracting parties[2] of the GATT, at the time, was clearly that, even if there were imperfections in the finally agreed text, it was in their vital national interests to be part of a new trading system and its institutional structure, the WTO, and to commit to the contractual requirements of membership.

4. Before the Uruguay Round was launched, in November 1983, the then Director-General of the GATT Arthur Dunkel had established an expert Group under Fritz Leutwiler, Chairman of the Swiss National Bank and the Bank for International Settlements, to look at the state of the international trading system and to try to understand and provide pointers to solutions to the challenges then being faced in global commerce.

5. The task of the Leutwiler Group was different from ours but it started from a position that we share. The Group agreed that fundamental economic changes were taking place in the world and that these changes were not only inevitable but to be welcomed as a motor for economic growth and development. Open international trade was in their view a key to sustained growth. On the other hand, trade restrictions and protectionism acted only as a brake on the ability of economies to take advantage of new technology and to grow. That diagnosis was in no way controversial. If not then, it has become controversial in more recent times.

6. In fact, we believe that these conclusions are, if anything, even more pertinent and correct today. The global economy has been developing rapidly since the WTO was established and is likely to continue to do so, even if it experiences some hesitations. The essential purpose of this Report is to examine the functioning of the institution that is often placed at the centre of the debate on globalization - the WTO - and to consider how well equipped it is to meet the demands that will inevitably weigh on its future. While we appreciate the importance of the current trade round, we are required to look beyond the Doha Development Agenda.

7. It is worth noting the evolution of the acceptance of the benefits of being part of this system. When the GATT came into force on 1st January 1948 it had only 23 contracting parties - almost half of them, developing countries. The number of WTO Members has now increased to nearly 150. That enormous increase in membership demonstrates what the world community really thinks of the value of the institution and is the most eloquent riposte to its detractors. The WTO is after all the only multilateral institution created recently and explicitly for a global and wholly interdependent economy. That China is one of the most recent new Members - and is being followed by Russia, Vietnam

[1] "Reshaping the World Trading System", John Croome. Published by the World Trade Organization, 1995.
[2] Participants in the GATT (1948-1995) were known as contracting parties.

and others - only highlights that fact, and the unique and central role played by the WTO in the economic and development ambitions of its Members.

8. Since the creation of the GATT, in 1948, there have been great changes in the political and economic condition of the world; of these, the most momentous political event was the collapse of the Iron Curtain. This, along with major technological innovations, has generated almost unprecedented potential for a truly interdependent world. Globalization has become part of the lexicon of modern discourse on world affairs. The supposed flaws in the process have given rise to much popular debate - some of it well informed. It is undeniable that there are concerns and anxieties about globalization. It is not the purpose of the Report to deal with these in any detail. However, if we are to look at the potential of the WTO to develop as a major institution assisting in the process of global governance, we cannot ignore the unease with which many people associate the institution and the sometimes severe and disturbing global economic phenomenon of change.

9. It is correct to say that freer trade has been a key element in the intensification of globalization over the past few decades. This perhaps explains why some who attack globalization have equated it almost solely with the WTO. Yet other factors, such as the increased movement of capital and people have had a significant role in the process, as have technology and the lower cost of freight and passenger transportation. It is not our intention here to engage in the debate as to whether the WTO drives globalization or responds to it; the reality is probably a mixture of both.

10. **In the end, the underlying rationale of a WTO that oversees increased liberalization of trade has to be that trade is conducive to prosperity.** Plainly a WTO, dedicated to the freeing of trade among its principal objectives, would merit inclusion in an international institutional architecture that is designed to enhance the welfare of humanity only if the liberalization of trade were indeed a beneficial policy. **Hence, it is necessary to address the criticisms of freer trade that have arisen recently.**

A. GLOBALIZATION - RESPONDING TO THE CRITICS

Is open trade a threat to human rights?

11. It is argued by some that freer trade is being pursued for its own sake and, instead, should be judged in terms of its impact on the quality of human life. **In fact, the case for freeing trade is made very definitely in terms of enhancing human welfare - nowhere better than in the preamble to the Marrakesh Agreement that established the WTO.** It is true, however, that the broad objectives of opening markets to competition - and not least their impact on poverty in reducing the prices of basic consumer goods - are seldom mentioned by the proponents of such policies or negotiations. It is assumed - often wrongly - that we all understand trade is a means to an end, not an end in itself.

12. As we discuss elsewhere, the notion that trade, investment and the growth of business detracts from non-economic facets of human rights is the contrary of the truth. Generally, the marks of closed economies are lack of democracy and a free media, political repression and the absence of opportunity for individuals to improve their lives through education, innovation, honest hard work and commitment. In the end - and we accept it may take time - the exposure of governments and their citizens to an international institutional framework dedicated to openness will have its effects on much more than commerce.

Is freer trade driven by corporate interest only?

13. A common complaint is that open trade is pursued by corporations and, therefore, serves their special, not the general, interest. Yet, corporations are owned by people, employ people and pay taxes for the benefit of yet other people. Their interest is, therefore, not necessarily a special interest that is harmful to social good. Indeed, the fact that corporations are among the lobbies that push for trade does not imply that trade therefore is not conducive to human welfare. **It might better be argued that it is precisely when corporations act against open trade - a not uncommon situation - that they are attacking the widest social interests. And that is precisely when the WTO's rules act to restrain governments from acting against the wider social good.** At the same time, there is nothing about freeing trade that removes or minimizes society's right to oversee and regulate corporations. Open markets are not markets devoid of appropriate regulation; far from it.

Does trade liberalization impose "one size fits all" solutions?

14. Open trade is also condemned as a prescription that ignores the maxim that "one [shoe] size does not fit all" - that not every country is at the optimal point in its development or has the necessary capacity and resources to pursue liberal trade and economic policies. **Yet there is a fundamental decision to be made by governments on whether to go barefoot or wear shoes at all. The approach to freer trade will inevitably lead to adjustments that reflect economic and political realities, so that the shoe size will indeed vary - again, the WTO's rules reflect that reality.** However, it is for the policy-makers and governments to decide whether to head in the direction of freeing, or restricting, trade. Both theory and experience strongly suggest that the former is the better option.

Are the benefits of open trade exaggerated?

15. Some critics argue that the proponents of open trade exaggerate the good that trade liberalization will bring. Whether the gains from freer trade are "large" or "small" will, for the most part, reflect the specific circumstances of each country. Much remains in the hands of individual governments: if policies tend to shelter entrenched interests, including import-competing industries, at the expense of firms with export potential then the gains will tend to be lower. Where resources can move more freely, the gains will be greater.

16. It must be accepted, however, that the gains from trade and open trade policies may look "small" when measured against national income, as is often the case for other essentially beneficial policies. In any event, even if gains from trade are "small" and limited downsides are possible, this does not translate into a conclusion that trade will typically be harmful. **Generally, it is difficult to escape the conclusion that those countries that have chosen to make trade a pillar of economic growth have, indeed, grown more strongly and become more wealthy than those which have chosen a reliance on domestic markets behind protective walls.**

Does freer trade hit the interests of the poor?

17. One of the more serious critiques is that freer trade harms the fight against poverty. Sometimes, the argument is based on the attribution of causality where there is only unrelated sequencing. The allegation that the North American Free Trade Agreement (NAFTA) depressed Mexican wages and hence increased poverty is a good example of this fallacy. In the Mexican case, the pressure on real wages came not from trade liberalization under NAFTA, but because of the stabilization that had to be carried out as a result of the peso crisis in November 1994. In fact, the political bonds established by NAFTA led the US Treasury to extend extraordinary support to Mexico to cope with the macro-crisis. Without such support,

the effects on real wages and hence poverty in the aftermath of the crisis would have been significantly more severe.

18. But what does the evidence show more generally in regard to the link between trade and poverty reduction in the absence of any other overriding phenomenon like a dramatic financial crisis? **The proponents of a favourable link have a two-step argument: that trade promotes growth, and that growth reduces poverty. As illustrated by the work of several economists[3], the evidence for both these propositions as dominant tendencies is very strong in our post-Second World War experience.**

19. Consider the two largest countries - China and India - with a big share of the world's poor on every definition of poverty. Until the mid-1980s, these two nations pursued (for different reasons) inward-looking policies on trade and investment and turned away from exploiting the opportunity that the world economy provides for faster growth. As a consequence, they registered low growth rates of exports and hence also of income. In turn, these low growth rates failed predictably to make an impact on poverty. **While economists can produce paradoxical outcomes, it makes sense that stagnant economies cannot pull up masses of unemployed and underemployed poor into sustained, gainful employment and out of poverty.** The experiences of India and China since the mid-1980s, and the onset of economic liberalization policies, demonstrate adequately, though to different degrees, the other side of the coin.

20. Can we say something about whether inequality among nations has worsened or improved as trade and globalization have moved ahead? The analysts of convergence among nations have looked at both the general trends in international inequality, measured in alternative ways, and also at the direct association between trade and convergence of per capita incomes. As regards the former, recent expert work shows that, according to many measures, world inequality has diminished, not increased. The work of economist Sala-i-Martin[4] shows that international inequality, using several alternative measures, has declined in the last two decades.

21. So there are issues on poverty alleviation that must be faced. **Yet the basic equation seems to us to stand: trade does inspire growth and growth, to a greater or lesser degree and given time, will combat poverty.** We have to accept that the story may not always be as clear-cut for small and vulnerable economies - especially those that have become dependent on trade preferences. We shall return to this issue. But it is clear that preferences offer no long-term solution to development handicaps.

So, does trade damage the interests of the poor in developed countries?

22. But then there are critics, particularly within some labour organizations, who charge that trade is responsible for producing more poor people in the rich countries as well. The main argument is that trade with poor countries depresses the prices of labour-intensive goods such as shoes and textiles. This in turn leads to lower real wages for the unskilled workers competing in the same industries in the rich countries. The general stagnation of the real wages of unskilled workers for long periods in the last three decades has lent teeth to this hypothesis. **Yet the general consensus among researchers in this area is that technical change, not trade with poor countries, has driven the overwhelming bulk of the pressure on the unskilled.[5]**

23. Besides, while imports of manufactures from developing countries have been growing, they still constitute a small fraction of such imports into developed markets. Moreover, there is evidence that manufacturing jobs in many developed countries, regardless of their

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[3] See the extensive review of the considerable evidence in Jagdish Bhagwati, "In Defense of Globalization", Oxford University Press, 2004; Chapter 5 "Poverty: Enhanced or Diminished?".

[4] See Xavier Sala-i-Martin, "The World Distribution of Income Estimated from Individual Country Distributions", National Bureau of Economic Research Working Paper No. 8933, Cambridge, Mass., May 2002, page 31.

[5] This conclusion has been reached by many economists, including Robert Lawrence, Paul Krugman, Arvind Panagariya and Alan Krueger. Also see Bhagwati, Chapter 10, ibid. The conclusion relates to the question of absolute real wages, not to wage inequality between the skilled and the unskilled, which is generally a different issue.

trade volume and pattern, have fallen, suggesting strongly that the underlying cause is technical change in manufacturing. The real wages in many skilled occupations have also risen worldwide, also suggesting that skills-biased technical change, rather than trade, is the principal factor at play.

What about the race to the bottom?

24. The next argument is that trade with the poor countries, and outward investment from the rich countries, will produce a "race to the bottom" in labour standards. On the face of it, this fear sounds plausible, but the evidence for it is negligible. **On the contrary, there is more reason to suggest pressures for a "race to the top". These take the form of political demands from the rich countries that poor nations upgrade their standards and raise their production costs as the price for trade advantages.** That approach is supposed to subdue competition and allow firms in rich countries to avoid lowering their own standards or becoming more competitive in general. It is more than debatable whether this is a wise or effective stance. Experience suggests that eventually economic growth naturally stimulates pressure for decent wages and working conditions. Increasingly also, consumers have choices in deciding whether to purchase the products of countries known to be denying basic employment rights to their workers.

25. In any event, many cross-industry and cross-country analyses underline indirectly the robustness of labour and environmental standards to international trade and even direct equity investment.[6] They do this by showing, for example, that the choice of investment location, or even of techniques of production (whether they are environment-friendly or pollution-intensive) is sensitive, not to lack of standards or lower standards abroad, but to a host of other factors. In short, investors and importers need much more than the dubious - and probably temporary - denial of labour standards to do business.

Outsourcing - a new focus for protectionism?

26. The worry about the adverse wage effects of trade with the poor countries has now been extended to skilled and semi-skilled jobs with the recent concerns over outsourcing of services from the rich countries. In the United States there have been calls for the exclusion of developing countries such as India from government procurement contracts and the denunciation of firms that outsource. A similar outcry has been heard in some European countries.

27. Having been told that they must see manufacturing jobs go overseas but that services employment will expand as a replacement, it is not surprising that workers in industrial countries are shocked to see even relatively high-paid services tasks moved elsewhere. Of course, any expansion of a country's trade opportunities, whether in agriculture, manufactures or services, is only welfare-enhancing in the aggregate. Looking more broadly at cross-border trade in services it is apparent that the rich nations are, in fact, importing largely lower-end services such as call-answering and financial back-office services from the poor countries while they export higher-value professional services such as medical, architectural, teaching, legal and other services. The trade balance in such services remains very much in the rich countries' favour. In effect, the wealthier economies are tending to specialize, in the main, in high-wage services while importing low-wage services - as has become the case for much of the industrial sector.

28. Besides, studies show that, in the United States, the substantially reduced prices of IT hardware in the 1990s fed a big spurt in investment and technical change. This fed into the huge rise in productivity and growth of the US economy. Similar surges in income expansion

[6] Among the many such studies, see in particular Beata Smarzyska and Shang-jin Wei, "Pollution Havens and Foreign Direct Investment: Dirty Secret or Popular Myth?", World Bank Policy Research Working Paper No.2673, 2001.

due to cheaper services can also throw up associated growth of new skilled jobs. **Companies that can reduce costs in one area through outsourcing may thereby be able to invest in others and create new jobs. So, the case for protection or penalties against outsourcing lacks plausibility much as that relating to the loss of unskilled jobs in manufacturing. Long-term it would be counterproductive.**

29. We should also keep in mind just how modest this "problem" really is. When the jobs that have been outsourced are aggregated, the largest estimates in the US run between 100,000 annually for 1999-2002 to projections of 225,000 annually in the next 15 years. These must be compared against the Bureau of Labour Statistics estimates of a stock of IT-related jobs estimated at over 17 million in 2002. The outward flow of jobs in the future will be less than 1.5% of the total job stock. The picture in Europe is little different.

Can trade and environmental protection co-exist?

30. Serious criticism has also been levelled at trade liberalization on the ground that it is at odds with the objective of environmental protection. This critique has been notably pointed in Europe where agricultural protection has been defended on the ground that agriculture has multiple facets and hence cannot be liberalized on the ground of economic efficiency alone. Maintenance of the countryside and rural communities, for example, must be put alongside achievement of economic efficiency.

31. Two remarks are in order. If, for example, the countryside must be valued, then it is true that free trade, even though it maximizes or advances economic efficiency and prosperity, may damage the countryside. However, environmentalists should not assume that just because free trade may occur without an optimal environmental policy in place, the environment would suffer.

32. A 1991 GATT[7] report illustrated, with two examples, how both income and environment could improve with trade liberalization and be damaged by trade protection. One was a study of what happened in the 1970s and 1980s as a result of the imposition of voluntary export restraints (in effect, quotas) on Japanese car imports into the US to protect American manufacturers. To maximize benefits from a now limited market, Japanese producers moved to exporting larger, high-priced, gas-guzzlers because they carried more profit per unit. So, protection damaged economic efficiency, increased petrol consumption and exacerbated pollution. Another study showed that agricultural liberalization would both enhance efficiency and reduce environmental damage from pesticide use as production shifted from pesticide-intensive European farming habits to suppliers using environment-friendly techniques.

33. **It is old wisdom in many cultures that you cannot kill two birds with one stone. Modern commercial policy theory today also argues persuasively that if there are two objectives, income and the environment, then generally two policies will help governments attain them both to the best advantage. So, the correct policy solution is to fix the environment through an appropriate environmental policy and to maintain open trade to maximize the gains from trade and hence economic prosperity.** This is one rationale for the "delinking" of domestic support for farmers from agricultural production. The most recent reform of the Common Agricultural Policy (CAP) of the European Union (EU) allows for farmers' incomes to be supported from public funds, for the countryside to be maintained and protected while, at the same time, ensuring that the support so given distorts international trade less than under previous arrangements.

[7] International Trade 1990-1991, GATT publication, 1992.

B. FROM GLOBALIZATION TO A FULLY-EFFECTIVE WTO

Avoiding the mistakes of the past

34. The inception of the WTO reflected a recognition by the overwhelming majority of states that exist today that the process of trade liberalization and increasing economic interdependence required an institutional and constitutional base going beyond that provided imperfectly by the GATT. This was particularly necessary because the Uruguay Round had greatly expanded the ambit of traditional trade negotiations into new and sensitive areas of domestic economic policy-making.

35. The GATT had been created, in significant respects, as a consequence of a recognition that previous attempts at liberalizing trade and opening markets had not been sustained. What had been lacking was an effective rules-based system to maintain the value of tariff concessions. Rapid tariff increases, unimpeded by multilateral obligations, had been the response to market penetration from imports into developed countries, largely from developing ones, during the period between 1860 and 1914.

36. More pertinent for those who sought to construct a new world order after 1945, had been the experience between the two World Wars. The 1930 passage of the "Smoot-Hawley" Tariff Act in the United States effectively closed the world's biggest market. That provoked widespread protectionist reactions elsewhere and competitive currency devaluations on top of tariff hikes. The economic recession of the late 1920s was turned into the Great Depression. It is generally accepted that the experience was a contributing factor for the Second World War and took 20 years to put right.

37. The multilateral trading system has developed continually since 1948. The GATT itself was amended and supplemented progressively. However, it took a complete restructuring, through the Uruguay Round, to make the system truly relevant to the latter part of the twentieth century and the beginning of the twenty-first. By providing a rules-based system, with an effective adjudicating process for disputes, the WTO has allowed states to enter binding and durable commitments in the economic sphere because of the overall benefit of the reciprocal rights and opportunities afforded them.

38. Paradoxically, in a global economy that may sometimes appear out of the control of individual government actions the acceptance of global rules has had the effect of enhancing rather than reducing the real freedom of action of WTO Members. It has also provided positive evidence that multilateralism can enhance security and progress and reduce political conflict - often, itself, fundamentally a reflection of contrasting commercial interests. It is worth recalling that fundamental purpose of the system. As Montesquieu put it: "Peace is the natural effect of trade".

39. **It is important to grasp the central role of the WTO's rules. Neither the WTO nor the GATT was ever an unrestrained free trade charter. In fact, both were and are intended to provide a structured and functionally effective way to harness the value of open trade to principle and fairness.** In so doing they offer the security and predictability of market access advantages that are sought by traders and investors. But the rules provide checks and balances including mechanisms that reflect political realism as well as free trade doctrine. It is not that the WTO disallows market protection, only that it sets some strict disciplines under which governments may choose to respond to special interests.

40. The WTO provides a level playing field with a credible referee dealing even-handedly with the players. It is a playing field on which

only governments participate in the game. Business and other interest groups have the right to seek to influence the players - but only governments play. That is another aspect of fairness. It is difficult to conceive of a different system that in its essence could be fairer or provide a more level playing field.

Trade liberalization sometimes needs safety nets

41. That freer trade is desirable is a sound prescription and the WTO, building on an impressive record of the GATT, need make no apology for overseeing the liberalization of trade. But this does not mean that having opened their markets governments can sit back while prosperity ensues. Newly open economies invariably face adjustment problems. Import-competing industries may lay off workers. The social strains on individual communities can be intense.

42. It is true that the WTO's Safeguards Agreement allows governments, under some very stringent conditions, to put in place time-limited protective measures where particular imports have led to disruption that cannot be managed politically. However, **such situations require the provision of adjustment assistance to facilitate the acceptance of liberal trade. Without it the benefits of trade liberalization may be renounced and policies reversed.** Unfortunately, while WTO addresses orderly withdrawal of trade concessions, it says practically nothing, even by way of exhortations, to WTO Members and to aid-giving institutions, on adjustment assistance.

43. For over forty years, the US has had adjustment assistance programmes that have been continually revised with virtually every major piece of trade legislation. The European Union (EU) has its regional development aid and individual member states have their own social security safety nets. Whether such programmes are efficient or are implemented effectively, are matters over which there has been continuing debate and experimentation. But there is wide agreement, if not consensus, that such programmes are necessary as advanced economies have further opened up to trade - and, have wound back subsidies.

44. As developing countries - which generally have higher tariffs than developed nations on industrial products - increasingly turn to trade liberalization they frequently lack adjustment mechanisms. Often, of course, it is simply a question of budgetary constraints. It has been argued for some time that international development agencies, chiefly the World Bank, should fund such programmes to cope with the occasional downside for specific import-competing industries. Moreover, they might even assist export industries that suddenly face an unanticipated downturn in world markets. The World Bank has recently announced that it will devise such a programme. This is a move to be welcomed.

The WTO cannot guarantee success in trade

45. We hear about the losers from world trade and there are indeed numerous examples of states where the often-repeated benefits of a global economy are clearly absent. However, to argue that this is a failure of the WTO is to aim at the wrong target. **The WTO is about providing opportunities - it does not provide guarantees nor does it provide all the conditions for participation in the global economy.** In essence it says to governments: here are a set of market opportunities that your local firms or individuals, if they are competitive, could benefit from; here also are the rules under which they will operate in foreign markets and under which others must be allowed to operate in your market.

46. It has to be recognised by both sides of the poverty debate that the mere provision of this system cannot be a panacea for all economic ills. Many such problems are the consequence of problems or handicaps in other

areas. Let us name just a few: debt burdens; failed education, training and health systems; inadequate infrastructure; corrupt administration; inefficient customs management; smuggling; uncompetitive financial services and so on. The WTO cannot supply a response in most of these areas; although, working in cooperation with other agencies it can certainly help build capacity in some.

47. There are some developing countries that have not benefited from globalization largely because they do not have the capacity to participate in it. Many countries in sub-Saharan Africa are at war or recovering from it. Others have failed to put in place an environment offering security, institutional integrity and administrative efficiency without which their exporters can never be competitive and investors will never show interest. There are others still that have not benefited because they have failed to respond to the challenge of WTO membership, spending decades firmly entrenched behind protective barriers. Such countries will never succeed as trading nations simply by calling on the rest of the world to open up to their goods while they themselves persist in the failed policies of the past. On the other hand, as we have seen, where political leadership has responded to the opportunities presented by the WTO, freer trade has enabled some populous low-income countries to grow significantly faster than high-income countries generally.

48. **The position of the poorest Members of the WTO, the least-developed countries (LDCs), has been and should be an issue of increasing concern. If they do not receive real benefit from membership there can be little point in their remaining part of the organization and the moral case for the WTO as a source of good is diminished.**

49. **The time and effort that has been expended over recent years in the WTO and associated agencies in addressing the needs and handicaps of the world's smallest and poorest countries in the trading system is remarkable, by any standards.** As we have already emphasized, the advantages the WTO can endow on chronically poor countries is limited. But at least it cannot be argued that their voices have not been heard. Moreover, it is now easier for least-developed countries to have recourse to the dispute settlement system and to have their specific market concerns addressed. Very poor countries are beginning to win cases brought against some very large WTO Members. **Certainly they are better off as Members of the WTO.**

The system has its own safety net - consensus decision-making

50. Lost within the rhetoric about "losers" in the system is the simple fact that every WTO Member has a right to influence and even to block WTO decisions. The practice of consensus within the institution has never been broken - even if the Marrakesh Agreement that established the WTO permits voting and, as we shall discuss, consensus is not invariably the best approach to decision-making. Poor nations have demonstrated their ability to block and influence decisions in the Doha Round.

51. However, it is clear that there is a need to continue creating and legitimising structures that influence globalization and that is the role for the WTO that we seek to improve. The WTO system is a significantly more complicated system than was the GATT. **At the same time, principles like non-discrimination through the most-favoured-nation (MFN) rule are now replete with so many exceptions and derivations that there is a need to stand back to review where we have reached (see Chapter II).** The WTO now provides so many examples of instruments that can be used to accelerate or brake the process of market opening that there is a clear need to assess them and to ensure that they are appropriate, necessary and effective.

The WTO constrains the powerful

52. **We should not forget that the WTO is as much about shaping policy - and the administration of policy - in the large economies as in the small.** At that end of the scale, the GATT and the WTO have consistently pulled the major players towards multilateral solutions to trade issues. As we shall discuss later, it is certainly true that these powerful WTO Members have also recently turned towards regional and bilateral options. But that, in a sense, is why we have been asked to look at the functioning of the WTO: to ensure the organization achieves results that will obviate any need among its Members to seek alternatives to multilateralism.

53. For the most part, the US, the EU and other major economies have recognized their interests - and those of their exporters - in seeking to make the multilateral system deliver. The effort is frustrating sometimes. We shall examine whether decision-making should be made easier. But all **WTO Members must keep in mind that simply by virtue of their market power, the giants of the system have options in the manner in which they conduct trade relations**. **For as long as they choose to exert that market power in a multilateral context, under rules agreed by everyone, the poor and the weak need not fear a return to the law of the jungle. Everyone has an interest in the continued success of the WTO as an institution but no group has a greater interest than the weak and poor.**

54. The notions of "fairness" and "a level playing field" are subject to much abuse for domestic political purposes. Fairness and evenness tend to be in the eye of the beholder, especially when commercial interests are at stake. However, the WTO is the only global institution that has attempted (with reasonable success) to create a set of rules for trade that have reflected concern for the interests of the poor countries; the rules reflecting the economic understandings of the time. True, there are still tasks to be accomplished, such as the removal of agricultural subsidies in the rich countries and the lowering of industrial tariffs in the poor countries. But these have been very much on the agenda of successive multilateral trade negotiations - not least, the Doha Round.

55. However, in the final analysis, the WTO only makes sense if its rules and negotiations lead to firms across the world making decisions to trade and invest. There is little other practical output: all the growth, development, employment, social and other benefits that can stem from trade, all depend on individuals or undertakings participating in the global economy. It is not governments that create wealth but global firms, small and medium-sized enterprises and individuals participating in markets. All play their part in translating the activities of the WTO into a better life for the many.

56. A key for business is the transparency and predictability of the markets. While it is as a negotiating platform that the WTO can generate market access opportunities, it is as a "rules-based" treaty institution that it can provide security and predictability. Traders, producers, and other market participants can rely on the binding rules. Where those rules are being breached, complainants can go to their governments to seek redress under the WTO dispute settlement system.

57. Although the security and predictability of the conditions needed by entrepreneurs to trade and invest can never be perfect, the higher they are the more they will reduce the "risk premiums" of ventures considered or undertaken. As such risk-lowering becomes more established and widespread, world economic activity becomes more productive and welfare enhancing.

CHAPTER II

The erosion of non-discrimination

A. NON-DISCRIMINATION: THE CENTRAL PRINCIPLE OF GATT

58. At the heart of the GATT was the principle of non-discrimination, characterized by the most-favoured-nation (MFN) clause and the national treatment provisions principally embodied in Article I. The MFN clause was regarded as the central organizing rule of the GATT, and the world trading system of rules it constituted. It required that the best tariff and non-tariff conditions extended to any contracting party[8] of the GATT had to be automatically and unconditionally extended to every other contracting party.

59. The choice of unconditional MFN as the defining principle of the GATT reflected widespread disillusionment with the growth of protectionism and especially of bilateral arrangements during the inter-war period. The Great Depression was widely seen as, at least partly, a consequence of the closing of markets and competitive exchange rate policies at the end of the 1920s. As a consequence, some key political leaders as well as most students of international trade concluded that MFN, and its attendant non-discrimination, was the best way to organize international trade among the community of nations.[9]

60. **Yet nearly five decades after the founding of the GATT, MFN is no longer the rule; it is almost the exception. Certainly, much trade between the major economies is still conducted on an MFN basis. However, what has been termed the "spaghetti bowl" of customs unions, common markets, regional and bilateral free trade areas, preferences and an endless assortment of miscellaneous trade deals has almost reached the point where MFN treatment is exceptional treatment. Certainly the term might now be better defined as LFN, Least-Favoured-Nation treatment.** Does it matter? We believe it matters profoundly to the future of the WTO. That is not to say the arguments are not complex. Nor is it to suggest that the spaghetti bowl can be easily or quickly unravelled. But all of us concerned to support the multilateral approach to international economic cooperation need to weigh carefully current trends and look for some answers if the risks to the system are, indeed, real.

61. The proponents of what we shall call, collectively, "Preferential Trade Agreements" (PTAs) see a number of justifications for action outside the multilateral system. Periodically, the motivations that drive governments towards bilateral or regional arrangements reflect simple frustration with the multilateral approach. In a sense, this Consultative Board was constituted as a consequence of widespread frustration with the paucity of recent multilaterally negotiated advances in the World Trade Organization. Our purpose - and the objective of this Report - is to sustain constructive engagement by governments at the negotiating table in Geneva that is focused, efficient and purposeful in manner.

62. However, it would be wrong to dismiss PTAs as simply the easy way out. Other arguments are commonly put forward in their defence. The first is that groups of willing nations - smaller than the full membership of the WTO - may well wish to develop trade relationships that are both broader and deeper than is easily achievable on a global scale. There is certainly, also, some experience to show that such agreements - the EU and NAFTA are the most obvious - can act as spurs to the more hesitant development of the multilateral system. Protectionism at national level can be confronted and defeated to the benefit of later multilateral negotiations. Of course, there must be concern that some PTA agendas might lead the WTO in the wrong direction, as we shall discuss, but that risk should not be used to deny some potential benefits.

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[8] Participants in the GATT were known as contracting parties.

[9] US Secretary of State (1933-1944) Cordell Hull was a principal proponent of MFN. John Maynard Keynes, arguably the greatest economist of the 20th century, while originally against it, became an impassioned advocate as well. Nearly all of the great economists of international trade of the time when GATT was launched, such as Gottfried Haberler of Harvard University, were staunch multilateralists and supporters of non-discrimination.

63. Further, the political or foreign policy motivations that drive some PTAs also have their positive as well as negative connotations. Paying off allies is not an easily defensible approach to trade policy. Supporting reform, stability, poverty alleviation and the fight against corruption may well be. The EU was itself founded in an effort to provide peace, stability and security in a region that had known enormous conflict. It was a noble cause and remains so as new countries from behind the old Iron Curtain enter and themselves become part of the customs union with which the rest of the world trades.

64. The use of non-reciprocal preferences for developing countries - especially the least-developed among them - has grown strongly over the past decade. As we shall see, the trend is not wholly positive. Nevertheless, we have to accept that access to such treatment is now long established in the WTO and is reasonably regarded as part of the "acquis" of its developing Members. Moreover, the commercial value to many firms in poor nations, struggling to find a small niche for themselves in a tough global economy, is real. Such firms frequently need some positive discrimination if they are to stand a chance. So, for every importer seeking to cope with the spaghetti bowl of PTAs there are manufacturers, farmers and traders in developing countries whose best opportunity lies in exploiting a small comparative advantage born of a preference.

65. In that same context, it is also understandable - politically at least - that small groups of developing countries may see value in liberalizing within regional trade arrangements as a means of working their way in (or moving up the learning curve) to the harsher competitive realities of the global economy. Mercosur[10] is one example of such a grouping.

66. Thus, our basic approach to PTAs has to be, first, to appreciate the concerns; second, to accept the reality of the situation we have now reached with the massive spread of PTAs over the past decade; and, third, to look at where we go from here.

B. EXCEPTIONS TO A RULE - DISCRIMINATION IN THE GATT

67. Despite the pervading importance of the non-discrimination principle, the GATT contained explicit Articles to permit discrimination, and departure from MFN, in particular circumstances. These exceptions fell into two classes: those which were exceptions to the MFN rule for functional reasons; and those that exempted certain classes of contracting parties from the rules accepted by all others (or modified the rules for them).

68. In regard to the first class of exceptions, Article XXIV was the most important. This provision permitted the formation of Free Trade Areas and Customs Unions, described widely today as Preferential Trade Agreements (PTAs), but also defined the rules that would apply to their formation. Although of a quite different nature, other provisions allowed discriminatory action against imports - Article VI (anti-dumping measures and countervailing measures against subsidized goods - both directed not just at countries, but individual firms) and, more recently the Uruguay Round Agreement on Safeguards that effectively replaced Article XIX of the GATT.

69. In regard to the second class of exceptions, the original GATT Agreement allowed for the developing countries to have special rules, as in Article XVIII under which they had different, less onerous obligations for balance of payments purposes and to develop "infant industries". Article I:2 provided blanket exemption from the MFN rule in regard to pre-existing preferences under the old colonial regimes - now, largely phased out.

[10] Members of Mercosur: Argentina, Brazil, Paraguay and Uruguay.

70. What became known as Special & Differential Treatment ("S&D") developed over time. Part IV of the GATT was added in the 1960s and provided for discriminatory "advantages" for developing countries in GATT negotiations. They were explicitly relieved of any requirement to reciprocate the benefits provided by developed countries. In 1971, a waiver was adopted to temporarily legitimise a "Generalized System of Preferences (GSP)". This later became part of the 1979 "Enabling Clause". Such GSP preferences were subject to few rules, with the selection of products, the level of preferences, and the choice of beneficiaries, left to the discretion of each developed country. It also provided cover for preferences among developing countries. Further, it allowed for S&D with respect to rules on non-tariff measures under the agreements negotiated in the Tokyo Round. A number of agreements provided for limited, voluntary membership. In the Uruguay Round, where all agreements required the commitment of all Members, S&D was used to permit easier, usually delayed, implementation terms to developing countries. This has again become an issue prior to, and during, the Doha Round.

71. In 1972, the European Communities agreed the Lomé convention, which folded the previous colonial preferences into a preferential system aimed at the African, Caribbean and the Pacific countries (the ACP group).

72. The GATT 1979 Understanding now called the "Enabling Clause" effectively made GSP permanent and further extended discriminatory preferences on an additional basis to the so-called least-developed countries (LDCs). The Enabling Clause also confirmed the notion of non-reciprocity by developing countries in trade negotiations.

C. DISCRIMINATION: THE CENTRAL REALITY OF THE WTO

73. Therefore, by the time the GATT had yielded to the WTO at Marrakesh, the principle of non-discrimination had been badly dented. As detailed below, while Article XXIV had been envisaged as an exception to MFN that would be judiciously and only occasionally exercised, the reality by the time of the formation of the WTO was that the number of PTAs had risen dramatically; it has almost exploded since.

74. The reality today is that the WTO presides over a world trading system that is far from the vision of the architects of the GATT. This is best illustrated by reference to the EU which now has its MFN tariffs fully applicable to only nine trading partners[11], albeit including the US and Japan. All other trading partners are granted concessional market access under Article XXIV, the Enabling Clause, GSP schemes, "Everything but Arms" and other relationships.

D. CUSTOMS UNIONS AND FREE TRADE AGREEMENTS

75. From the outset, GATT Article XXIV has allowed customs unions and free trade agreements to exist, subject to conditions. In addition, the Enabling Clause has also allowed preferential trade liberalization to occur, in a much less demanding fashion, for the developing countries outside the Article XXIV framework. However, the sad fact is that even the relatively weak disciplines of Article XXIV - principally the condition, albeit undefined, that barriers to "substantially all" trade between PTA members should be eliminated - have been poorly enforced.

76. Out of a total 300 PTAs notified to the GATT and the WTO up to October 2004, 176 were notified after January, 1995.[12] Of these, 150 PTAs are currently in force, and an

[11] Australia; Canada; Chinese Taipei; Hong Kong, China; Japan; Korea; New Zealand; Singapore; and the US.
[12] These figures correspond to PTAs notified to the GATT/WTO under GATT Article XXIV, GATS Article V and the Enabling Clause, including accessions to existing agreements.

additional 70 are estimated to be operational, although not yet notified. By the end of 2007, if PTAs reportedly planned or already under negotiation are concluded, the total number of PTAs enforced might well approach 300.

77. In only one case[13] was consensus reached in an examination of an agreement under Article XXIV provisions. In practice, there are now just too many WTO Members with interests in their own regional or bilateral arrangements for a critical review of PTA terms to take place and for consensus on their conformity to be found.

78. Originally, economists were sceptical of PTAs simply because they, in line with the optimistic assumption of the architects of Article XXIV, assumed that the effects of PTAs could be analyzed as if there was only one PTA to consider. The classic analysis of a PTA in this vein was by the economist Jacob Viner. He wrote that a PTA (which he simply called a "customs union"), even as it reduced tariffs, was not necessarily welfare-enhancing either for its members or for non-members. He showed this by demonstrating that a PTA could divert trade from a lower-cost non-member country to a higher-cost member country.

79. International economists since Viner's path-breaking work have known that a single PTA must therefore be judged by whether the trade creation it leads to (implying a shift in production from one high-cost member to another low-cost member) outweighs the trade diversion it may create. Ongoing research into the trade diversion problem by economists familiar with the complexity introduced by trade diversion is not reassuring.

80. Observers and critics of PTAs, however, have focused on new issues that Viner's analysis had not contemplated. There are three important problems:

81. First, as noted already, PTAs have multiplied. The result is that there is more than an element of confusion in the world trading system. This is not merely because multiple preferential rates are being applied to multiple trading partners - and often within schemes that have different timelines for reaching the final zero or low-duty preferential rate. The administration of these schemes is complicated. Preferential origin rules are complex and inconsistent. We are still without the harmonized rules of origin promised at the end of the Uruguay Round - though, admittedly, preferential arrangements were excluded from the negotiating mandate. That is a pity; especially since the globalization of production and trade means that many products contain components and inputs from a variety of sources. As of now, "local value added" or "transformation" tests are built in, purely arbitrarily, to define origin.

82. Many observers have noted that this situation increases substantially the transaction costs of trade in the trading system today. But, as South Africa's former Trade Minister Alec Erwin has emphasized, these costs are particularly onerous for small corporations and traders, and hence for the developing countries.[14] In effect, they constitute a significantly greater tax on the trade of poor nations than for larger corporations from the rich countries. Added to the formal costs of administering preferences, the potential for informal costs, through corrupt practices at the border - for instance, as bribes are paid to ensure decisions on origin attract the preferential tariff - must be added in to the equation.

83. Second, are PTAs "building blocks" or "stumbling blocks" in the opening of markets at the multilateral level? Economists have discussed two alternative ways in which this question may be analyzed: if a group of countries form a PTA, will there be an incentive or a disincentive for the PTA to add members and

[13] The customs union between the Czech Republic and the Slovak Republic after the break up of Czechoslovakia.
[14] Speaking at the World Economic Forum in Davos in 2001.

would it handicap or prompt them to liberalize their trade barriers on non-members?[15] Again, the conclusions are not always encouraging.

84. While this economic debate remains inconclusive, some policy-makers embrace the concept of "competitive liberalization": participation in PTAs provides a spur to liberalization on multiple fronts and contributes to innovative policies in such areas as investment rules and market regulations. While there may be some truth to this proposition, the unregulated proliferation of PTAs tends to create vested interests that may make it more difficult to attain meaningful multilateral liberalization. Also, the last generation PTAs has seen diminished attention to tariff issues relative to increased focus on regulatory issues in goods and services trade. This is creating complex networks of trade regimes potentially undermining transparency and predictability in international trade relations. Thus, while these so-called WTO-plus PTAs may act as testing grounds for new multilateral trade policy disciplines and regulations, the discretion enjoyed by PTA parties in designing such regulatory regimes can strike a serious WTO minus note for the multilateral trading system.

85. We can look further than theoretical analysis. In the Doha Round we have witnessed the hesitations of many developing countries, enjoying GSP or PTA preferential access to rich-country markets, to support ambitious objectives on MFN tariff reductions that would erode the value of their preferences. There is, therefore, real reason to doubt assertions that the pursuit of multiple PTAs will enhance, rather than undermine, the attractiveness of multilateral trade liberalization - at least in the short and medium term. This doctrine has been described as one of "competitive trade liberalization". Critics suggest it is based on an arguable and possibly implausible assumption that the relationship between PTAs and multilateral trade liberalization is complementary.

86. At the very least, the diversion of skilled and experienced negotiating resources into PTAs - especially for developing nations and probably for rich countries also - is too great to permit adequate focus on the multilateral stage. Despite all the efforts at training negotiators in developing countries, there are just not enough capable people for most of them to concentrate adequately on more than one serious trade negotiation at a time. In recent years, we fear it is the WTO that has lost out in terms of negotiating focus.

87. Third, one other unanticipated and significant issue that has arisen with the growth of PTAs is the injection of particular "non-trade" objectives into trade agreements. Apart from comparatively ambitious and one-sided provisions on intellectual property rights, we have seen an increasing tendency on the part of preference givers to demand significant labour and environmental protection undertakings - and even restrictions on the use of capital controls - as the price for preferential treatment. The evident fear is that such requirements become not merely "templates" for further PTAs but the forerunners of new demands in the WTO. After all, as more and more countries concede non-trade provisions of this kind at the PTA level the less these WTO Members are likely to stand out against demands for their eventual inclusion in the multilateral rules. We would argue that if such requirements cannot be justified at the front door of the WTO they probably should not be encouraged to enter through the side door.

E. SPECIAL & DIFFERENTIAL TREATMENT

88. If there is recognition of the serious problems posed by PTAs, and the preferences they entail to the multilateral trading system, there is a similar need to recognize the fault lines in the other significant source of discrimination in the world trading system: those arising from special and differential treatment (S&D) for the developing countries.

[15] See the citations to the work of Richard Baldwin, Pravin Krishna and Philip Levy, in particular, in Bhagwati, Krishna and Panagariya (1999, Introduction and Chapters 1 and 2).

89. **S&D is part of the WTO's legal "acquis" and remains a valid concept, although the mechanisms of S&D have to be compatible with WTO aims. In light of the present characteristics of the trading system and global economic realities, these mechanisms require further study and research that the Board recommends be undertaken.**

90. As it developed in the GATT and the WTO, S&D reflected two early and central assumptions about why the developing countries should be subjected to different rules: first, that the economics of trade liberalization was not valid for the poorer countries so that demands for reciprocal trade concessions[16] from them was inappropriate; and second, that reciprocal trade concessions by the developing countries, in any event, were not worth the bother because their markets were insignificant.

91. Today, the second assumption does not hold for many developing countries. Hence, the demands for "graduation" - moving the more advanced economies towards mainstream WTO obligations. This has long been a difficult issue within the WTO and, indeed, the United Nations family. With a good number of "developing" countries now performing better in terms of GDP per capita than some Organisation for Economic Co-operation and Development (OECD) members, the issue will have to be grappled with, even at the cost of some solidarity among developing countries.

92. However, the bigger issue today is with the first assumption. Many empirical studies[17] of trade policies in the developing countries, underlined two principal lessons. First, they concluded that autarkic, inward-looking policies were harmful to the developing countries and that the doctrine of infant industry protection had to be resorted to carefully, not indiscriminately. Second, it was apparent that their own protection undermined the developing countries' export performance by creating a "bias against exports". Effective market access to developed markets was being frustrated and countervailed by the protection of the developing countries themselves. Developing countries were increasingly saddled with higher average manufactures tariffs than those of the developed countries and all the economic costs that went with them.

93. Nevertheless, the two assumptions led towards an S&D doctrine that, not merely should developing countries not be asked to make any concessions in trade negotiations, but that developed countries should go further and offer discriminatory (non-reciprocal) market access to them. The analysis by many economists of the GSP and related schemes that have materialized has raised substantial doubts about the wisdom of such discrimination. Among the many criticisms are the following:[18]

94. First, GSP was to be granted unilaterally by developed countries and for developmental purposes. In reality, the recipient countries have been burdened with obligations unrelated to trade, which are expressed as conditions to receiving preferences. Thus, it can be argued, preferences are no longer unreciprocated. A recent WTO Appellate Body finding,[19] overturning part of a panel ruling in the GSP case brought by India against the EU, seems to establish that there is at least some limitation on what developed countries can demand as conditions to receiving preferences. Nevertheless, by enabling discriminating conditions among

[16] The "Enabling Clause" states: "The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs".

[17] Several in-depth projects under the auspices of the OECD (led by Little, Scitovsky and Scott), of the NBER (National Bureau of Economic Research, led by Bhagwati and Krueger), and of the World Bank (led by Balassa) during the late 1960s through 1970s.

[18] See the illuminating discussion of S&D, in terms of GSP, by Arvind Panagariya, "EU Preferential Trade Policies and Developing Countries", The World Economy, Vol.25 (10),November 2002, pp. 1415-32. The discussion of S&D in its more recent WTO versions, discussed below, can be found in the excellent paper by Alexander Keck and Patrick Low, "Special and Differential Treatment in the WTO: Why, When and How?", Economic Research and Statistics Division, WTO, May 2004.; and also in Bernard Hoekman, "Overcoming Discrimination against Developing Countries: Access, Rules and Differential Treatment".

[19] "European Communities—Conditions for Granting of Tariff Preferences to Developing Countries," Appellate Body Report, WT/DS246/AB/R, 7 April 2004.

GSP-eligible countries, non-trade conditions introduce clout for advancing what are principally developed country lobbying agendas.

95. These conditions also introduce instability in the GSP schemes since the benefits are not binding. For instance, in April 1992, the US terminated India's GSP privileges on $60 million worth of exports of pharmaceuticals and chemicals on the pretext, backed by unilateral determination, that India did not have adequate intellectual property protection.

96. Second, grantor, rather than grantee, country interests have determined the product coverage and the preference margins in GSP schemes. The EU's GSP system, for example, increasingly became differentiated on product coverage as protectionist caps were imposed as soon as GSP led to successful exports.
A reputed critic has written: "Yearly tariff quotas were established for dozens of countries and tens of thousands of products. Some tariff quotas were so tight that they were filled within the first three days of each year. Others (for jet aircraft for example) were not taken up at all. In fact, different sets of rules and margins of preference soon developed for different categories of products. All areas of potential comparative advantage for developing countries were subject to tight tariff quotas, meagre preference margins and strict rules of origin."[20] In fact, until very recently, the EU GSP schemes excluded agricultural products almost completely. The "Everything but Arms" (EBA) initiative, designed to give added preferential access to LDCs, will ultimately include all agricultural commodities - though for some important products (rice, bananas and sugar) after a considerable delay.

97. Another source of insecurity has been introduced through alterations in local content requirements within increasingly complex rules of origin. For instance, the US granted GSP preference under the Caribbean Basin Initiative when the eligible products had 35% local content. However, when corporations invested in Jamaica and Costa Rica to convert European wine into ethanol so as to reach the 35% local content, and exports rose, the US raised the local content required for GSP eligibility to 70%, ruling out access to GSP benefits.[21]

98. More generally, the application of identical local content rules can put the smaller, less developed countries at a disadvantage because their manufacturing sectors are often limited to simple assembly operations in which local content is necessarily low.

99. Third, as might be expected from the preceding arguments, empirical studies of the impact of GSP schemes conclude that little benefit has in fact accrued to developing countries. One economist whose sympathies for developing countries are not in doubt has offered the following judgment, writing in 1990: "This paper suggests that the available empirical studies, limited as they are, point to the conclusion that special and differential treatment has had only a marginal effect on country economic performance, especially through GSP. And in the more rapidly growing economies, such as Korea; Chinese,Taipei; Turkey and others, there is little evidence that special and differential treatment has played much of a role in their strong performance."[22]

100. Fourth, the offer of preferential market access, even as it is hedged and fudged in the ways detailed here, serves to undermine the incentive and the ability of developing countries to stand up to their own domestic protectionist pressures. While unilateral trade liberalization is relatively common, reciprocity still has its uses and remains a powerful mechanism for enabling governments to open markets.
A recent econometric analysis of annual data sets for 154 developing countries eligible for the US GSP programme, in the period 1976 -

[20] Victoria Curzon-Price, (2004), "Place of Non-discrimination in a Rapidly Integrating World Economy", Cordell Hull Institute Trade Policy Analyses Volume 6.
[21] This example is cited by Bernard Hoekman and M. Kostecki, "The Political Economy of the World Trading System", Oxford University Press, 2001.
[22] John Whalley, "Non-discriminatory Discrimination: Special and Differential Treatment under the GATT for Developing Countries", The Economic Journal, Vol.100, December 1990,pp. 1318-28.

2000, compares those dropped with those who remained on GSP. It demonstrated that those dropped from the GSP programme opened their markets significantly.[23]

101. Finally, the tendency of GSP beneficiaries to become over-reliant on preferences (or trapped by the nature of the system) at the expense of industrial and agricultural diversification is a common and observable phenomenon hardly requiring analytical or theoretical confirmation.

102. Though we believe it is important that WTO Members consider with some care the benefits and drawbacks of preferential market access as it is often offered, other aspects of S&D are less problematic. Under the WTO regime, S&D has also taken the form of exemptions from disciplines and rules, including with respect to agreements on non-tariff barriers. Where these take the form of extended periods for implementation, owing to institutional and other capacity handicaps in developing countries, they make eminent sense. But it needs to be remembered that the longer the time taken to introduce reform - at the institutional and regulatory levels as well as market opening - the longer the time that the gains from trade liberalization will be delayed. Hence, an appropriate response to the concerns over trade liberalization has to include the external financing by aid agencies of developing country adjustment assistance programmes, as proposed elsewhere in this Report.

F. DISENTANGLING THE SPAGHETTI BOWL?

103. Finally, while our political senses tell us that little can be done effectively to prevent some further spread of PTAs, **we would like to think that governments will take into account the damage being done to the multilateral trading system before they embark on new discriminatory initiatives. If the motivation is to promote non-trade agendas or simply an instinctive desire to "catch up" with others or follow suit, they should show restraint. At the very least, we need to be clear that future initiatives are taken above all other considerations genuinely to improve trading and development prospects of beneficiaries or PTA members.**

104. In the longer term, it is clear that reducing MFN tariffs to zero can eliminate the spaghetti bowl problem (at least with respect to customs duties, if not for non-tariff measures). Since preferences are relative to the MFN tariffs, if the latter go to zero so do the preferences. **So, if old PTAs cannot be scrapped and new ones cannot be prohibited, the remedy to the spaghetti bowl of discriminatory preferences that they spawn would be to attack them indirectly through effective reduction of MFN tariffs and non-tariff measures in multilateral trade negotiations. Hence, the urgency of success in the Doha Round is manifest from this perspective - and perhaps a commitment by developed Members of the WTO to establish a date by which all their tariffs will move to zero should now be considered seriously.** But, as is often the case in public policy, while PTAs increase the necessity for MFN tariffs to be taken to zero, their perceived discriminatory value also increases the incentive not to do so.

105. **The other route to a less damaging approach to PTAs must clearly be clarification of Article XXIV and a better-organized means of administering its provisions**. This is on the table in the Doha Round. Progress to date has been slow with respect to the reform of the WTO rules, where long-standing problems are now compounded by the increasingly prominent place given to PTAs in countries' trade policies. However, negotiations have moved in the area of transparency. **Parties to PTAs examined in the Committee on Regional Trade Agreements may now opt for entrusting the Secretariat with the factual presentation of their agree-**

[23] Caglar Ozden and Eric Reinhardt, "The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976-2000", February 15, 2002; mimeographed. The authors also consider specific examples such as how Chile, after being dropped from the US GSP programme in 1988, responded immediately by reducing Chile's average external tariff from 20 to 15%.

ment. This modest development - implemented on an experimental and voluntary basis - could easily be extended to a form of Trade Policy Review Mechanism of individual PTAs. Thus, on a regular basis, WTO Members would have a chance to review and comment upon the developments within, and external impact of, PTAs. That would entail no legal ramifications but would certainly add to transparency and understanding.

106. It is worth recalling the words of John Maynard Keynes, in the House of Lords in London, when the negotiations at the end of the war had allowed him to see the issue with clarity and perspicacity:[24]

107. "The policies being proposed in 1945 for adoption by the United Kingdom aim, above all, at the restoration of multilateral trade…the bias of the policies before you is against bilateral barter and every kind of discriminatory practice. The separate blocs and all the friction and loss of friendship they must bring with them are expedients to which one may be driven in a hostile world where trade has ceased over wide areas to be cooperative and peaceful and where are forgotten the healthy rules of mutual advantage and equal treatment. But it is surely crazy to prefer that".

[24] Quoted in Jay Culbert, "War-time Anglo-American Talks and the Making of the GATT", The World Economy, Vol. 10(4), 1987, pp. 381-408; page 395.

CHAPTER III

Sovereignty

108. Much of the public debate and commentary around the activities of the WTO focuses on a perceived loss of "sovereignty". The source of this controversy is often that a dispute settlement finding has found a piece of trade "defence" legislation to be contrary to WTO obligations and, therefore, in need of elimination or amendment. At issue, may be a loss of freedom to impose elevated environmental standards on other countries or, at least, on their export products. Or it may be restrictions on the capacity of governments to block imports on purely political grounds. Sometimes it is a view that WTO rules restrict the policy space of developing countries and push them towards a single liberal market-oriented model of development. Broadly, there is a perception, often amplified in political or media circles, that states are progressively losing their ability to decide for themselves their own policy directions and priorities.

109. But is the notion of "sovereignty" real? Are countries and governments in a global economy not obliged to subjugate some level of domestic prerogative to international rules and disciplines? If so, is that a gain or loss to the well-being of societies? In short, in the context of the WTO, is the complaint over "sovereignty" a red herring and a cover for justifying annoyance over the rejection of special interest advocacy in the interests of a wider good?

A. SOVEREIGNTY CONCEPTS AND THEIR MISLEADING USES

110. "Sovereignty" is one of the most used and also misused concepts of international affairs and international law. The word is often repeated more or less as a "mantra", without much thought about its true significance. In fact, the word covers a large range of very complex ideas sometimes relating to the role of states in international organizations, other times relating to internal divisions of power (such as in a federal state), or the degree of government authority towards its citizens. In each of many subjects, the concept of sovereignty is not unitary or "all or nothing." It covers disaggregated "slices" of relationships.[25]

111. Acceptance of almost any treaty involves a transfer of a certain amount of decision-making authority away from states, and towards some international institution. Generally this is exactly why "sovereign nations" agree to such treaties. They realize that the benefits of cooperative action that a treaty enhances are greater than the circumstances that exist otherwise. Indeed, the Appellate Body has commented[26] as follows: "The WTO Agreement is a treaty - the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement."

112. In the context of a globalizing world in which states acting alone cannot achieve important governance goals, only the processes of treaty-based cooperative action can overcome this growing inability to achieve those goals. This is particularly the case when it comes to economic affairs, which are often driven by global economic structures - global companies, global markets and global distribution networks - which individual states acting alone cannot effectively manage or regulate. Cooperation through a treaty institution may be the only way out. This has been the core of international trade for more than half a century and, therefore, the essential foundation of the GATT and WTO system.

113. But it is still recognized that the state is central to the current international law structure. Indeed there are strong grounds to believe that many important goals of societies, includ-

[25] An overview of some of these concepts can be seen in the article by Professor John H. Jackson, "Sovereignty Modern: A New Approach to an Outdated Concept," American Journal of International Law 97 (October 2003): 782-802.
[26] Japan - Alcoholic Beverages II, p. 16, Dispute Settlement Reports (DSR) 1996:1, p. 97 at 108 (WTO documents: WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R).

ing democracy and human rights as well as the successful operation of markets, are still best protected by national governmental structures. International institutions often lack effective machinery to implement common goals as well as appropriate mechanisms to ensure "democratic legitimacy". Unlike national governments, they cannot always furnish appropriate participatory opportunities for varied constituencies.

114. In the context of the WTO, these propositions are extraordinarily important. We often hear the strident invocation that "national sovereignty" is to be protected at all costs. Particularly so when some WTO treaty obligation is perceived to intrude too deeply into a particular nation's internal governmental or economic processes, offending some special interest or creating shifts of authority or economic advantage from some groups to others. Thus it becomes important to better understand the costs and benefits of how an international institution carries out its mandate derived from the treaty acceptance of its members.

115. In the WTO context, there are numerous examples of how "sovereignty" is meaningfully discussed and argued. In the dispute settlement processes, for example, a major issue (discussed in Chapter VI) is the degree of deference which the WTO dispute settlement process should accord to national government decisions when they are challenged as inconsistent with WTO obligations. Likewise, there are "slices" of sovereignty involved in the general idea in the WTO (and other treaties) that the state retains the power to decide how to implement an adverse dispute settlement decision against it. In literally dozens of WTO dispute settlement proceedings, discussions have involved sovereignty ideas in the effort to apply various treaty standards to measures taken by WTO Members. Among them can be cited the "sovereign's choice" of the degree of risk that it is willing to assume in its food safety rules (in the text of the Agreement on Sanitary and Phytosanitary Measures), or the consistency of certain national government procedures in applying safeguard measures.

116. In addition, the method by which a WTO Member implements a ruling against it involves a judgment about a "slice" of sovereignty. Some WTO Members have a constitutional or other institutional structure that prevents a WTO dispute settlement ruling from automatically becoming part of their domestic law. Further domestic legislation or administrative actions may be required, thus preserving a degree of sovereignty that could provide meaningful "checks and balances" against irresponsible international intrusion into domestic offences. On the other hand, this "preserved sovereignty" can be utilized by domestic advocacy groups for special protectionist or other interests. Such failure to comply by domestic application does not, however, excuse the Member from its international obligation to comply (see Chapter VI).

B. WHAT IS SOVEREIGNTY?

117. One observer has succinctly defined the concept and its problems: "Historically, sovereignty has been associated with four main characteristics: First, a sovereign state is one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognized by other governments as an independent entity entitled to freedom from external intervention. These components of sovereignty were never absolute, but together they offered a predictable foundation for world order. What is significant today is that each of these components - internal authority, border control, policy autonomy, and non-intervention - is being challenged in unprecedented ways."[27]

[27] Richard N. Haass, former ambassador and director of Policy Planning Staff, US Department of State. "Sovereignty: Existing Rights, Evolving Responsibilities", Remarks at the School of Foreign Service and the Mortara Center for International Studies, Georgetown University, at 2 (Jan. 14, 2003).

118. In introducing his September 1999 Annual Report to the General Assembly, UN Secretary-General Kofi Annan said,: "Our post-war institutions were built for an inter-national world, but now we live in a global world."[28]

119. There is a considerable amount of literature concerning the issue of "sovereignty," and the various concepts to which it might refer. Most of this literature is very critical of the idea of "sovereignty" as it has generally been known. Some authors have described sovereignty as being "of more value for purposes of oratory and persuasion than of science and law."[29]

120. Some of the discussion and practice about the role of "sovereignty" also focuses on the principle of "subsidiarity," which is variously defined. Roughly, it stands for the principle that governmental function should be allocated, among hierarchical governmental institutions, to those as near as possible to the most concerned constituents, usually down the hierarchical scale. Therefore, some believe that an allocation to a higher level of government - a multilateral institution like the WTO, for instance - requires a special justification as to why that higher governmental institutional power was necessary to achieve the desired goals.

121. In the area of trade policy, there are many specific instances of avoidance of "sovereignty concepts." A striking example was the criteria for membership of the GATT and now, the WTO. It was not, and is not, limited to a "sovereign entity," but instead[30] to a "State or separate customs territory possessing full autonomy in the conduct of its external commercial relations…".

122. The ambiguity, scope, and complexity of the term "sovereignty," has led some eminent scholars and practitioners to urge that the word be abolished. We take the view, rather, that the concepts associated with "sovereignty" must be analyzed in a much more careful way than often has been the case.

C. WHAT SOVEREIGNTY ANALYSIS REALLY SHOULD MEAN

123. So what does "sovereignty," as practically used today, signify? We offer a hypothesis: most (but not all) of the time "sovereignty" actually refers to questions about the allocation of power; normally "government decision-making power." So, when a party argues that a state should not accept a treaty because that treaty infringes upon its sovereignty, what is most often meant is that a certain set of decisions should, as a matter of good government policy, be retained at the state level or be devolved still further down the line. There should be no ceding to an international level.

124. Another way to articulate this idea in the WTO context is to ask whether a certain decision on trade should be made in Geneva or Washington D.C. Should such a decision be taken in Geneva, Brussels or Berlin? Similarly, one could ask the same question in connection with countries in all parts of the world.

125. There are various other dimensions of the "power allocation" analysis. Those mentioned above could be designated as "vertical," whereas there are also "horizontal" allocations to consider, such as the separation of powers within a government entity (legislature, executive, judicial, etc.) and division of powers among various international organizations (World Trade Organization (WTO), International Labour Organization (ILO), World Health Organization (WHO), Food and Agriculture Organization (FAO), International Monetary Fund (IMF), International Bank for Reconstruction and Development (IBRD) etc.).

126. In all those dimensions one can ask a number of questions that would affect the allocation issue. Questions of legitimacy loom

[28] Kofi Annan, as quoted in "State, Sovereignty, and International Governance" (Gerald Kreijen et al. eds., 2002) at 19.
[29] Stephen D. Krasner, "Sovereignty: Organized Hypocrisy" (Princeton University Press, 1999). The literature in this regard is extensive, see, e.g., Kreijen, supra note 3, and Neil Walker, ed, "Sovereignty In Transition" (Hart Publishing, 2003).
[30] Article XII of the Marrakesh Agreement Establishing the WTO.

large and often; therefore, there is a focus on "democratic legitimization". This is frequently meant to challenge more traditional notions of sovereignty. Some say we are gravitating from ideas of "sovereignty for the benefit of the state" towards ideas of "sovereignty of the people".

127. Clearly, the answer to the question of where decisions should be made will differ for different subjects. There may be one approach to fixing potholes in streets or requiring sidewalks, another approach for education standards and budgets; yet another for food safety standards, and still another for rules that are necessary in order to have an integrated global market work efficiently. Questions of culture and religion pose further important challenges.

128. Clearly, many values or policy objectives could influence consideration of the appropriate level or other (horizontal) distribution of power among a landscape of government and non-government institutions.

D. WHY SHOULD WE FAVOUR GOVERNMENT ACTION AT AN INTERNATIONAL LEVEL?

129. A large number of reasons could be given for preferring an international-level power allocation, including what economists call "coordination benefits." This describes situations where, if governments each act in their own interest without any coordination, the result will be damaging to everyone. Matters can be improved if states accept certain, probably minimal, constraints so as to avoid the dangers of separate action. Likewise, there is concern about the so-called "race to the bottom," in relation to government regulation and the worry that economic competition among countries could lead to a degradation of socially important economic regulation. International cooperation, including in the WTO, is more likely to discourage such a race than provoke it.

130. The subject area of the environment seems to be one that directly engages these issues of power allocation, and such issues as those involved in the so-called "global commons". Actions that degrade the environment tend to have "spill-over effects" across frontiers and demonstrate the, often pressing, need for higher supervision. The extraordinarily detailed and profound discussion of these issues in the Shrimp-Turtle case[31] well illustrates the complexity and delicate balancing of policy objectives involved in these issues. That 1998 WTO case concerned a US regulation prohibiting imports of shrimp if they had been gathered in a manner that caused the death of endangered species of turtles. The first Appellate Body report in this case found the US measure to be deficient for a number of reasons, but after the US took administrative action to correct the deficiencies, the Appellate Body found that the US had adequately complied.

131. Many other policy areas are very controversial, and remain unresolved in this regard. For example, at what level should competition policy be handled? What about human rights? Questions of local corruption or cronyism might seem, to some of us at least, to call for a higher level of supervision.

E. VALUES, GOALS OR CONSTRAINTS THAT SUGGEST ALLOCATING POWER MORE LOCALLY; THE PRINCIPLE OF "SUBSIDIARITY"

132. Advocates of subsidiarity - a concept much discussed in the EU - note the value of having government decisions made as far down the "power ladder" as possible. One of the basic ideas is that by being closer to the constituents, a government decision can more reflect the subtleties and necessary complexity and detail that most benefits those constituents. The history of the US Constitution is filled with debates and struggles about the internal allocation of power, often with extensive reference to

[31] "US - Import Prohibition of Certain Shrimp and Shrimp Products", Report of the Appellate Body, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

"sovereignty," as can be seen in the Federalist Papers of 1787-88, the handling of Native American tribes, and, in recent years, many cases (many by 5 to 4 decisions) in the US Supreme Court. Many other countries or associations of states have similar problems.

133. Likewise, it is often said that the decision-making that is furthest down the ladder and closest to the constituent will be policed by a greater sense of accountability. Indeed, there are many illustrations of the dangers of distant power, including, of course, colonialism in general and the origins of the US, in its rebellion against England in the eighteenth century, in particular.

134. At times, however, the controversy over which level to place a government decision is truly a controversy over the substance of an issue. National leaders will use international norms and institutions to further policy that is otherwise difficult to implement because of the structure of their national constitution, or political landscape. In other circumstances, they will tend to keep decision-making powers on home ground to retain complete political control.

F. HOW IS THIS RELEVANT TO THE WTO?

135. Based on the analysis of the previous sections of this chapter, it is apparent that a key question is how to allocate power among different human institutions. Advocates for market economics argue that the most efficient process of decision-making in an economy is reliance on the private sector to handle most of the choices, and to keep the government out. However, there is the well-recognized exception of "market failure," and thus it becomes necessary to analyze what this failure entails.

136. Often, categories of market failures include monopolies and competition problems, asymmetries of information or lack of information, public goods and free rider problems, and externalities. In each of those cases, one can see how the economics of a globalized, economically interdependent world operates. A certain judgment about the existence of market failure may be made if appraisal takes place at the national level. However, a quite different conclusion may be generated through analysis at a regional or global level. Judgments of corporate mergers and acquisitions, for instance, will depend acutely on how the "relevant market" is defined.

137. Even if there is a judgment as to the existence of market failure leading to a government response, the kinds of responses possible at the level of states differ dramatically from those at the international level. Most often, the international level institutions do not have powers to effectively tax, subsidize, or materially alter market mechanisms (such as setting up tradable permits). Another intergovernmental response is to have rules and prohibitions. This is virtually the only credible response at the international level. However, the key practical question is whether a particular rule or prohibition will be effective - that is, will it be observed - and therefore operate efficiently to correct market failure.

138. Obviously, the WTO can be seen as a significant example of the practical reality of the principles outlined in this chapter. Certainly some of the more intricate and elaborate (and some say controversial) examples of power allocation principles can be witnessed in relation to globalization, and the problems that accompany it, which are forcing the creation or adaptation of multilateral institutions that can cope. Naturally, the treaty obligations of such institutions - as is the case with the WTO - reach deeply into domestic policy-making fields, including economic regulation. This means that international cooperative mechanisms will, almost of necessity, clash with national "sovereignty," and with special national interests whose

particular economic well-being will be affected, even damaged, by international obligations. It is not surprising, therefore, that the WTO is, at the same time, both a candidate for filling institutional needs to solve current international-level problems and a target to attack.

139. Nevertheless, increasingly often, states cannot regulate effectively in the globalized economy. This is particularly relevant to economic factors that are global and mobile (investment, monetary payments and monetary policy, and even the free movement of persons). Yet markets will not work unless there are effective human institutions to provide the framework that protects the market function. Thus, the core problem is the globalization-caused need for developing appropriate international institutions. If a thorough analysis would lead to a conclusion that the WTO is a good place to concentrate some of these cooperation activities, one could see the WTO becoming essentially an international economic regulatory level of government. This, of course, is a challenge to more traditional thinking about the sovereignty of states.

140. Yet it is possible - and more reasonable - to take a quite contrary and more favourable view. **In committing to the WTO and its procedures and disciplines, governments are returning to themselves a degree of "sovereignty" lost through the process of globalization. If governments are losing the capacity to regulate meaningfully at the domestic level, they are reclaiming some control of their economic destinies at the multilateral level.** If market failure needs to be avoided or treated then it will increasingly happen at the multilateral level. That is why the WTO plays such a crucial role - for developed and developing countries alike - and why arguments about loss of "sovereignty" are often ill-considered and misplaced.

141. This does not mean that the WTO, or any other multilateral institution, is warranted a role in every aspect of economic regulation, including those areas still clearly the prerogative of national governments. Far from it; the concept of subsidiarity is worth holding onto even in the area of international trade. However, it is difficult to deny some locus for the WTO in those many areas of domestic policy-making that impinge directly on the trading interests of others.

142. In summary, there are very few countries in the modern world where the notion that "sovereignty", however defined, must necessarily be shared, is denied. In some cases, the acceptance of the ceding of sovereignty goes very far - even to the point where a nation's own judicial organs can sometimes give judgments against their own governments based on obligations in an international treaty. The WTO does not interfere in sovereignty in that sense.

143. Yet the WTO does have competences and powers that were previously the monopoly of states. **Ultimately what counts is whether the balance between some loss of "policy space" at the national level and the advantages of cooperation and the rule of law at the multilateral level is positive or negative. Our view is that it is already a positive for all WTO Members and will increasingly be so in the future.**

CHAPTER IV

Coherence and coordination with intergovernmental organizations

144. The WTO was conceived as an independent international organization, expected to usher in "a new era of global economic cooperation" - to recall the language of the Marrakesh Declaration of 1994. In this sense the WTO was the first post-Cold War international organization. The bold purpose of developing an integrated, more viable and durable multilateral trading system, aiming at universal membership, appeared to leave behind previous differences as to how to organize world economic activity at the intergovernmental level.

145. The onset of a more intense era of "globalization" made the need for such a system more evident. Technological innovation in the spheres of transport and communications, as well as the remarkable development of global financial markets, has increasingly diluted the difference between the "internal" and the "external". These trends diminish the importance of frontiers as natural barriers to trade. In this context, globalization can be seen as the process through which the world is "internalized" in the day-to-day life of countries and societies.

146. The need for codification and progressive development of positive rules of cooperation has been evident. The positive impetus for the negotiation of these rules is the "coordination benefits" that derive from avoiding the damage that the unilateral non-coordinated action of national governments can produce. This is the background of the transformation of the GATT into the WTO. The legal scope of the WTO is significantly greater than that of the GATT. However, it does not, and cannot, cover every policy area that touches on international trade and investment. Thus, there is need for "horizontal coordination" with other intergovernmental organizations.

147. It is to this issue that the present chapter addresses itself. The issue is worthy of review because the second half of the nineties and the beginning of the twenty-first century have been characterized by a very different political environment to the one that led to the conclusion of the Uruguay Round. It is an environment in which a logic of fragmentation and conflict is pervasive and where questions regarding equity of the rules in the distribution of the "benefits of coordination" created by the WTO are constantly present. Hence, the trend is towards reduced political space for economic cooperation.

A. THE WTO IS WELL ENDOWED WITH THE INSTRUMENTS OF INTERNATIONAL COOPERATION

148. Coherence and coordination of the WTO with other intergovernmental organizations have to be seen in the light of the scope and functions of the organization (Articles II and III of the Marrakesh Agreement Establishing the WTO). The broad legal framework for this discussion are Articles III, V and VIII of the Marrakesh Agreement. Article VIII is the source of the legal personality of the WTO. Article V empowers the General Council to make appropriate arrangements for cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO. Article III:5 refers to greater coherence in global economic policy-making and thus, cooperation, as appropriate, with the IMF and the World Bank. The WTO was set up as a *sui generis* intergovernmental organization; it is not a specialized agency of the United Nations. From an institutional point of view, the WTO was a successor of the GATT that, as a result of its origins, deriving from the 1948 UN Conference on Trade and Employment, was *de facto* a specialized agency of the UN. Hence, the establishment of the WTO in 1995 was accompanied by an exchange of letters between the executive heads of the UN and the WTO allowing for an orderly transformation. These letters provided for cooperative ties between the two international organizations to be set up as they ceased to have formal institutional links.

149. From a legal point of view there is one key linkage between the UN Charter and the WTO system that is worth recalling. Article XXI (c) of GATT 1994 deals with security exceptions and thus with the possibility of economic sanctions. This provision provides that WTO Members cannot be prevented "from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security". The fact that the UN and the WTO are distinct international organizations and do not have the same membership explains the autonomy that the General Council of the WTO has in setting up cooperative arrangements with other international organizations. In the cooperative ties between the WTO and the UN, the fundamental interactions occur with UNCTAD, which has observer status in basically all the bodies of the WTO.

150. Aside from UNCTAD, decisions regarding cooperation agreements with other international organizations and of granting them observer status are guided by the potential contribution those organizations can offer to the activities of the WTO. Such is the case of World Intellectual Property Organisation (WIPO) (under Article 68 of the TRIPS Agreement), given its expertise and responsibilities on intellectual property.
In the area of services the WTO has a cooperation agreement with the International Telecommunications Union (ITU) (Art. XXVI of GATS). An agreement with the Office International des Epizooties (OIE) (an observer in the Committee on Sanitary and Phytosanitary Measures) rests on the functional complementarities with that organization. The same can be said of the cooperative assistance of the World Customs Organization (WCO) in the work of the Committees on Rules of Origin and Customs Valuation.

151. The degree of cooperation can be strong when there is mutual legal recognition of the relevance of "horizontal coordination". Such is the case in the relationship between the IMF and the WTO when balance-of-payments problems lead WTO Members to take trade restrictive measures. Accordingly, the agreements between the IMF and the WTO (see below) provide for the participation of the Fund in the consultations carried out by the WTO Committee on Balance of Payments Restrictions, in accordance with what was previous GATT practice.

152. On the other hand, elements of cooperation can be quite loose as a result of decisions that clearly define jurisdictional differences and limits among international organizations. Such is the case of core labour standards. The Singapore Ministerial Declaration of 1996 clearly stated that the ILO "is the competent body to set and deal with the standards", only noting that "the WTO and ILO Secretariats will continue their existing collaboration".

153. In the case of trade and the environment there are linkage references in the legal texts of the Uruguay Round. Consequently, elements of cooperation exist between the secretariats of the WTO and the United Nations Environment Programme (UNEP), with a more recent opening to the secretariats of Multilateral Environmental Agreements (MEAs). Further horizontal cooperation will depend on the conclusions of the negotiations contemplated in the Doha Round, in which the relationships between existing WTO rules and specific trade obligations set out in MEAs, are being considered.

154. **The guiding line for granting observer status to international organizations, as for cooperative agreements, is the contribution "horizontal coordination" can offer to the activities of the WTO. That is why observer status is not automatic, differs in accordance with the distinct responsibilities of individual WTO bodies, and is based on functional complementarities.**

B. COOPERATIVE VENTURES AT THE PRACTICAL LEVEL

155. Cooperation with other intergovernmental organizations has recently focused especially on helping the WTO meet its obligations in the context of the special difficulties faced by developing countries.

156. One example is a new fund, called the Standards and Trade Development Facility, which provides grants and financial support for technical assistance projects to help shape and implement international standards on food safety, and plant and animal health. Established in 2002 by the World Bank and the WTO, this Facility, in cooperation with other international organizations (FAO, WHO, OIE, Codex Alimentarius), will be administered by the WTO. It aims to place developing countries in a stronger position to take advantage of the Agreement on the Application of Sanitary and Phytosanitary Measures and thereby to improve the marketing prospects of their food exports.

157. Another significant example of "horizontal coordination" is the "Plan of Action" that resulted from the Singapore Ministerial Conference of 1996 to deal with the particular trade problems of the least-developed countries. This lead, in 1997, to the launching of the "Integrated Framework" of cooperation among the secretariats of several intergovernmental organizations.

158. The Integrated Framework is an interesting example of "horizontal coordination". It is now an international initiative through which the International Monetary Fund (IMF), the International Trade Center (ITC), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Development Programme (UNDP), the World Bank and the WTO combine their efforts with those of least-developed countries and donors. The arrangement facilitates a coordinated response by these agencies - each in their area of competence - to the trade related assistance and capacity building needs identified by the least-developed countries themselves. However, this is a complex undertaking that initially took some time to get off the ground and, to date, has been applied comprehensively to relatively few countries. It is hoped that the system will prove itself, in the long-term, as an effective, results-oriented weapon in the battle against poverty. Equally, it is to be hoped that donors, agencies and the governments of the target countries themselves continue to demonstrate the necessary commitment.

C. SEEKING COHERENCE ACROSS THE POLICY HORIZON

159. As observed at the outset of this chapter, the broad political context that led to the conclusion of the Uruguay Round was an awareness of global trends and tensions and an inclination to respond to them through international cooperation. The 1994 Ministerial Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policy-making expresses one problematic aspect of this awareness. It points out the challenges for trade liberalization that lie outside the trade field and cannot be redressed through measures taken in the trade field alone - in particular, the obvious linkages that exist between trade, exchange-rates and financial conditions. The Declaration also draws attention to the ever-growing interactions in economic policies pursued by individual governments as the globalization of the world economy progresses.

160. Hence the importance of pursuing and developing WTO's cooperation with intergovernmental organizations responsible for monetary and financial matters. Article III:5 of the Marrakesh Agreement invited the Director-General of the WTO to establish agreements with the IMF and the World Bank.

161. The agreements with the IMF and the World Bank were negotiated and concluded in 1996. From the point of view of the WTO, one of the basic aims was to raise the *locus standi* of the unprecedented *sui generis* organization to a new level in matters related to global economic management. In short, the idea was not to have the WTO adjusting in a subordinate manner, to the policies of the IMF and the World Bank but for the WTO to insert, through "horizontal coordination", its agenda in those of the two powerful and long-established intergovernmental organizations.

162. In practical terms, the agreements impose on the three institutions a general obligation to consult. Further, the arrangements allow for the WTO Secretariat to observe meetings of the Executive Board of the Fund and of the Executive Directors of the World Bank when the agendas include discussion of trade issues or the formulation of policies in trade matters. The agreements effectively established some reciprocity in procedures for consultations and observership among the WTO, the IMF and the World Bank with the intention of ensuring the adoption of consistent and mutually supportive policies. In other words, "conditionalities" imposed by the IMF and World Bank should not only be supportive but consistent with WTO obligations - since they are not excluded from challenge under the Dispute Settlement Understanding.

163. The results of horizontal cooperation among the WTO, the IMF and the World Bank have, on the whole, been positive. The Fund and the Bank have been supportive of the efforts related to capacity building. They have also been supportive in sustaining trade liberalization, and both institutions have been critical of protectionist tendencies in developed countries, particularly those related to agriculture. In April 2004, the IMF announced a new policy called the Trade Integration Mechanism that permits the Fund to provide resources to cushion countries likely to face balance-of-payments shortfalls as a result of the implementation of the results of multilateral trade negotiations by their trading partners.

164. As to coherence in economic policy-making and the linkages that exist between trade on one hand and, on the other, exchange-rates, finance, and macro-economic and development policies, the climate of opinion in 2004 is, again, not what it was in 1994. The political drive for international cooperation has diminished and the consensus regarding sound economic policies has grown thinner in the wake of the financial crises that have hit many emerging economies.

165. The issue of the compatibility of national policy space with coherence in global economic policy-making is a relevant one. However, it must be seen in the light of the contemporary global economy. States cannot effectively regulate, on their own, economic factors that are global and mobile, such as finance, investment flows, monetary payments and monetary policy. In dealing with these factors there is a clear governance deficit that the IMF and the World Bank are not able presently to accommodate. This is a limitation on the achievement of greater coherence in global economic policy-making that is beyond what horizontal coordination among the WTO, the IMF and the World Bank can presently achieve.

D. SOME FINAL COMMENTS ON THE SCOPE AND LIMITATIONS OF HORIZONTAL COORDINATION

166. **Given the special nature of the WTO discussed earlier, one obvious limit to the scope of horizontal coordination is the need to preserve both the creation and interpretation of WTO rules from undue external interference.**

167. The awareness of this limit is present in the agreements between the WTO and the IMF and the World Bank and in the practices of the WTO. Special care has been taken to preserve the autonomy of dispute settlement panels in exercising their legal competence to interpret WTO rules, including the rules that relate to linkages between financial and trade matters - and therefore to the relationship between the IMF and the WTO legal system. **In short, the dispute settlement system of the WTO, due to its special characteristics and being self-contained in its jurisdictional responsibilities, offers no legal space for cooperation with other international organizations except on a case-by-case basis derived from the right of panels to seek information. The Board endorses the maintenance of this policy.**

168. Much the same considerations apply in the areas of law-making and standard-setting. The WTO legal system is part of the international legal system, but it is a *lex specialis*. This *lex specialis*, *qua lex specialis* cannot be changed from the outside by other international organizations that have different membership and different rules regarding the creation of rules.

169. That said, observer status for international organizations in the WTO clearly serves a useful purpose. However, in recent years, it has been the object of political and diplomatic manoeuvring rather than judgments on practical merit. **In this context, the Board recommends that the issue of observer status in the WTO should not be examined in terms of the political tensions and conflict that prevail in other fora. Members would do well to benefit from the fact that the WTO is a *sui generis* international organization and to take positions on observer status based solely on the Organization's role as a forum for trade negotiations.**

170. **More broadly, the Consultative Board takes a favourable view of "horizontal coordination". Cooperation with other intergovernmental agencies generally adds value to the activities of the WTO. It also helps legitimize the WTO since it complies with the general obligation of conduct, related to cooperation, that is part of public international law**. This is particularly the case in the present political climate as it helps to build up the network value of international cooperation in a world that is prone to conflict and fragmentation. One objective should be that in addressing the philosophy, as well as the legal detail of trade policy and reform, all the institutions engaged in this cooperative effort speak coherently. Wise trade policies are not encouraged by mixed messages from important institutions. We include in this context not only the World Bank and IMF but other agencies of the United Nations - like UNCTAD and UNDP - as well as the donor governments who work so closely with developing countries.

171. Yet coherence is not always straightforward; "horizontal coordination", even at its best, is not a complete response to the governance deficit that exists today as a result of globalization. Further, the issue of equity in the rules of international economic regulation towards the distribution of the benefits of coordination also looms high in today's world. It is not going to be resolved through inter-agency cooperation alone.

172. In Chapter I we have pointed out that trade liberalization and a more open economy can create adjustment problems for WTO Members. We also mentioned that developed nations have pursued adjustment assistance programmes based on domestic initiatives. These programmes reflect the political need to offset the social impact of trade liberalization which would otherwise not be politically sustainable. Developing countries, as they increasingly turn to trade liberalization, often lack adjustment mechanisms and are unable to put them into place due to budgetary constraints. This is an issue where there is room

for improvement through horizontal coordination. **International development agencies, chiefly the World Bank, should have, or should improve, programmes to fund adjustment assistance for developing countries. They should do so in close cooperation with the WTO and other agencies.** Indeed, we would argue that the ability of the Doha Round to deliver worthwhile results depends vitally on such action.

173. However, to reap the full benefits of "horizontal coordination" and achieve coherence attention has to be given to the role of the WTO Secretariat and the Director-General. As we discuss in Chapter IX there is a need, first, to avoid the tendency for other international institutions to fill the intellectual and expertise gap - that results from the present limitations of the Secretariat - in a manner that does not always serve the WTO system well. **If the Secretariat's participation in "horizontal coordination" is to be on an equal footing with, for instance the World Bank and IMF, there are some significant resource and capacity issues that will have to be faced by Members. For its part, the Consultative Board believes that the strengthening of the Secretariat will add value to "horizontal coordination" and global economic policy coherence**.

174. There is, however, no reason to hold back in the area of coherence because of resource constraints. Much more could be achieved if the Director-General's very considerable mandate to pursue coherence issues were fully exploited. The General Council took decisions in 1996 that not only approved the terms of the agreements between the WTO and the IMF and World Bank, but also invited the Director-General to build on those agreements to achieve greater coherence in global economic policy-making. This is the only area in the WTO where the Members have given the Director-General a formal, independent mandate to press the case for trade liberalization, for its own sake and for the contribution it can make to resolve other economic policy problems. On two occasions the Director-General has convened meetings of the General Council devoted to coherence at which the Managing Director of the IMF and President of the World Bank participated. These sessions have provided valuable - though rare - opportunities to view the trade related activities of these three key agencies, and the trade policies pursued by their members, in the broader contexts of development, debt relief, poverty alleviation and the international financial landscape generally. More could be achieved along these lines.

175. **The Consultative Board therefore recommends that the Director-General review options for expanding and intensifying WTO activity in relation to coherence within the terms of his 1996 mandate. This might entail the involvement in consultations of additional international organizations (other than the IMF and the World Bank) working in other trade-related policy areas. Further, given that our proposal for a new consultative body in the WTO (Chapter VIII) is based on the need to broaden and deepen the debate on trade issues among ministers and senior trade officials, we see the Director-General's coherence mandate as relevant to that initiative also.**

CHAPTER V

Transparency and dialogue with civil society

176. A distinct feature of the tremendous transformation that has taken place in the global order over the past two decades has doubtless been the expanding role of civil society. The rise of mass democracy, or what some have called the "global associational revolution" was particularly powerful in the decade of the nineties as the UN world conferences galvanized the forces of civil society globally in a bid to promote a more inclusive, participatory and transparent system of global governance. This, amidst a growing sense that many global problems could only be effectively addressed through a partnership of state and non-state actors.

177. This new partnership has not been without its tensions. The concerns of civil society organizations for more meaningful and substantive participation, the anxieties of sovereign governments about the invasion of their hitherto uncontested space, and the challenges faced by global institutions in reconciling their mandates and legal frameworks with these new realities are still very much alive.

178. Even so, the new partnership has in many ways been a welcome and beneficial experience. It has focused political and public opinion on the importance of trade and often has revealed key intersections between trade policies and economic, foreign, social and other policy areas. At the same time, for those who recognize the large benefits the multilateral trading system has brought to hundreds of millions of people across the globe, it has often been a frustrating and discouraging experience. While some non-governmental organizations have sought to acquire the necessary expertise on trade issues to make a productive contribution, others have not, being content to protest the existing order.

179. To be sure, civil society activism and advocacy for inclusion in global governance is not an entirely recent phenomenon. In 1946, at the London Preparatory Conference for negotiations on what was eventually to become the GATT, the International Chamber of Commerce complained bitterly about the lack of consultation with non-governmental organizations. At the same time, the World Federation of Trade Unions protested about the prevalence of "neo-liberalism" in the draft texts. Nevertheless, the expanded role of civil society in the global arena and, with it, the quest for greater transparency in the business of global institutions has become well established and arguably an irreversible tendency in the global order. Today, the issue is no longer whether, but how to partner and collaborate effectively.

180. The WTO Secretariat has rightly sought to engage civil society to the best of its limited capacity, in the full knowledge that it is the Member governments themselves that must shoulder most of the responsibility for developing these relationships. The efforts have borne some fruit, while provoking new demands for access and influence.

181. However, these issues are not challenging for the WTO alone. Generally, the efforts to create new partnerships between state and non-state players in the global arena have been marked by tensions. The simple ideological divide that marked the global political order during the Cold War has been replaced by more complex alliances among a larger and more diverse body of actors.

182. For the WTO, the problem is more pressing and in some ways more difficult than it is for other intergovernmental organizations. For one thing, it is not a lending institution and does not have the leverage of the purse; its rather tight budget is also a constraint on the extent and forms of engagement it can adopt with civil society. Nevertheless, the institution of the WTO is squarely in the eye of the storm of the international development debate. In these circumstances the WTO needs to keep all

the options of transparency and dialogue with civil society under regular review.

A. THE WTO HAS ALREADY TAKEN BIG STRIDES IN INCREASING TRANSPARENCY

183. Like many intergovernmental organizations, the WTO has made significant progress in the areas of external communications and the strengthening of relations with civil society over the past few years. The General Council, in 1996, adopted guidelines which, among other things, sought to improve transparency and develop communication with non-governmental organizations. In 2002, the General Council decided to expedite the derestriction of documents. This move alone has generated an explosion of easily accessible documentation - much of it available almost simultaneously with its delivery to Members. For the first time ever, most strands of most negotiations can be followed through first-hand sources. Taken together with the excellent explanatory material now on the WTO website, WTO negotiations are remarkably transparent. It is unclear that the process could go much further without being counter-productive to the conduct of negotiations.

184. The Director-General and staff of the WTO Secretariat meet with non-governmental representatives regularly, there are briefings for Geneva-based representatives of civil society groups on meetings of WTO Councils and Committees and a good cross section of non-governmental organizations attend plenary sessions of Ministerial Conferences and symposia on specific issues in Geneva. Indeed, some 1578 participants representing 795 NGOs attended the Cancún Ministerial, compared to 235 participants representing 108 organizations who attended the Singapore meeting, seven years earlier.

185. Online outreach has improved tremendously and the extended online forums to which government officials, private sector representatives, NGOs and other non-state actors are invited are a particularly helpful innovation. As a result of this much-improved outreach, the perception that the WTO is a rather closed organization has been relieved - although those who wish to portray the institution as secretive and sinister continue to do so regardless.

B. IS THERE A CASE FOR ADDITIONAL EXTERNAL TRANSPARENCY AND CIVIL SOCIETY ENGAGEMENT?

186. The case for external transparency cannot rest simply on political expediency; it is not a matter of following a "politically correct" path in a changing international environment. There need to be explicit objectives, with the gains and risks properly assessed, as they have been in some of the internal discourse on these matters within the WTO. While all intergovernmental organizations share common objectives in the pursuit of transparency, each organization's peculiar mandate and structure may call for specific objectives, modes of engagement and the choice of civil society organizations with whom to collaborate. One of the objectives of the World Bank's relations with civil society organizations, for instance, is to enhance community ownership and sustainability of bank-supported projects by consulting with, and tapping the knowledge of, community-based civil society groups. Clearly, that would not often be an appropriate model for the WTO.

187. For the WTO, the starting point of our discussion must be Article V:2 of the Marrakesh Agreement, which authorizes the General Council to "make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO". This makes the WTO one of a small number of intergovernmental organizations whose charters explicitly talk of relations with civil society organizations. Although the Agreement does not spell out the

rights and responsibilities of non-governmental organizations with which the WTO might enter into such relations, the understanding is clearly that such arrangements would respect the intergovernmental character of the organization.

188. The inclusion of Article V:2 was arguably a more conscious and deliberate decision than the faint and guarded clause in Article 71 of the UN Charter, which authorized the Economic and Social Council (ECOSOC) to "make suitable arrangements for consulting with non-governmental organizations concerned with matters within its competence". The Marrakesh Agreement, after all, was made against the background of the momentum generated by the expanded participation and prominent role of civil society organizations in the early1990s. One view of that experience had been that in spite of their great diversity, the NGOs and other civil society organizations could, if properly engaged, play a positive role in enriching debate, influencing shifts in the positions of state actors and helping to achieve convergence in difficult areas of policy. Indeed many had come to see in the new global movement, an effective bulwark against unilateralism. Transparency in the conduct of the business of intergovernmental organizations and their active collaboration with civil society organizations were thus the most promising way to tap this potential.

189. These sentiments have resonated in debate within the WTO about external transparency. In response to widespread criticism of the organization's processes as undemocratic and non-transparent, the 1998 Ministerial Conference among other things acknowledged the importance of informed public opinion in the debate on the reform of the multilateral trading system. Ministers urged that ways be found to improve the transparency of the WTO's work and internal processes.

190. There are continuing tensions around the issue and something of a North/South divide in the positions of WTO Members reflecting important nuances in the way Members perceive and state the case for external transparency. Even so, there is broad agreement among Members that transparency and some degree of active engagement with civil society are in the interests of the organization itself and also of its Members. However, there is also a widely held view that the primary responsibility for communicating the business of the organization rests with the Members themselves who must inform the different national constituencies to whom they are accountable.

191. Given the intergovernmental character of the organization, WTO Members generally consider that its efforts at enhancing external transparency will bear little fruit unless they themselves are transparent at home with national stakeholders. At the same time, it should also be recognized that the WTO is not exactly a sum of its parts; that it does have an image and personality of its own which must be perceived to be democratic and transparent. In other words, the WTO must communicate well on its own behalf - we return to this theme in Chapter IX.

192. While it can be regarded as a natural duty of any intergovernmental organization, the case, in the WTO, for external transparency and dialogue with civil society exists, therefore, on a number of levels. For a start, it helps to promote the image of the WTO as an effective and equitable organization at the helm of the multilateral trading system. More important, it can help promote an understanding of the principles that underlie WTO rules and with that a more willing acceptance of the value of WTO obligations to its Members.

193. Dialogue with civil society, business and other stakeholders should also enable the WTO to tap the knowledge and expertise of these groups. Transparency is not a one-way process in which the WTO seeks to inform, persuade

and educate. Many stakeholders in the trading system have their own understanding and experience that should permeate the institution from time to time. Managed properly such engagement could make the civil society organizations of all kinds active agents in support of multilateralism.

194. As the experience over the past 15 years has demonstrated, the leadership of civil society organizations can be quite effective in building caucuses and in influencing governments to shift positions and strengthen their commitment to agreed rules. Although admittedly the unresolved issues in the current Doha Round negotiations are more difficult than say those of the UN Conferences, there is some reason to believe that properly engaged, they could be more helpful than has often appeared to be the case.

195. Finally, as some Members have again noted in internal debates about transparency and civil society participation, improved external transparency and engagement with civil society can also serve to create space in the domestic policy-making arena for Member governments to overcome domestic barriers to further liberalization.

196. The administrative and financial implications of a more active programme of civil society engagement must be carefully assessed. The World Bank and other intergovernmental organizations, that have developed extensive relations with civil society, have done so with substantial budget support. The External Relations Division of the WTO is currently responsible for relations with civil society, intergovernmental organizations and parliamentarians. This outreach work is handled by a small number of professionals in a small division. No specific resources are earmarked for civil society related work as such, in either the WTO's general budget or the division's budget. The division's total travel budget amounts to about CHF 25000 a year and mostly goes into WTO representation at meetings of other intergovernmental organizations. In practice, this means representation at mainly UN and OECD meetings. The WTO's high profile and largely successful Annual Public Symposium as well as its outreach programmes for parliamentarians and NGOs, which started in 2002, are all fully funded from extra-budgetary resources.

C. SOME UNDERSTANDABLE RESERVATIONS REMAIN

197. However, a number of caveats are warranted here. While many non-governmental organizations are well informed and a good number have the expertise and the interest to be constructive commentators or advisors on WTO issues, others do not. Moreover, such competence and financial capacity as there is tends to be concentrated in developed countries. In recent years, some non-governmental organizations have been actively advising governments especially in poorer countries on their WTO negotiating positions. Clearly, that must in part reflect unfortunate gaps in the level of competent, independent technical assistance being made available to governments by the multilateral agencies or the inability of those countries themselves to mobilize available national expertise. It must also reflect a greater local credibility on the part of non-governmental organizations that may have been active in the field over decades. Either way, this is not an ideal state of affairs especially for the countries involved, whose objective, long-term interest must surely reside in the development of national capacity and policy ownership.

198. Another often-expressed concern by some WTO Members is that excessive transparency merely opens up new fronts on which already hard-pressed trade negotiators must engage. Some governments are well equipped domestically to deal with multiple constituencies when considering trade issues. Many others

are not; and that goes especially for developing countries. The principal requirement of a WTO Member is to engage with fellow Members at the governmental level. Adding parallel tracks, the argument goes on, in which, for example, international non-governmental organizations with large budgets and huge capacity must also be engaged is likely to be burdensome and not necessarily constructive. However, leaving aside the obvious difficulty in deciding what is excessive and what is not, this is an argument that has doubtful merit from the point of view of the developing countries. Historically, it is not the NGOs that have burdened and stretched developing country negotiating capacity by overloading the negotiating agenda on trade. At any rate, surely what is needed is for new fronts to be opened where they represent real issues, and for poor countries to be assisted in coping with the extra demands on their negotiating capacity.

199. A further criticism of the trend towards increased WTO transparency is that the critics of the current practices - and those lobbying for more access - are often neither especially accountable nor particularly transparent themselves. It is important that the underlying interests of civil society groups be apparent if they are to expect any special rights in the WTO itself or in their dealings with WTO governments.

200. Finally, on the negative side of the slate must be counted one practical reality. Trade negotiations require some level of confidentiality. Wholly public negotiations do not always deliver meaningful results. For a start, trade negotiations are about commercial interests. Governments have every right, indeed duty, sometimes to keep those interests to themselves. It is governments that negotiate - and have responsibility for - the contractual detail of the WTO. Internal transparency in the WTO should therefore keep Member governments well informed, that much is clear. On the other hand, the dynamics of trade negotiations - at least at the point when deals are close - are, by their very nature, sensitive. External transparency, in other words, must have its limits. Without such limits the WTO is not going to be able to do its job and deliver commercially worthwhile agreements that provide opportunities for those who create jobs and provide investment in the global economy. Therefore, civil society is always likely to be frustrated by being left out of the deal making. What is important is for all sides in the debate to fully recognize these practical realities in seeking norms of transparency that are required to protect the public interest.

D. SOME LIMITED ADDITIONAL PARLIAMENTARY INVOLVEMENT

201. The continuing tensions around the issue of transparency and civil society involvement are also evident in the area of parliamentary involvement. Clearly the primary democratic oversight of the WTO is reposed in national parliaments and there are widely differing parliamentary systems applied around the world. Some of these may be open to the criticism that the executive branch does not adequately obtain informed consent from national parliaments for negotiating positions in the WTO. However the constitutional requirements in individual WTO Members or in deeply integrated groups such as the EU are matters that can only be modified or developed internally and cannot be effectively addressed in this Report.

202. The question as to whether the WTO should have a parliamentary dimension is now a matter of some debate within many jurisdictions. The EU, at least its former Trade Commissioner, is in favour of inter-parliamentary meetings at the WTO level. Elsewhere, particularly in the US, and in developing countries generally, there is opposition. In the US in some measure this may reflect the stronger role of Congress in authorizing and ratifying the terms of trade negotiations than, for example, that of

the European Parliament or indeed the parliaments of the member states of the EU.

203. Parliamentary involvement in the affairs of the WTO has been increasing, and some momentum for the creation of a Parliamentary Assembly of the WTO has indeed developed. A proposal was launched in the margins of the 1999 WTO Ministerial meeting in Seattle by members of the European Parliament and was adopted by all the parliamentarians present. This initiative was pursued further at the Doha Ministerial Conference in 2001.

204. Certainly, legitimacy is central to the effective development of the WTO as a force for good in the world, and national parliaments are the key mechanism to secure that legitimacy. Particularly in the early decades of its existence, diplomats and technocrats from trade ministries drove negotiations in the GATT, largely behind closed doors. That has changed. Legitimacy requires, in part, that parliaments be associated with the adoption of negotiating positions by governments and WTO rule-making more generally. The manner in which that participation is achieved will vary but needs to be addressed. Parliaments, in short, need to be engaged, at the national level, in the "forum for negotiations" established by Art III: 2 of the Marrakesh Agreement Establishing the WTO.

205. The arguments for even greater parliamentary involvement through an assembly under the aegis of the WTO do not appear to command adequate support. In July 2002, a group of parliamentarians actively interested in WTO issues who had formed an independent Parliamentary Steering Committee[32] admitted the "massive resistance of developing countries" to the creation of a Parliamentary Assembly as part of the WTO. Several developed countries share this position. We think, therefore, that the most that can be done in this area is: first, to promote transparency by WTO governments towards their own parliamentary institutions and, second, to advocate domestic parliamentary involvement that more effectively connects negotiations and decisions with the people they affect.

E. WHAT DIRECTION FOR THE FUTURE?

206. Clearly, it is important for the WTO to keep the issue of its relations with non-governmental organizations under periodic review. Within the limited bounds of an institution founded on negotiated contractual commitments among governments, there are limits to how much further the organization can go.

207. Some ideas have been put forward by non-governmental organizations themselves. A system of accreditation has been proposed to help formalize relations with civil society organizations, reflecting practice in some UN organizations. While it has some attractions, perhaps in ensuring that responsible NGOs get the advantage of a closer relationship with the WTO, such a move would impose a continuing bureaucratic burden to receive, sieve and make judgments about candidate organizations. More important, it is unclear what the purpose of accreditation might be. Apart from attendance at the plenary sessions of Ministerial meetings every two years, it is unlikely that accreditation would mean the right to observe WTO meetings first hand. A quite different approach to access would be the use of web broadcasts of certain meetings. This would not necessitate an accreditation system.

208. Given that the practical benefits of formal accreditation can be obtained with a simple system of ad hoc registration for conferences and other events, it is by no means certain that this is a worthy investment for a small organization with a limited budget. Indeed, accreditation implies a contained group with a long-term relationship; possibly an over-rigid approach that might make access difficult for newcomers. However, if the organization should decide, for

[32] This body has grown out of a series of Parliamentary Conferences on the WTO organized by the Inter- Parliamentary Union and the European Parliament.

good reason, to go that route, there are models, including the ECOSOC system of accreditation, that it might wish to study. In any event, we draw a distinction between formal systems of accreditation and the Secretariat's need to make decisions about the organizations with which it will have regular or ad hoc relationships (see our recommendation on guidelines for the Secretariat below).

209. One step further on is the issue of direct participation in the decision-making process of intergovernmental organizations, in this case the WTO. The issue is common in the UN system. While there is now a broad recognition among member states of the UN of the substantial and proven benefits of non-governmental participation in intergovernmental debate on global issues, there are continuing concerns about the legitimacy, representativity, accountability and politics of non-governmental organizations. There is also a serious imbalance in the capacities of non-governmental organizations from developed and developing countries.

210. Many, but by no means all, governments hold the view that direct participation by non-governmental organizations in decision-making is incompatible with the character of intergovernmental organizations. Concerns of this type are more acute for an organization like the WTO, in which governments must make critical decisions that affect their citizens. Those same governments must implement those decisions and be accountable at home for their actions in Geneva.

F. A FRAMEWORK FOR THE WTO'S RELATIONS WITH CIVIL SOCIETY

211. **Much has already been achieved in the areas of both external and internal transparency within the WTO over the past few years.** Those who choose to believe that the WTO remains a closed institution will probably never be persuaded otherwise no matter what actions are taken. **Nevertheless, it would be a mistake not to keep the issue of transparency under periodic review and to consider, from time to time, whether gaps exist that could be usefully filled.**

212. **A framework for reviewing WTO relations with non-governmental organizations as well as with the public generally could reasonably be based on the following general principles:**

- **It must continue to be recognized that the primary responsibility for engaging civil society in trade policy matters rests with the Members themselves**. While the WTO's relations with civil society have their own integrity and dynamics, they are inextricably bound with government /civil society relations at the national level.

- **The membership should thus develop a set of clear objectives for the WTO Secretariat's relations with civil society and the public at large.** Within the general framework of these objectives, the 1996 General Council Guidelines for Arrangements on Relations with Non-Governmental Organizations should be further developed so as to guide Secretariat staff in their consultations and dialogue with civil society and the public. Guidance should be included on the criteria to be employed in selecting those civil society organizations with which the Secretariat might develop more systematic and in-depth relations. **Trade policy competence would be a natural criterion, but not exclusively so. Nor should any single set of organizations be constituted to the permanent exclusion of all others. We particularly emphasize the need for the Secretariat to work with NGOs from poor countries** that seek to develop trade expertise in areas of their choice.

- **Certainly, the Secretariat should be under no obligation to engage seriously with groups whose express objective is to undermine or destroy the WTO in its present form.** The dialogue needs to be constructive on both sides and, given the expertise of non-governmental organizations in certain areas, it ought to be mutually reinforcing.

- **A special effort should be made to assist local civil society organizations specializing positively in trade issues in least-developed countries, especially in Africa.** This might be done in collaboration with continent-wide and regional organizations and think tanks.

- **Clearly, the administrative capacity and financial resources of the WTO Secretariat would need to be scaled up to support a renewed effort at further enhancing the WTO's external transparency with respect to civil society.** However, the Director-General should give some thought to whether the most appropriate course is to strengthen the External Relations Division or reinforce and better coordinate non-governmental relationships and activities across the Secretariat.

CHAPTER VI

The WTO dispute settlement system

213. The current WTO dispute settlement procedures - constructed with painstaking, innovative, hard work during the Uruguay Round - are to be admired, and are a very significant and positive step forward in the general system of rules-based international trade diplomacy. In many ways, the system has already achieved a great deal, and is providing some of the necessary attributes of "security and predictability," which traders and other market participants need, and which is called for in the Dispute Settlement Understanding (DSU), Article 3.

214. On the other hand, the WTO dispute settlement system may be at a crucial, and perhaps somewhat delicate, point in its brief history. In our appraisal and recommendations regarding the WTO dispute settlement system, we are strongly motivated by several general principles. First, while there are some grounds for criticism and reform of the dispute settlement system, on the whole, there exists much satisfaction with its practices and performance. Second, in appraising ideas for reform or improvement, the most important principle is to "do no harm." Caution and experience are needed before any dramatic changes are undertaken.

A. MOVING THE SYSTEM TO NEW LEVELS OF EFFICIENCY AND EFFECTIVENESS

215. Regarding dispute settlement, the GATT had only three short paragraphs of treaty text, partly because it was anticipated that the extensive chapter regarding disputes in the International Trade Organization (ITO) charter would be the umbrella to provide the necessary dispute settlement institutions. During GATT's early years there was some debate about whether the GATT dispute settlement clauses were designed only to promote resolution through diplomatic negotiation. However, over the decades the system evolved gradually, through trial and error and the benefit of actual experience, into a relatively highly refined dispute settlement procedure.

216. By the early 1980s, these GATT procedures began to be held up as a model, and new interest groups saw them as attractive for achieving their goals. Services sector and intellectual property interests seeking new multilateral agreements through the GATT's Uruguay Round were, at least partly, motivated by the dispute settlement procedures and the relative success of those procedures in enhancing treaty rule compliance.

217. But the GATT dispute settlement system was beset by "birth defects". In particular the consensus rule of decision making which had developed through practice over decades meant that essential steps in the dispute settlement procedure were always threatened by a single "blocking vote" by a respondent to a complaint. These steps included, crucially, the establishment of a panel after a request from a complainant, and the "adoption" of a panel report. A respondent who desired to avoid a panel process, or who had "lost" in the panel, could prevent any legal effect. Likewise there were a number of ways in which a government could obstruct the dispute procedures, including making it difficult to select the panellists. By the beginning of the Uruguay Round trade negotiation in 1986, it was clear that something had to be done about these failings.

218. The Uruguay Round negotiators therefore designed the current DSU. They agreed upon substantial reforms, while retaining as much as possible the essentials of the GATT procedure. The DSU created strong deadlines and a fall-back procedure whereby the WTO Director-General can appoint the members of a panel if no agreement is reached in a reasonable time. It eliminated the possibility of blocking the setting up of a panel. And most significant, it created a "reverse consensus" procedure for adopting a panel report. That means that such

adoption occurs automatically unless there is "consensus" against. No longer could the losing parties block adoption of reports, alone. It is generally expected that virtually every WTO dispute settlement final report will be adopted.

219. The balancing element in the DSU was the creation of a right to appeal which can be exercised by any disputant after the first level panel report is final and before it is adopted. To consider any such appeal, the DSU established an Appellate Body consisting of seven persons who would be retained on a part-time basis. From these seven, a "division" of three is selected to handle each appeal. A collegiality procedure developed whereby all seven Appellate Body members discuss each case. The final report of the Appellate Body then also goes to the Dispute Settlement Body (DSB) which automatically adopts it through the "reverse consensus process".

220. A further element in the political balance that made possible the emergence of this high level of automaticity in WTO dispute settlement proceedings was acceptance by all WTO Members to refrain from making their own binding unilateral judgments on whether other parties have acted inconsistently and acting upon any such judgments. This restraint is crucial to ensuring that the multilateral trading system allows the force of law and process rather than the force of economic power to determine the treatment of trade difficulties.

B. SO FAR SO GOOD - THE SYSTEM HAS WORKED

221. By most accounts, and most measures, the operation of the dispute settlement system in the WTO has been a remarkable success. As of 17 September 2004, there had been a total of 314 complaints brought by Members of the WTO. This is a rate many times the average during the history of the GATT for dispute settlement complaints. It is clear that the Members find it useful to utilize the new system as a tool for enhancing their trade diplomacy and securing solid and reasonably timely responses to practical trade problems.

222. One of the interesting facets of this record of complaints is a much greater participation of developing countries than was the case in the GATT dispute settlement system. Of course, the major trading powers continue to act either as complainant or respondent in a very large number of cases. Given their large amount of trade with an even greater number of markets, it could hardly be otherwise. Yet developing countries - even some of the poorest (when given the legal assistance now available to them) - are increasingly taking on the most powerful. That is how it should be.

223. Another interesting statistic is the fact that less than half the complaints actually go on to a panel process. The remaining cases undoubtedly include a number of complaints that are settled, but also some complaints that are merely dropped or otherwise disposed of. The formal dispute system was always intended to encourage negotiated settlement "out of court". At the same time, the complaint process is a "learning process" for participating countries. Sometimes parties appear to be able to predict from the already extensive jurisprudence of the WTO what would be a likely outcome, and this can lead to settlements.

224. Thus far, overall there have been 81 cases in which there have been adopted reports. Of these 56 have been appealed, leading to both an adopted Appellate Body report and the non-appealed or appellate-upheld portions of the first level panel report. This leaves 25 final un-appealed first level panel reports adopted, which is 31% of the total. Although at the beginning, virtually every case was appealed, more cases are now being completed without appeal. Again, this suggests that the jurisprudence of the WTO has provided a measure of

predictability. This can lead governments to foresee what might be the chances of appeal, and to refrain from that expensive activity if their chances are not very great, or the matter is not that important to them.

225. These 81 cases for which reports are adopted, and reports whose adoption is pending, amount to more than 27,000 pages of jurisprudence. In the opinion of many impartial observers (whose opinions are not constrained by particular advocacy roles) this jurisprudence is extraordinarily rich and detailed for a body in existence only ten years. There is no doubt that this jurisprudence will have an effect on general international law broader than the borderlines of the WTO system. In addition, it is having the effect of illuminating certain key WTO treaty obligation questions, and providing some rule stability by resolving ambiguities, all with creditable and elaborately reasoned opinions.

C. WTO JURISPRUDENCE IS BREAKING IMPORTANT NEW GROUND

226. The dispute settlement jurisprudence of the WTO has provided important insights on many dozens of particular legal issues. A few of these are worth summarizing here. They are chosen to illustrate the work of the dispute settlement system, and the approach of the panels and Appellate Body towards very complex and delicate international law issues; they do not, therefore, represent any comprehensive review of the overall jurisprudence.

Standard of review and deference

227. Often central to the jurisprudence is the delicate question of the extent to which the WTO international procedures should give deference to Members' governmental decisions, a question which certainly engages issues of "sovereignty" as discussed in Chapter III. These national decisions often involve a view of a government about how to resolve the ambiguities or gaps that inevitably occur in a massive multilateral treaty that has been negotiated by over 100 Members. The deference question comes up in several different ways, one of which focuses on what is termed the "standard of review".

228. With the exception of the Anti-dumping Agreement, the treaty text of the Uruguay Round Agreement is not explicitly subject to a deferential standard of review. There is no very explicit language for a general standard of review approach of the WTO dispute settlement system towards Members' decisions. However, the Appellate Body has relied heavily on Article 11 of the Dispute Settlement Understanding, which calls for a panel to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements…".

229. The Appellate Body has taken a similar view of the basis for consideration of appeals, sometimes based on other phrases of the DSU. On the other hand, it is recognized that language of DSU[33] Article 3 may suggest a more deferential approach when it says: "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Language in the Uruguay Round text regarding anti-dumping measures has a more explicit reference to a standard of review criteria applicable just to that text, and it is argued that this criteria requires more deference to Members' decisions. These issues are quite controversial, and it is not the role of our Consultative Board to give a legal opinion on them, except to note that there are good faith arguments on various sides of the controversies. Later, we address some suggestions for an enhanced role for the Dispute Settlement Body in relation to future cases that raise controversial issues.

[33] Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], Annex 2 to Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, at Article 3.2.

230. Apart from these references to the DSU, the Appellate Body, from the very beginning of its existence, has indicated through statements in its reports that it is quite cognizant of the need for deference to Members.[34]

The power of precedent

231. It is generally agreed that the strictest type of precedent, as utilized in many common law jurisdictions[35] is not applicable in international proceedings: indeed, it is not applicable in most legal systems of the world. However, it is quite clear that some degree of "precedent" concepts motivates the WTO dispute settlement processes (as well as most other international law tribunals process). This reliance on prior cases, while not always determinative, and certainly not totally binding on subsequent panel cases, nevertheless provides a degree of consistency which, in turn, enhances the predictability of the whole system. That is called for by the DSU, when it stresses the goal of providing "security and predictability." In addition, the Agreement Establishing the WTO requires that the WTO "shall be guided by the decisions, procedures and customary practices followed by the contracting parties to GATT 1947…".[36] This "guidance clause" is extremely important, and represents a desire on the part of the drafters of the Uruguay Round text to continue the general practices and jurisprudence of the predecessor organization, GATT, i.e., to follow the GATT "acquis."

232. The elaborate use of precedent by the Appellate Body and first level panels, including precedent from GATT panel reports, can easily be seen upon reading any of the current WTO jurisprudence.[37] The precedent concepts used in the WTO jurisprudence is, thus, centrally important to the effectiveness of the WTO dispute settlement procedure goals of security and predictability.

General international law in WTO jurisprudence

233. From the very first case, the Appellate Body has made it quite clear that the WTO is part of the general international legal landscape for world affairs. It notes that it is required, in its process of interpreting the WTO Uruguay Round text, to follow the customary rules of general public international law regarding interpretation of treaties. The Appellate Body indicates that those customary rules are well expressed in the text of the Vienna Convention on the Law of Treaties, even though that convention is not, itself, ratified by all Members of the WTO.

234. There is, nevertheless, some controversy about the degree to which general international law should be utilized in the jurisprudence and determinations of the WTO dispute settlement system. Clearly, it seems to be the case that international law will have relevance, but that there are also risks about pushing that relevance too far. It can be argued, for example, that particular norms, notably in the DSU "remedies" procedures (Articles 21 & 22) of the system, provide special legal norms (sometimes technically referred to as *lex specialis*), which would "trump" customary international law. Once again, there is a possibility of further elaboration of some of these concepts as the jurisprudence evolves.

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[34] Examples include: "Japan - Taxes On Alcoholic Beverages", WT/DS8, 10, & 11/AB/R, 4 October 1996, page 22, "WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world"; and "EC - Measures Affecting Livestock and Meat (Hormones)", WT/DS26 & 48/AB/R, 16 January 1998, paragraph 165, "We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome obligation by mandating conformity or compliance with such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the SPS Agreement would be necessary."

[35] This is generally referred to as *stare decisis*.

[36] Marrakesh Agreement Establishing the World Trade Organization, at Article 16.1.

[37] A recent first level panel report contains over 5,800 footnotes, most of which are references to prior cases, and the case report includes a list of the 54 cases actually cited and relied upon. See "US—Definitive Safeguard Measures on Imports of Certain Steel Products", WT/DS248/R, WT/DS248/AB/R, adopted 10 December 2003.

235. The customary international law rules of interpretation are, themselves, sometimes questionable when applied in the context of very detailed and intricate economic obligations of the WTO. There are many different techniques that can be used for interpreting a treaty, and the Appellate Body has utilized many of the rules that are necessary.

The role of non-trade policies in WTO cases

236. In general the WTO dispute settlement system mandates that the focus of the cases be upon the WTO Uruguay Round texts, and the jurisprudence of the GATT and the WTO. Nevertheless, the Appellate Body has, on occasion, been forced to confront strong arguments that its interpretation should not be totally confined to embellishing trade policies, but on the contrary, it must weigh, or balance, such policies in certain situations against other kinds of policies, such as environmental protection. This is an area that the jurisprudence will need to develop further.[38]

D. THE EMERGING PROBLEM OF COMPLIANCE - MONETARY COMPENSATION FOR THE POOREST?

237. In recent years, as more and more dispute settlement cases reach the stage of adopted reports, attention has naturally been shifted towards the procedures that can occur at the end of the process, particularly those relating to "enforcement" or "compliance" inducing measures. These fairly new procedures (which were not included in the GATT treaty texts and understandings) provide for a reasonable time period for governments to implement the adopted report of the Appellate Body or panels. There is a provision for arbitrating the standard length of time, and there is also a provision in the DSU for the "winning parties" to challenge whether the "losing party" has adequately performed under the requirements of the adopted panel.[39]

238. If non-performance continues, there is an opportunity provided in the DSU for the winning parties to demand "compensatory measures". Under GATT and now WTO rules, compensatory measures have traditionally not been monetary payments ("cheque in the mail"). On the contrary, such measures have generally been additional market access measures by the party called upon to correct its failure to fulfil its WTO obligations. (The idea of monetary payments is discussed below.) Absent agreement on such compensation by adding to market access, the winning parties may take measures that would suspend obligations regarding the losing party; a response which is sometimes informally called "retaliation".

239. We have now had a considerable amount of this "post-judgment activity" under the relevant measures of the DSU.[40] Difficulties with the treaty text and the practices involved are becoming more apparent. The DSU treaty text itself is not completely consistent within its different parts, and this has led to the view that something needs to be done about "sequencing"; meaning how a challenge on whether the response of the losing party has been adequate and can operate consistently with the provisions allowing the winning party to take countermeasures. Clearly, this problem deserves some attention, even if the matter has been partly resolved by a developing practice of the disputing parties agreeing on the sequencing approach applying to their particular case. Some careful observers suggest that leaving this matter to agreement between disputants contains a risk that such agreement may not be found in certain troublesome cases. Most observers feel that it is generally clear which changes to the DSU are appropriate to resolve the sequencing problem, but that the consensus requirement for any DSU changes have greatly inhibited what should be an easy resolution to the problem.[41]

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[38] One of the most detailed examinations of this problem arises in the Appellate Body report in the "Shrimp-Turtle" case: "US - Import Prohibition of Certain Shrimp and Shrimp Products", Report of the Appellate Body, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).
[39] DSU Articles 21 and 22.
[40] As of 17 September 2004, there have been 15 referrals to an Article 21.5 DSU compliance panel.
[41] As of 17 September 2004, there have been 12 cases of a sequencing agreement. For example, "US - Shrimp", WT/DS58/16; US - FSC, WT/DS108/12; and "EC - Bed-Linen", WT/DS141/11.

240. As noted above, when compliance is not forthcoming, and compensatory measures are not agreed, the fallback temporary measures of "suspension of obligations" or what some call "retaliation" can occur. The problem is that retaliation goes against the underlying objective of the WTO system generally to promote rather than restrict international trade. The somewhat relaxed, even complacent resort to such damaging trade action is becoming serious. Also, there are worries, in particular, that some countries, including some of the major trading partners, such as the US and the EU, are acting in a recalcitrant manner, and not taking measures that would effectively, and in a timely manner, fulfil their obligations.

241. It has even been argued by some that a WTO Member finding itself in a losing position in the WTO dispute settlement system has a free choice on whether or not to actually implement the obligations spelled out in the adopted Appellate Body or panel reports: the alternatives being simply to provide compensation or endure retaliation. This is an erroneous belief. There is an underlying obligation, which although not 100% explicitly clear in the DSU language, can be seen through a careful analysis of the total DSU and some dozens of treaty text clauses, to require measures to bring the governmental activities complained of into consistency with the rules of the WTO.[42]

242. **To allow governments to "buy out" of their obligations by providing "compensation" or enduring "suspension of obligation" also creates major asymmetries of treatment in the system. It favours the rich and powerful countries which can afford such "buy outs" while retaining measures that harm and distort trade in a manner inconsistent with the rules of the system.** In turn that can only diminish the extent to which companies, trading and investing, can rely on the rules to provide market predictability.

243. For poorer WTO Members, especially the least-developed countries with their narrow participation in world trade, the "buy out" attitude can nullify the value of their pursuing dispute settlement cases. These countries normally cannot effectively use the weapon of retaliation without imposing damage on themselves and on the goals of trade liberalization. **One proposed solution is to allow monetary compensation from the party required to comply with a dispute settlement report, to substitute for compensatory market access measures by the winning aggrieved disputant. Some experimentation in this regard could be useful, but great care must be exercised to be sure that monetary compensation is only a temporary fallback approach pending full compliance, otherwise the "buy out" problems will occur.** In addition, monetary compensation will in some cases face enormously difficult "valuation" problems, and may often ignore the rights of third parties, and damage the goals of security and predictability of a rules-based system for market participant future activities. "Valuations" would have to consider not only effective losses, but also potential gains that are nullified or impaired.

244. Proposals have been put forward that in some circumstances losing parties should reimburse legal process costs of a successful complainant. This proposal also has some merit, but must be thought through to avoid burdens on poorer countries, which could inhibit their access to the dispute settlement procedures in cases, which, although not clear, involve a reasonable argument regarding a troublesome ambiguity in the treaty texts.

245. It is possible, of course, that effective compliance will not really depend so much on the specific remedies - including retaliation or compensation - contained in the DSU, but more on the general attitudes of WTO Members, particularly the very large and powerful among them. Those attitudes reflect a willing-

[42] See, e.g., John H. Jackson, "Editorial comment: International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?" American Journal of International Law 98 (January 2004): 109-125.

ness - or lack of it - to support the credibility and fair operation of the dispute settlement system. Thus it is extremely important that the major players follow a policy of conforming to the obligations outlined in WTO panel or Appellate Body reports in cases brought against them. It is important for the system to maintain the political support and confidence of all WTO Members, and to be viewed as fair and rigorously impartial by all stakeholders. It should be noted that for some countries, compliance is regular and satisfactory when a government can act without obtaining legislation from a parliamentary body, but compliance is sometimes delayed or difficult when legislation is required. This suggests that governments which have this problem need to seriously consider institutional changes in executive-legislative relationships to avoid this risk to appropriate good faith compliance.

E. CRITICISMS OF WTO JURISPRUDENCE

246. It is not always clear that some of the harshest critics of WTO jurisprudence, many of whom have advocacy roles related to a variety of special interests, have the best interests of the overall WTO system in mind. Nevertheless, the criticisms need to be examined and understood and, in some cases, they may warrant some accommodation.

247. As mentioned above, one of the areas of criticism has been the degree of deference that the WTO dispute settlement system shows to Members' decisions. Another criticism is that gap-filling is not an appropriate role for the dispute settlement system. This view is itself open to criticism since every juridical institution has at least some measure of gap-filling responsibility as part of its efforts to resolve ambiguity. On the other hand, it can also reasonably be argued that WTO obligations should generally be the product of negotiations among Members, not juridical proceedings. In recent years, Members have successfully negotiated very little: the Doha Round, it is to be profoundly hoped, will eventually correct the imbalance between law-making and any tendency towards creative law enforcement through the dispute settlement system. Likewise, improvement in the various decision-making processes of the WTO to avoid what sometimes appears to be stalemate situations or other inability to act (sometimes attributed to the consensus rule), would considerably diminish the incentive to bring situations to the dispute settlement system, rather than work out agreed solutions though the diplomatic process.

248. Another criticism is that the dispute settlement system is too biased, in preferring "pro-liberal trade" approaches to alternatives, even when certain important national government goals are at stake. In such cases, critics would argue that there has to be more of a fair balancing. Indeed, there may be some measure of validity in this criticism, but it needs to be carefully appraised in a context not too weighed down by special interest advocacy.

249. One area of endeavour in the jurisprudence that has engendered a great deal of criticism is the "trade remedies" area. This generally is considered to embrace the agreements on anti-dumping, countervailing duty and subsidies, and safeguards. A fairly large number of those cases (approximately 53% of the disputes) have been decided in the last four or five years. It is hardly surprising that this field of trade policy would engender the most tension and controversy in the WTO jurisprudence, since it often involves national decisions designed to assist constituent interests of some importance to governments. Safeguard actions, for instance, are generally designed to soften the rigor of liberal trade policies, and to provide an exception that would give some temporary adjustment relief to domestic interests that find imports to be rising and causing significant injury. Generally, panels and the Appellate Body urged rigorous procedural requirements in the use of these trade remedies, in order to prevent their

usage for protectionist or purely political purposes. But some notions of balancing this rigor with the policy goals of the trade remedy (especially for safeguard measures) seem worthy of consideration.

250. The DSB might be able to play a more constructive role than it has in the past, with respect to criticisms of the jurisprudence. It is important that the DSB not take any actions which would inject a political or diplomatic change into the results of any particular dispute settlement case. To do so could seriously undermine the credibility, rigor, and intense reasoning of the system. Furthermore, a certain amount of the discussions in the DSB about a report sent to it for adoption tend to be a rehash of advocacy positions, and expressions of dismay by one side or the other about issues which they had advocated and had not been adopted.

251. **A more constructive approach might be to occasionally select particular findings for in-depth analysis by a reasonably impartial, special expert group of the DSB, so as to provide a measured report of constructive criticism for the information of the WTO system, including the Appellate Body and panels.** Such a report could be presented to the DSB for information, or conceivably could be adopted by the DSB. In an extreme case, perhaps the report could go so far as to recommend that the DSB and General Council take measures under Article IX of the Agreement Establishing the WTO, for a "definitive interpretation" of the treaty text.

252. Even a report presented or adopted for information only could have an important effect on the thinking of the Appellate Body members and the panellists for future cases. However, it would be important that these not have an impact on the instant case, for reasons to be mentioned in the next section.

F. REFORM PROPOSALS SINCE MARRAKESH

253. The Marrakesh Ministerial meeting of the Uruguay Round decided on a review of the dispute settlement system after the fourth year of its existence. Over the past several years several hundred proposals have been tabled. Much time has been devoted to their consideration but consensus on a package of changes to the system has eluded Members. In the Doha Round, reform of the dispute settlement procedures was set to be taken up separately from the rest of the negotiations. Again, the work has so far proved inconclusive.

254. There are, however, **a number of viewpoints expressed by governments and non-government observers that suggest a general sense of satisfaction with the dispute settlement system.** That has led to the suggestion that there does not exist a strong political incentive to reform the system. Indeed, as expressed at the beginning of this chapter, **an important underlying concern is, or should be, to not "do any harm" to the existing system since it has so many valuable attributes.**

255. **Some of the ideas for reform would create a sort of "diplomatic veto" or the opportunity for specific disputants to "nullify" or change aspects of the final adopted report following a full dispute settlement procedure.** To inject the opportunity for political or diplomatic activity to interfere with the basic result so carefully arrived at by the relatively intense dispute settlement procedures, would shift the emphasis away from reasoned advocacy, with all sides having an equal and fair opportunity to present their arguments and ideas. It would undermine and bring discredit on the procedures, and in some ways, would be a regression towards some of the very important problems in the GATT era, such as the opportunity for losing parties to block the adoption of a report. For these reasons, **the Consultative Board would strongly advise against any such measures as part of a reform package.**

256. There are a number of other reforms, however, which do deserve serious attention, although there may not be a high priority to achieve them soon. We have mentioned some ideas in paragraphs above; in addition, it has been suggested, for example, **that the opportunity for the Appellate Body to "remand" a case to the first level panel should be clarified.** Clearly, one of the problems would be that since first level panels are appointed ad hoc for the instant case only and are generally discharged when their report is forwarded to the DSB, there might not be an entity in existence to which a remand could proceed. Nevertheless, **the principle is worth pursuing, especially if remands can be achieved without adding delays to the already quite lengthy process.**

257. Another proposal is for a roster-type of arrangement, somewhat similar to the Appellate Body procedure, for designating the membership of first level panels. Such a roster would not need to provide "100% staffing" of the panels. It could be of a size that, even in a peak caseload period, at least one member from the roster would be on each panel. The remaining panellists could be provided using procedures now in existence. **Thus, a combination of roster and ad hoc appointments might serve the institution very well and ease somewhat the particular problems that have been witnessed in a few of the panel selection procedures.** One serious question regarding the roster idea for first level panels, however, addresses the procedures by which the roster persons will be appointed. There exists considerable worry that the usual diplomatic and political processes might not produce the best calibre individuals the tasks require. Thus, **thought is needed about a possible small apolitical body of experts who would examine applications and produce a list of nominees who meet carefully set out criteria. This body could then work with the DSB in finalizing the roster.** This is just one suggestion, among several.

258. Other reform proposals have given some attention to the Appellate Body, raising the question whether the Appellate Body should have more members, given that its caseload has sometimes been heavy. It has also been suggested that the Appellate Body members be considered full-time, rather than part-time, as they are currently retained. These proposals involve various pragmatic and resources questions, and the Consultative Board can see arguments on both sides. Probably more experience with the still new dispute settlement system is needed before some of these changes are made. The DSU might be changed to allow some flexibility for a later decision of the DSB (or the General Council) on these matters, after such experience has been obtained.

259. Several additional suggested dispute settlement reforms relate to the very important subject of how the WTO should relate to civil society and non-governmental entity participation. This subject is more broadly discussed in Chapter V. But two issues are especially significant for the dispute settlement system, namely the issue of opening parts of the dispute settlement procedures to public view or attendance, and the issue of how the dispute settlement system should handle so-called *"amicus curiae"* briefs (or similar submissions of views to a case procedure).

260. **First, with regard to *amicus* briefs, the Consultative Board agrees generally with the procedures already developed for acceptance and consideration of appropriate submissions of this type.** The DSU already provides ample authority in its Article 13 for first level panels to exercise their discretion about this. Likewise, for different legal reasons, the Appellate Body has authority to regulate this matter, and in practice, has been operating on a case by case basis. **However, those intimately involved in these proceedings see important need to develop general criteria and procedures at both levels, to fairly and appropriately handle**

***amicus* submissions, balancing worries about resource implications with fairness and a general recognition that such submissions can in some instances improve the overall quality of the dispute settlement process. The Consultative Board agrees that such procedures should be developed.**

261. The issue of opening parts of the dispute settlement proceedings, particularly the so-called "hearings" for public view (but not public participation) is more complex, partly because the current DSU text prevents such approach in most cases. Thus, amendment of the DSU will be needed, and this requires consensus, which can be blocked by any WTO Member. **Our recommendations about consensus in Chapter VII are thus importantly linked to our recommendations here. The Consultative Board feels that the degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution.** This Board accepts the view of many participants in the system that many public observers would be favourably impressed with the processes.

262. **Thus, the Consultative Board recommends that, as a matter of course, the first level panel hearings and Appellate Body hearings should generally be open to the public.**

263. **This new practice would be susceptible to a motion by a panel (or Appellate division) or by a disputing party, arguing there is a "good and sufficient cause" to exclude the public from all or part of a hearing.** The need to protect confidential information, such as "business confidential" matters would be one example of such cause. **Furthermore, at least in the early years of this new policy, the Board would recommend that when any disputing party for reasons such party gives in writing as "good and sufficient," that view shall be treated as determinative.** This could alleviate some anxieties about this transparency, but it would be hoped that the presumption would be established that open hearings should be the prevailing norm. However it is achieved, such additional transparency should serve to reinforce a positive public view of the dispute settlement system. Certainly, it should counteract the deliberately mischievous image sometimes promoted of a mechanism that is both secretive and conspiratorial.

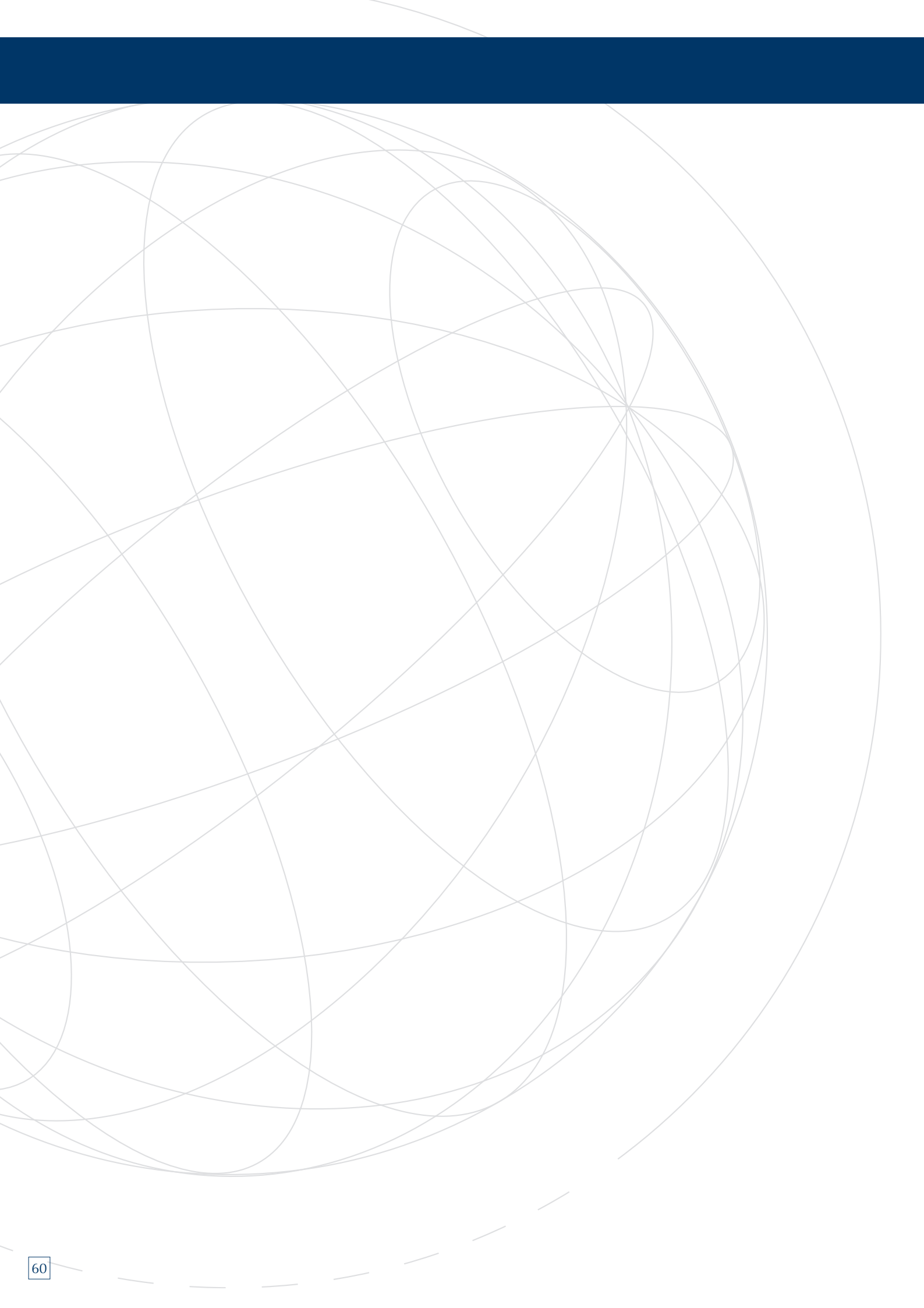
264. Closely related to the prior paragraphs are several final points that should be made. First, it is self-evident that the better informed are diplomats and government officials on the fundamentals of international dispute settlement the better. This goes rather further than a good understanding of procedures. **A broader understanding of the role of "rule orientation" in treaty implementation, as well as the general approaches that virtually all juridical institutions, national and international, take to their work would sometimes be welcome**. Thus, the resolution of ambiguities, a certain amount of limited gap-filling, the need for various interpretation techniques are all part of the natural scenery of dispute settlement. They come together in providing predictability and security to enterprises in the market. **The WTO Secretariat should encourage and facilitate technical assistance in this area.**

265. Second, **the nature and value of the dispute settlement system must be sold to a wide public and political audience.** Clearly, in the last several years, the amount of criticism of the system and the results it generates has intensified. But, much of this criticism - which often is sharp but not necessarily balanced or informed - stems from relatively one-sided, advocacy-related positions. **It is important that the system be better understood, not only by the diplomats, public officials and legislators that have to engage in it, but also by the general public** who provide the constituencies that are being served by the system.

266. Consequently, the WTO as an organization, and its officials working directly in dispute settlement activities, have some obligation to educate as well as administer. Some of the efforts of the Secretariat to inform the public, such as the reasonably elaborate explanatory and bibliographical materials on the WTO website, are very welcome.

267. **Further constructive efforts along this line, perhaps including some by expert groups appointed by the WTO or by the DSB, would be welcome**.

268. Finally, it is interesting to note how extensively the WTO dispute settlement system is being treated in literature from non-governmental sources. There is an enormous amount of scholarly and policy-centered literature about the dispute settlement system. This is evidence of the general and public interest in the subject, and in the recognized importance and, perhaps, value of the system. Individual cases are debated at length (similar to attention received by decisions of national courts). This activity, either of scholars or of intelligent and pointed argumentation by other perceptive observers, can play a constructive and complementary role in support for a rules-based institutional framework for international trade, just as similar activity plays such a role within nations.



CHAPTER VII

A results-oriented institution - decision-making and variable geometry

A. CONSENSUS

269. The World Trade Organization is in large measure a negotiating machine.[43] Like the GATT before it, the WTO was designed to seek negotiated solutions to the challenges of global trade. The efficient conduct of negotiations and the pursuit of multilateral consensus as a means of closing off the bargaining and the making of decisions are the WTO's only means of fulfilling its mandate. The organization has no money with which to secure objectives, unlike the World Bank and the International Monetary Fund. While trade is an important factor in achieving development aims, the WTO is not a development agency. It relies instead on technical assistance and capacity building aid to achieve results among its poorer Members. Other institutions are expected to fulfil that role; the WTO is in the business of negotiating conditions of market access and supportive trade rules that provide opportunities for its membership to take commercial advantage of the global economy.

270. In recent years, the WTO has sometimes given the impression of being unable to negotiate effectively. As public and political interest has increasingly focused on the institution, it has not always appeared able to deliver on the stated ambitions of its Member governments. Still less has it been able to respond to the multiplicity of demands on which special interest groups have campaigned. This has led to frustration, at best, and extreme, sometimes violent protest, at worst.

271. The extent to which the WTO can or should seek to meet the demands of all its critics is covered in other chapters. Here, we look at the mechanics of negotiations and decision-making to establish whether structures and procedures are optimal, including whether the consensus rule should be modified.

B. NEGOTIATING ADVANCES ARE NATURALLY SPORADIC

272. It ought to be stressed at the outset that periods of modest achievement by the world trade body are not unusual. Since 1947, the GATT and the WTO have moved forward in fits and starts - notably through eight completed trade rounds. In the early years, these rounds were largely about tariff reductions among a small group of countries: they could be conducted and concluded relatively quickly. Since the 1960s, however, there has been a single, increasingly broad, multilateral trade round concluded once every 12 or 13 years. In between, work has concentrated on the settlement of disputes and accessions. Clearly, Members have needed time to digest and implement the results of each round. Negotiating fatigue is a real phenomenon. Moreover, the political impetus necessary to launch and drive forward a new negotiation deflates naturally as other issues predominate and economic fortunes encourage or discourage trade liberalization initiatives.

273. Arguably, the WTO has done well since the conclusion of the Uruguay Round and the establishment of the new institution in 1995. After all, in the late 1990s it secured major deals covering telecommunications and financial services. In 2001, it tied up the most complex accession negotiation ever, that of China. There have been many other successful accession negotiations conducted also. Furthermore it has resolved more trade disputes in eight years than the GATT managed in almost 50 years. And, against many odds, it launched the Doha Development Agenda.[44]

274. Yet, what progress there has been, was hard won. Movement in the Doha negotiations has been painfully difficult and has raised questions about the process itself. However, it would be wrong to jump to conclusions about the need for structural and procedural change. There are many potential explanations for the

[43] The functions of the WTO as laid out in Article III of the Marrakesh Agreement Establishing the WTO include: facilitating implementation, administration and operation of the Multilateral and Plurilateral Trade Agreements; administering the Dispute Settlement Understanding; administering the Trade Policy Review Mechanism and cooperating, as appropriate, with the IMF and World Bank to achieve greater coherence in global policy-making.

[44] The Doha Development Agenda Round of negotiations was launched at the Fourth WTO Ministerial Conference in Doha, Qatar, in 2001.

sometimes troubling absence of substantive negotiating advances in recent years. First, participation is broader and more intense. There are many more Member governments involved (almost 150 compared to the 86 at the start of the Uruguay Round), so consensus is bound to be more elusive. More important than sheer numbers of Members, the impact of much-enhanced training and technical assistance programmes means there are now many more effective negotiators with the capacity to make a mark. Additionally, Members still lacking negotiating capacity have access to externally funded consultancy services which also seek energetically to have a visible impact on the negotiating process.

275. An area of explanation lies in the scope and sensitivity of negotiations. Many of the easy issues have been tackled; tariff barriers, for instance, have been reduced in developed countries to the point where those that remain at high levels are also the most politically sensitive. As a consequence, further opening of market access in many areas of goods and services is a hard sell for governments. Even though many developing countries start from much higher levels of protection, their governments face no less difficulty in exposing domestic industry to external competition. More generally, and leaving market access to one side, the issues dealt with by the WTO - although clearly trade-related - increasingly touch on sensitive aspects of domestic policy-making and crucial choices among welfare objectives. Agricultural support policies and the application of intellectual property rights are obvious examples.

276. The results of WTO negotiations bite more deeply into national competitiveness than ever before. In an increasingly open global economy, those who seek to compete - for markets or for investment - all have much to gain from major multilateral trade deals. The balance between "gains" and "concessions" is acutely defined: ambitions can be very high, defensive postures exceedingly rigid. Furthermore there is too frequently a political bias in domestic assessments of national competitiveness that leads in counterproductive directions. The recent controversy over outsourcing of services jobs is an obvious example

277. There are currently no opt-out options available to WTO Members where new rules and agreements are being negotiated. Prior to the Uruguay Round, there were few obligations imposed on developing countries and, as a result of the Tokyo Round especially, a number of important plurilateral agreements to which membership was wholly voluntary. The Uruguay Round changed all that, with a "single undertaking" to which all WTO Members would be required to subscribe - albeit with differing implementation periods. That change, welcome in itself, now weighs heavily on developing country governments and has clearly coloured their attitudes towards the Doha Round. Simply acquiescing in decisions promoted by the major players is no longer cost free.

278. Finally, while business and consumers continue, rightly, to be the key stakeholders in multilateral trade negotiations, governments must increasingly take account of others. The impact of development, environmental, labour and other interests in the past decade has been significant. Governments must decide for themselves how to respond in terms of WTO negotiations. However, in many cases the impact of other stakeholders has led to ambivalence in governments about their fundamental support for the multilateral trading system and the negotiating positions they adopt. In short, trade negotiations have long ceased to be the almost exclusive domain of technocrats; they are now, increasingly, high level concerns for political leaders.

279. Few of these changes are likely to go away. To a large extent the WTO must learn to live with them. Its Members can look at

possible methods of driving negotiations and they can consider how to facilitate decision-making, but they cannot ride roughshod over the rights of individual Members. Nor can anyone pretend that governments will cease to make very political, as well as commercial, judgments on when and how to move in negotiations. The WTO, like the GATT, is a remarkable instrument of multilateralism. Because it is so, it must remain for sovereign governments to decide, at every point, their national interests and to demand that those interests are fully reflected in everything the WTO decides. That may be frustrating when particular Members wish to move ahead and others prefer to hold back. We look at some alternative approaches in the following paragraphs. But it should be observed that almost no WTO Member is ever single-mindedly on the side of creating new obligations and further opening markets. It is, to say the least, a little disingenuous to complain about lack of liberalizing zeal in the WTO membership one day and to insist on a sovereign right to maintain some sensitive corner of protection the next. Ambition and humility are often good bedfellows.

C. SHOULD THE CONSENSUS PRINCIPLE BE QUESTIONED?

280. Certainly, the most dramatic solution to the troublesome system of decision-making in the WTO would be to look again at the consensus rule. Voting is provided for in the Marrakesh Agreement with specific majorities required for certain specific situations. However, the practice of decision-making by consensus in the WTO has been, so far, to the exclusion of voting. Consensus was also the norm in the GATT, although voting was used, for instance in the case of new accessions and for waivers.

281. Establishing a consensus means reaching a point where no WTO Member is actively opposing a decision. Put another way, it means that any Member, no matter how insignificant in global trade terms, can have a veto on any decision of the institution. That is the WTO's way of ensuring that the poorest and weakest cannot be overridden by the rich and powerful. It has been a cornerstone of the trading system over more than five decades; it is the procedural equivalent of the most-favoured-nation principle that ensures the weakest trading nations receive, unconditionally, the best conditions of market access offered in the WTO by the strongest. Thus, the big and powerful countries must spend time to persuade even small and less developed countries of the merits of a proposal. The smaller, less developed countries are better able to have leverage, which requires that they be listened to.

282. There is a larger sense of legitimacy for proposals adopted by the consensus approach, since it requires that no Member object to a proposal. But it should be noticed that the definition of consensus favours Members that can afford to be present at all meetings, since absence - or abstention - does not itself defeat a consensus.

283. On the other hand, there are also disadvantages to the consensus system of decision-making. As the number of Members grows larger and larger (now 148, perhaps going to 170 or more), it becomes harder and harder to implement needed measures that require decisions, even when there is a vast majority of the Members that desire a measure. The consensus requirement can result in the majority's will being blocked by even one country. If the measure involved a fundamental change, such difficulty would probably be worthwhile, as adding a measure of "constitutional stability" to the organization. But often there are non-fundamental measures at stake, some of which are just fine-tuning to keep the rules abreast of changing economic and other circumstances.

284. When the decision-making process becomes wholly inefficient and "treaty rigidity" sets in, there is much temptation to take situations to another procedure, one which has a proven ability to at least come to a reasoned decision. This other procedure in the context of the WTO is, of course, the dispute settlement system. Thus, a relative paralysis or deep inability to move forward, can actually cause issues that ought to be decided by a diplomatic or "legislative rule-making" process, to instead be referred to the juridical system, perhaps in situations that are inappropriate for a juridical system. Likewise, consensus blockage leads WTO Members to "take their business elsewhere" by establishing agreements or institutions separately from the WTO, or to utilize other techniques of "variable geometry".

285. Sometimes observers say consensus decision-making is not a problem since they do not observe many situations of a consensus being blocked. However, even without the blocking occurring, the fact that consensus is known to be the only pathway open in some situations leads Members to refrain from even making the attempt to achieve movement in the organization. Further, almost all potential decisions are prepared informally in advance and usually do not move to a formal proposition in a decision-making body if they are not ripe for consensus.

286. So the question has been put forward by a number of different Members and observers of the WTO as to what the organization should do about its "consensus problem." Clearly, voting is rarely, if ever, a wise alternative, even though the WTO treaty text provides for voting as a fallback (Article IX), or in some cases, as the method of decision. As stated above, the WTO practice so far has been quite consistent, even in those cases, to use consensus. Furthermore, the voting structure in the WTO can be manifestly unfair, given the existence of some large blocs of votes being available to some parties.

287. There are other practical objections to departing from consensus. Where, for instance, negotiations take place within a broad agenda covered by a single undertaking - as in the Doha Development Agenda - breaking the consensus practice would deny tactical advantages and leverage to those excluded. Some Members seek to block progress on potential agreements extending the reach of the trading system because they lack the means to implement new commitments. It must be incumbent on the membership collectively to ensure appropriate provisions and transition periods as well as adequate capacity-building support for implementation. Denying such a Member its right of veto would not be an acceptable response.

288. In the light of these conflicting policy goals, the Consultative Board has two recommendations. **First, it recommends that the WTO Members give serious further study to the problems associated with achieving consensus in light of possible distinctions that could be made for certain types of decisions, such as purely procedural issues.**

289. **As a second recommendation in this context, the Consultative Board urges the WTO Members to cause the General Council to adopt a Declaration that a Member considering blocking a measure which otherwise has very broad consensus support shall only block such consensus if it declares in writing, with reasons included, that the matter is one of vital national interest to it.**

290. Ultimately nobody can be excluded from any decision as things stand; nor should they. The fact must be faced that some issues dear to some participants will not always be progressed quickly - sometimes not at all. That may be frustrating, but multilateralism was never easy. There are, however, systemic and procedural options that might provide the means to lighten the burden of securing progress in the WTO.

It is important that the institution looks carefully at these and other possibilities. Indeed, as the process of globalization proceeds, the WTO is becoming a unique laboratory for multilateral negotiations. Thus, these issues should be considered in a very broad perspective.

D. VARIABLE GEOMETRY - LETTING THE WILLING MOVE FORWARD

291. One set of possibilities focuses on variable geometry in WTO commitments. In other words, some Members may choose to take on more or less obligations - obligations that may, or may not, be enforceable through the dispute settlement mechanism. A second area worthy of consideration - that is not mutually exclusive to the first - relates to more sophisticated management and consultative processes.

292. "Variable geometry" is a term to denote that obligations differ for different Members of the organization. To a great extent, the GATT and the WTO have always had certain elements of variable geometry. Tariff, service and government procurement schedules are examples, based on negotiating principles tailored for those subjects. The WTO Agreement provides for a few "plurilateral" (meaning optional, not binding on all) agreements in Annex 4. However, the consensus rule makes it difficult to add new agreements to that Annex. Special and differential treatment is a form of variable geometry to give special recognition for developing country needs. Regional or other GATT Article XXIV agreements are another example. (See related discussion in Chapter II.)

293. There are advantages to some amount of variation in obligations to avoid the "one size fits all" problems, and to provide opportunities for experimentation, innovation, and measures that have policy value, but which cannot be achieved in the context of so many Members. However, clearly there are other downsides.

294. A major effort was made in the Uruguay Round to move away from further splintering the multilateral trading system through the kind of limited membership agreements (plurilateral agreements) reached in the earlier Tokyo Round. In whatever form, re-establishing two or more classes of membership in the WTO is not always an optimal solution to the challenges of extending the scope of the institution, nor to deepening the commitments to liberalization of its Members. To some extent, the WTO serves to encourage and nudge its Members - particularly where governments face entrenched domestic or private sector opposition - towards development-friendly, market-based policy options. That said, for the reasons above, the alternatives to universal commitments must at least be reviewed.

295. The Tokyo Round generated nine agreements to which only limited numbers of GATT contracting parties ever subscribed. In the main, it was developed countries that signed on to these "codes". They covered largely non-tariff measures including technical barriers to trade, anti-dumping measures, subsidies and countervailing measures, government procurement, import licensing, customs valuation and so on. The Uruguay Round resulted in all WTO Members being required to take on all obligations under most of the WTO agreements. These included updated versions of the Tokyo Round codes. Varied and sometimes very lengthy timeframes were provided for developing countries to implement. Even so, many poorer countries found difficulty in so doing, notably with respect to the customs valuation agreement.

296. In practice, only two Tokyo Round plurilateral agreements remain operational in the WTO: those covering government procurement and trade in civil aircraft. The former is subscribed to by only around one-fifth of the membership, the latter much less. However, some 63 WTO Members are now participants in the Information Technology Agreement (ITA)

added in 1996. Taking the plurilateral route again would permit willing groups of Members to take commitments on specific dossiers where no agreement of meaningful substance is likely on a universal basis. All WTO Members might be enabled to participate in negotiations and subsequently decide whether or not to sign and implement.

297. Certainly the plurilateral approach would enable sets of WTO Members wishing to negotiate more ambitious commitments to do so. Groups might negotiate across a broad agenda or on single topics. What about the remaining Members? One proposal would permit them to participate in the negotiations of a plurilateral agreement but to retain the freedom to opt out of a result they found unpalatable. Another approach would be to exclude them from the negotiations but provide an opportunity for them to opt in at a later stage.

298. Clearly, this is a divisive approach that would enshrine a multiclass membership structure. It could take the multilateral trading system backwards rather than forwards. Those choosing not to participate might quickly be left far behind or feel marginalized. And they might play no part in the design of commitments they may ultimately desire - or have no alternative but - to sign on to. Thus, the rules under which any such negotiations take place in the future should be clear in advance and appropriate to the institution. Clearly, they should not permit small groups of Members to bring into the WTO issues which are strongly and consistently opposed by substantial sections of the rest of the membership.

299. One advantage of such an approach, however, might be to dissuade the most powerful Members of the WTO from taking alternative routes in securing - or avoiding - trade liberalization with their trading partners. In particular it might diminish the attraction of regional and bilateral trade arrangements, especially those that fail to come close to the requirements laid down in the WTO.

300. **The Consultative Board therefore advises that possible plurilateral approaches to WTO negotiations should be re-examined - outside the context of the Doha Round. There should be particularly sensitive attention to the problems outlined above. If there is political acceptance of the principle it is suggested that an experts group be established initially to consider and to advise on the technical and legal implications.**

E. THE "GATS SCHEDULING" APPROACH

301. The General Agreement on Trade in Services (GATS) established a new approach to the taking of trade commitments at the multilateral level. Essentially it allows each WTO Member to decide its own pace for offering market access and national treatment for specific services sectors and activities. Commitments are built from the bottom up; they are made and "scheduled" in a manner and at a speed which squares with development and other national policy priorities. Thus, while all Members would sign an agreement based on such an approach, there would be a high degree of voluntarism in concrete commitments made. Naturally, trading partners would be free to seek to improve the level of each other's commitments through negotiation.

302. Scheduling cannot be practical in all areas. It is hard to apply, for instance, in the rule-making areas such as anti-dumping and subsidies. There are other drawbacks. In particular, the multiplicity of individual national commitments can be a complication for traders and investors that are active on a global scale. That said, any enforceable and predictable commitment made in the WTO might be seen as preferable to no commitment and constantly changing market or regulatory conditions. Moreover, as in the GATS, some provisions in

such an agreement might be generally applicable - for instance, most-favoured-nation treatment and transparency.

303. It will also be argued that the "bottom up" scheduling approach is too lacking in ambition and, therefore, commercial impact. There are alternative mechanisms: the most obvious is a "top down" approach where everything is covered by all disciplines except where specific policies and activities are identified and scheduled. That, however, moves us back to a more onerous set of obligations which may be difficult to assess and implement for poorer countries.

304. **In certain circumstances, a GATS approach would be an appropriate alternative - in developing new disciplines - to a plurilateral negotiation. We therefore advise that these two concepts be further explored together.**

F. TAILORING THE COMMITMENTS OF THE WTO'S POOREST MEMBERS

305. The recent concern about market access negotiations and extending the reach of the WTO into new areas has tended to focus on the capacity of least-developed countries to secure benefits from their membership and to take on new commitments. The experience of some of those countries in implementing Uruguay Round agreements - albeit with long transition periods and, often, lower levels of commitment - demonstrates the validity of some aspects of such concern. Since at least some additional implementation burdens of any new WTO obligations agreed in the Doha Round will fall heavily on least-developed Members, is there an approach that would focus specifically on them?

306. Much of the broader response, naturally, will take the shape of reinforced technical assistance efforts and capacity building aimed specifically at meeting new obligations. There is a strong case to be made that least-developed countries should have a contractual entitlement to capacity building support to implement new commitments in the WTO. It is not good enough for advanced Members merely to express their political intent to provide support - it should be part and parcel of new agreements.

307. It is also assumed that long transition periods and, where appropriate, lower levels of obligation will continue to be provided for the WTO's poorest Members. Should more radical approaches be considered?

308. One such approach is to recognize that the least-developed countries are, unfortunately, insignificant in terms of world trade (even collectively) and to offer them the broad benefits of WTO membership while requiring of them none of the obligations. In any event, those WTO Members that provide trade benefits to LDCs currently do so while demanding little or nothing in exchange. Part IV of the GATT and the Enabling Clause establish the principal of non-reciprocity in trade negotiations under the WTO and in the provision of preferences, as we have discussed extensively in Chapter II.

309. However, going so far as to remove all obligations from all least-developed countries would be a mistake. Membership of the WTO is recognition by governments that more open and investment-friendly domestic markets create trade and generate development. Of more practical importance is that WTO membership is intended to place on governments - all governments - pressure to move them towards, not away from, competitive trade regimes.

310. It is evident that a good many least-developed country governments seek actively to harness the disciplines of the WTO to secure internal reform and to integrate into the global trading economy. Clearly, nations that wish to maintain very high levels of across-the-board

market protection and stultifying or corrupt regulatory regimes, and that have no intention of using WTO obligations to pursue development-oriented domestic reform, are going to reap minimal benefits from their membership. But if such nations exist, they are a very small minority. Most, at some point, if not today, will make constructive and creative use of their membership. Removing even minimal obligations will not hasten the day that policy changes are made to promote development and secure integration into the global economy. Such a move would also deny what little negotiating leverage least-developed countries currently wield in WTO negotiations.

311. **The Consultative Board advises that wherever possible new agreements reached in the WTO, in future, should contain provisions for a contractual right, including the necessary funding arrangements, for least-developed countries to receive appropriate and adequate technical assistance and capacity building aid as they implement new obligations.**

CHAPTER VIII

A results-oriented institution - political reinforcement and efficient process

312. In the previous chapter it is argued that new approaches to decision-making and perhaps some level of variable geometry in negotiations - and, therefore, in the WTO's legal structure - while not wholly desirable options, may need to be considered further. At the same time various less radical approaches could help facilitate consensus and the process of negotiations. These relate to the institution's delegate structures and consultative machinery. While juggling with structure and process will not resolve fundamental differences of substance, there is certainly room for more efficiency, deeper political and economic awareness and higher level participation in much of the WTO's work.

A. ADVANCING NEGOTIATIONS IN A "MEMBER-DRIVEN" ORGANIZATION

313. One starting point is the notion of the WTO as a "Member-driven organization". While the WTO is no more Member-driven than the GATT, the assertion of Member domination of the business of the WTO, notably since the conclusion of the Uruguay Round, reflects a significant change in attitude. In part it is a response to the critics outside. The image of the WTO as a group of grey-suited, secretive and anonymous men dictating the future of entire countries from behind closed doors was always fanciful. Nevertheless, it has been important to demonstrate the truth,that it is governments alone that steer the trade body and are responsible for its decisions.

314. One drawback to the "Member-driven" approach has been some diminution in the role of the WTO Secretariat which had previously helped to provide a clear sense of direction for the system. At a practical level the Secretariat has always had the capacity to inject creative proposals into the negotiating processes of the GATT and the WTO. Sadly, it is a capacity that sometimes appears less welcome now than before (see Chapter IX). That is a loss to Members when their work is in difficulty.

315. However, facilitating negotiations also requires more practical measures at the organizational level. The WTO needs to be efficient, decisive, inclusive in its deliberations, attuned to the world outside and trusted. Structural changes in its organization cannot, alone, make it so. The delegate bodies currently in place are largely a reflection of the negotiating structure created for the Uruguay Round. They may still be appropriate. Nevertheless, they should be re-examined in the light of the need to streamline regular activity and reduce the burdens on small delegations. At the same time there are new levels of political engagement and high-level consultative machinery that would serve to give direction and drive to negotiating processes.

B. POLITICAL INVOLVEMENT NEEDS REINFORCING

316. Remarkably, in an institution which political leaders everywhere claim as their principal vehicle of trade policy development, regular direct, formal, political involvement in the WTO is minimal - once every two years for Ministerial meetings and otherwise only when crisis threatens. Despite assurances to the contrary, ministers often devote far more time to bilateral and regional trade deals than to ensuring the multilateral system delivers worthwhile results. At the same time, recent experience suggests that only the direct participation of political leaders will provide the space and urgency for meaningful changes of position. So political has trade policy become, globally, that Geneva-based delegates seldom appear to have the flexibility, even on quite mundane issues, to move the negotiating process forward. On a day-to-day basis, the WTO has become too much of a talking shop.

317. Sessions of the Ministerial Conference currently take place every two years. This is too seldom and out of line with other major international bodies. Ministers should meet

annually. They should not be required to pursue lengthy agendas and conclude ground-breaking agreements every time. Ministerial meetings need to be demystified and expectations reduced; they should look more like the annual OECD Ministerial gatherings or those of the World Bank/International Monetary Fund. Outside of key negotiating periods, the agenda should require no more than a review of the state of the trading system, along with any routine decisions required at the Ministerial level. Preparation should be low-key; the essential objective being to get all WTO ministers together with an opportunity to bring their own trade priorities and challenges directly in front of the international community.

318. To help ensure ministers are engaged consistently - outside annual meetings - the Director-General should be required to report to ministers on key WTO developments, in writing - briefly, publicly and candidly - every six months. The intention would be to maintain political involvement and interest and send appropriate messages in a timely fashion.

319. While ministers of trade, agriculture and, perhaps, economy, should participate regularly in WTO developments, the system has need of support at the very highest levels. Political leaders must signal their expectations of the WTO in a broad political, social and economic context. A summit of world leaders - heads of government - should be held in the WTO every five years. Such a gathering would serve to reinforce commitment to the multilateral trading system. It would provide a platform for government heads to express any concerns. It would also serve to define a direction for future work and, when appropriate, to set an agenda for new negotiations.

320. **The Consultative Board therefore advises that Ministerial Conferences of the WTO should normally meet on an annual basis; that the Director-General be required to report to ministers in writing on a six-monthly basis; and that a WTO Summit of World Leaders be held every five years.**

C. SENIOR POLICY-MAKERS SHOULD BE IN GENEVA MORE FREQUENTLY

321. Except at times of particular negotiating intensity, senior policy-makers from capitals are also still too seldom in Geneva. Although many trade officials meet in regional or bilateral settings they seldom do so at the multilateral level. That is a loss to the system. This is especially so of developing country officials from trade, agriculture, development and planning ministries for whom, frequently, the financing of regular visits is lacking. It is precisely such officials who would benefit most from more extensive exposure to work in Geneva. It is also such officials who might contribute to more effective processes in the WTO and to sustaining positions fully in tune with those being pursued in capitals. It is absolutely crucial to the interests of all Members that there is coherence and coordination between positions taken in Geneva and government policies on the ground, notably in the context of economic regulatory reform and market liberalization. If poorer nations are to make the best of their WTO membership they must be fully and regularly present in Geneva, especially their senior officials.

322. Senior officials, from developed and developing countries alike, might be encouraged to attend General Council meetings every three or six months. Council sessions might be extended specifically for such capital-based officials to discuss general developments. Appropriate financing for least-developed country representatives would be necessary.

323. An alternative approach would be to construct a specific vehicle to accommodate senior officials' participation in Geneva. One possibility is the establishment of a senior level consultative body. Such a group existed for

many years in the GATT and was generally regarded as having value. In the case of the WTO, a consultative body might be pitched at the level of ministers or senior officials, or both. At the higher level, it might reasonably replace the informal "mini-Ministerial" format which is resented and often ineffective.

324. A consultative body would have neither executive nor negotiating powers. It would hold regular meetings to discuss the political/economic environment as well as current dossiers. When appropriate it would seek to provide some political guidance to negotiators. Above all it would give a political and economic context to the sometimes-insular proceedings of the WTO in Geneva. This proposal is very much in line with our view, expressed in Chapter IV, that the Director-General's mandate on coherence in international economic policy-making should now be intensified and broadened.

325. How would the membership of such a body be constituted? Clearly it would have a restricted membership to be effective - an absolute maximum of 30. Some major trading nations would inevitably be permanent members. The majority of seats, however, would be filled on a rotating basis - drawing, for instance, from geographical areas, regional trading arrangements, or mixed constituencies like those used in the IMF and World Bank executive boards. Whatever the solution, the combination of meeting frequency and participation should allow for the maximum involvement of all Members, and especially the least-developed countries.

326. The consultative body would be restricted to representatives from capitals, perhaps accompanied by Geneva-based ambassadors. It would be convened and chaired by the Director-General whose duty would be to report to the entire membership on the detailed proceedings. One option, however, while restricting the right to intervene to current members of the body, would be to hold sessions in a format that could be observed by all other Members.[45]

327. **The Consultative Board advises that a senior officials' consultative body to be chaired and convened by the Director-General should be established to meet on a quarterly or six-monthly basis. Membership should be limited and composed on a partly rotating basis. Funding should be available to ensure senior officials from the capitals of developing countries attend. When necessary, the consultative body could meet wholly or partially at ministerial level.**

D. MAKING MINISTERIAL MEETINGS EFFICIENT AND PRODUCTIVE

328. As already suggested, Ministerial conferences should be more regular and more routine. That does not mean they should be incapable of effective and productive work. At times they will need to take major decisions - including in the context of moving forward large-scale negotiating rounds. Much criticism has been directed at the conduct of recent Ministerial conferences in terms of their process and organization.

329. We do not believe a set of inflexible rules for the conduct and preparation of Ministerial conferences is the answer. On the contrary, the Chairman of the meeting and the Director-General, in consultation with the membership, should retain the maximum freedom to adapt procedure to circumstances within the limits of the rules already in place. However, there appears to be a serious lack of synchronization between the preparatory process in Geneva and the commencement of the Ministerial conference. There is a mismatch between official/diplomatic negotiations and the Ministerial process which too often takes two, or even three, days of a five-day Ministerial conference to adjust.

330. **Having already proposed the establishment of a senior officials consultative body, we would further propose that such a body meet immediately prior to Ministerial meetings to ease the working transition between the two levels.**

[45]It is worth noting perhaps that at meetings of the GATT "Consultative Group of 18" the member states of the European Union were present but did not intervene, leaving the EC Commission representative as spokesperson. That is also the case for most EC representation in WTO bodies.

331. Several possibilities should be seriously considered. For a start, the Director-General and the Chairman of the General Council should establish a close working relationship with the Chairman of the Ministerial conference at an early stage. Second, where it is clear that the meeting will need to cover a large agenda of negotiating issues, the practice of appointing "facilitators" should be reinforced. In particular, the appointments should be announced sufficiently early for them to be active almost immediately after the meeting convenes - but not so early that they detract from the final stages of the preparatory process in Geneva. The individuals chosen should be allocated to negotiating issues in which they have no national interest and they should be persons commanding wide respect. Other than that the appointments should be a matter of judgment for the Chairman of the Ministerial conference and the Director-General and should not become part of a further bargaining process.

332. It has been argued that the Director-General should chair Ministerial sessions. That is clearly an option. **However, the crucial point here is that the Director-General and Secretariat should have the capacity and the standing to be at the centre of negotiations during Ministerial meetings. Not only should Deputy Directors-General and divisional directors work closely alongside facilitators throughout the proceedings, they should be expected and encouraged to make proposals that will contribute towards the achievement of consensus**. That means a more assertive role for the Secretariat but one which requires of all WTO staff the continuous demonstration of neutrality and good faith.

E. REGIONAL REPRESENTATION AND COORDINATION

333. One final organizational improvement that would rationalize some negotiating activity in Geneva would be extended coordination within regional groupings. Some existing groups - the African and ACP group, for instance - are large and unwieldy and cover great variations in economic development and trade interests. Groups based on regional trade arrangements and other configurations may be more effective - though it is understood that many WTO Members have only the weakest links, if any, to such arrangements. Single-issue/single-commodity groups can also have a significant impact.

334. In general, however, with nearly 150 Members, the work of the WTO and especially its negotiating processes can only benefit from better coordination among nations with similar interests. As has been demonstrated in some regional trade negotiations - the Central American states in the Free Trade Area of the Americas talks, for instance - groups of smaller economies lacking negotiating capacity can sometimes be mutually reinforcing by assigning specific negotiating dossiers among themselves.

335. The issue is particularly relevant to the limited access ("Green Room") meetings convened by the Director-General and/or the Chairman of the General Council. Such meetings are necessary and appropriate in forging the basis for wider consensus in negotiations. Considerable progress has been made with respect to such informal consultations in recent years. Greater care is being taken to ensure that these meetings are balanced, representative and accountable. We should build on this progress to provide even greater transparency, representativeness and accountability. One option is clearly to develop a constituency structure based on the representation of regional trade agreement and other regional groups. However it is done, the "report back" function of participants in any limited access meetings should be solid and fully transparent for those not attending.

336. **The Consultative Board advises that the Director-General should explore with the relevant groups the potential for increased coordination and group representation in restricted meetings and the support that the Secretariat might provide such groups.**

CHAPTER IX

The role of the Director-General and Secretariat

337. The Secretariat of the World Trade Organization with little over 600 staff (and 100-150 temporary staff at any one time) is one of the smallest among major international institutions. Given its importance it is probably the worst funded. It has traditionally been highly skilled, devoted to its mission and well-respected. The professional staff, based in the WTO's single office in Geneva, combines the talents of economists, lawyers, trade policy experts and others. They provide an institutional memory for delegates and a boundless source of advice to an increasingly diverse collection of constituencies - governments, business groups, non-governmental organizations and other intergovernmental bodies among them. They service the delegate bodies of the WTO, present the institution to the outside world and increasingly deliver technical assistance to developing countries.

338. The Secretariat continues, rightly, to be well-regarded. Nevertheless, for some years, the mutual confidence between delegations and WTO staff has been less obvious than in the past. Certainly, the WTO's employees have been dissatisfied with their conditions of service and this has been an aggravating factor. That is not a matter for this Report. The deeper problem appears to be a view that, in a "Member-driven organization", the Secretariat's role must be solely one of support, not of initiative or even of institutional defence of the WTO system. As we have been moved to comment in the previous chapter, the principal losers from this attitude are the WTO Members themselves.

A. THE SECRETARIAT IS WELL-REGARDED, BUT THERE ARE CONCERNS

339. In practice the Secretariat continues quietly to contribute broadly and effectively to the work of the WTO's delegate bodies. However, there is cause for concern if a more timid and diminished role is leading to lost efficiency for the WTO. Further, the absence of a strong and coherent voice from the Secretariat leaves a vacuum to be filled by mixed - and sometimes grossly misleading - public messages on the nature, objectives and activities of the multilateral trading system. Of more concern is a tendency for other international institutions to fill the gap, not always in a manner that serves the system well. Those who argue for a merely passive Secretariat role may find that its influence over trade debate is thus reduced rather than enhanced. In the case of some governments and, indeed, certain non-governmental organizations, that is probably precisely the objective. If so, it is an extremely short-sighted view.

340. Yet the Secretariat's status is recognized in the Marrakesh Agreement: "Members…shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties." Clearly, the role of the Secretariat was not intended simply as the servicing of the WTO's committees and councils. There is, surely, a duty to help ensure that the WTO system functions efficiently, is properly understood and delivers on its mandate.

341. It must be the case that the Secretariat has a duty of absolute neutrality, care and respect in dealing with the rights and obligations of Members. The Secretariat may not take decisions or act in a manner that prejudices those rights and obligations. However, as discussed below, the Secretariat has a parallel responsibility, as guardian of the system - "Guardian of the Treaties" might be an appropriate expression - to act in the common interests of Members.

B. THE ROLE OF THE DIRECTOR-GENERAL SHOULD NOW BE CLARIFIED

342. The role of the Director-General is not defined in the Marrakesh Agreement. Article VI(2) calls on the Ministerial Conference to appoint the Director-General and "adopt

regulations setting out powers, duties, conditions of service and term of office…". Aside from determining conditions of service, this mandate has never been fulfilled; perhaps it now should be.

343. Is the lack of a job description a drawback? Certainly it makes the office over-dependent on the prevailing and often very transient political mood of Members rather than on the long-term interests of the institution. In response, Directors-General have increasingly seen their role as a form of international spokesperson and marketing executive. That means travelling widely and frequently: regular contacts with political leaders in capitals, while often of utility, have reduced the presence and role in Geneva. This is a serious change of emphasis. It has undermined the notion of leadership of the system as distinct from leadership of the Secretariat. Indeed, in previous periods, Directors-General of the GATT were sometimes regarded virtually as spiritual leaders of the system. Their words were given considerable weight in the substantive business and direction of the institution.

344. Neither approach to the Director-General's role is necessarily exactly the right one for current circumstances. However, it has to be recognized that if the head of the organization is reduced to a spokesperson and international advocate for free trade then he or she is unlikely to have a big impact at the diplomatic, negotiating level in Geneva. Further, the imbalance in the Director-General's activities can generate a mismatch between apparent high-level political support for active engagement and movement offered in capitals and the maintenance of inflexible negotiating positions in Geneva. That adds to the impression that both the Director-General's role and the diplomatic processes in Geneva are ineffective.

345. There is also a role for the Director-General in the delegate bodies of the WTO. Traditionally, the Director-General has chaired the Trade Negotiations Committee (TNC) - sometimes in a purely personal capacity - during trade rounds; and he does so currently in the Doha Round. That practice should be continued. Given the continuity and neutrality that the head of the Secretariat can provide, the chairmanship role might be extended, as appropriate, to other committees and councils when necessary, as was the case in the past. Arguably, the Director-General should chair the General Council. In any event, since he represents the institutional memory and authority of the WTO, delegations should not shrink from turning to the Director-General as an "honest broker" as well as for advice on procedure and precedent. That is equally the case in the context of the potential roles outlined for the Director-General in the Dispute Settlement Understanding.

346. Finally, there is the question of the Director-General's duty to manage the Secretariat. In recent years, there has been a tendency towards micro-management by Members, particularly through the Budget Committee. While Members will always have oversight of overall spending through the broad lines of the budget it is debilitating for the organization and discouraging for staff for oversight to become detailed interference in management. The Director-General must have an independent right to manage - albeit within the limits of a budget. Confirmation of that right in written "powers and duties" of the Director-General would be a worthwhile step forward.

347. **Consequently, the Consultative Board advises that, as required by the Marrakesh Agreement, the "powers and duties" of the Director-General now be spelled out clearly by the General Council, in part on the basis of the advice of present and past holders of the post.**

C. APPOINTING THE BEST CANDIDATE AS DIRECTOR-GENERAL

348. Naturally, the capacity of the Director-General to provide reinforcement to the work of delegations depends both on the quality of the Secretariat and his or her own personal background. The contrast in perceptions of the objectives of the head of the WTO Secretariat has clearly affected the views of Members on the qualifications required of candidates for the position. Should they seek a high political profile or someone with a detailed, technocratic understanding of the institution - a mixture of the two is a rare species. As discussed below, if the emphasis on political experience and profile is to predominate then it may have implications for the appointments made below Director-General level.

349. There remains a need to ensure rationality in the procedures for the appointment of the Director-General and his deputies. The avoidance of difficult choices between two favoured candidates through back-to-back three-year appointments is not an acceptable or viable procedure. The adoption of such an approach in 1999 was unfair to the two most recent incumbents and has served the WTO poorly. Any individual, no matter how experienced or well informed, takes time to adjust and become effective in this unique post.

350. The procedures adopted by the General Council for the appointment of Directors-General were a step in the right direction and are currently being put to the test. These include an appointment term of four years, renewable for a further four years - an arrangement with which the Consultative Board fully concurs. While the procedures allow for voting as a last resort, in the interests of demonstrating the broadest possible acceptability of a successful candidate voting should be avoided. That is particularly the case if one candidate is clearly close to commanding consensus support.

351. The key lies less in procedure than in political acceptance of the benefits of appointing the best, properly qualified candidate. That partly depends, again, on correctly defining the role of the Director-General. But it also requires a more realistic and responsible attitude by Members. Regional sequence is not a greater priority than quality. Nor is backing a domestic or regional candidature for the sake of having a sympathetic ear in the Director-General's office. The reality is quite the contrary. Any appointee of quality and credibility must clearly distance himself or herself from past associations, including geographical origin. The advantages of promoting a successful candidate may include some short-term international kudos, but never favours or benefits of substance.

352. **For these reasons the Consultative Board would favour the abandonment of the agreement that permits WTO Members to make nominations only of their own nationals or that candidates must have the backing of their own governments. Indeed, there would be more logic in disallowing such national nominations completely. Any tendency towards alternating between developing and developed countries and any regional sequencing should be avoided. By the same token we would favour reducing the intensity of candidate "campaigns". A further option requiring that an initial independent search for appropriate candidates be carried out may be worth further examination.**

353. **The Consultative Board fully endorses the position that technical competence and appropriate experience should be prerequisites in the appointment of Directors-General.**

D. A NEW APPROACH TO MANAGEMENT AND THE DIRECTOR-GENERAL'S DEPUTIES

354. Since the WTO was established, it has become the practice for the Director-General to appoint four deputies. There has been little serious consideration given to that number; the prevailing view has tended to be that it allowed for some geographical balance at the most senior levels of the Secretariat. It is not at all evident that more than two deputies are

necessary, especially given the large number of divisional directors who could appropriately report directly to the Director-General.

355. However, the optimal number of deputies depends heavily on what the membership expects of the Secretariat. If governments want a passive Secretariat and a Director-General acting largely as a salesman for the WTO, then there is little point in the expense of four, three or even two deputies. **If the Director-General is to be a high-profile political figure, spending considerable time outside Geneva, an alternative configuration may be appropriate. That would be the appointment of a single deputy as a chief executive officer equivalent. That deputy would run the Secretariat and take a frontline responsibility for the interface between the Secretariat and Geneva delegations. Such a high-level deputy would also be in a position to chair key councils or committees, undertake consultations and stand in for the Director-General as necessary.**

356. Alternatively, if the membership wants an active, innovative and fully engaged Secretariat then two or, at most, three deputies may be justified: if three, then one among them might still take on the chief executive role, depending on the background and wishes of the Director-General. **In any event, the final formulation must remain the prerogative of the Director-General.**

357. **Whatever the approach adopted at the senior levels of the Secretariat it should allow a much-strengthened management structure and culture to be put in place**. Dissatisfaction among the staff has two principal roots. One is a slack management structure and unwillingness to develop a corporate and collegial approach to working practices. Various management techniques have been introduced in recent years with varying degrees of success. What seems to be lacking is a sense of community and corporate vision. The Secretariat may be small by the standards of other international agencies, but it is still a substantial institution. If its staff cannot see their roles clearly within a well-defined management culture their efforts will remain splintered and often unfulfilling.

358. A second root of staff dissatisfaction has evidently been the terms of compensation and other conditions of service. While the reluctance of Members to increase the levels of compensation may persist, they must be vigilant in maintaining conditions which attract and retain the very best individuals. There will never be a shortage of candidates to fill the rare vacancies. However, Members must draw a distinction between quantity and quality. By the same token, they should also refrain from interfering with recruitment processes in the name of geographical balance or any criteria other than qualifications, suitability and potential performance. This is not to argue that balance is not valuable - for one thing, all representatives need to feel comfortable in seeking the help or advice of the Secretariat. However, there is no reason to believe that reasonable geographical and language balance will not be achieved on the basis of recruitment of the best candidate without the heavy-handed intervention of governments and delegations.

E. THE SECRETARIAT IN A "MEMBER-DRIVEN" ORGANIZATION

359. A third source of tension has been the reassertion of the principle of the WTO as a "Member-driven" organization. What does such an energetic insistence on this principle mean for the Director-General and the Secretariat? How does it impact on the public status and presentation of the multilateral trading system?

360. A Member-driven organization is a valuable concept in terms of political acceptance in capitals so long as the vehicle is being driven carefully in a direction consistent with its overall objectives. In recent years, the impression has often been given of a vehicle with a proliferation of back-seat drivers, each seeking

a different destination, with no map and no intention of asking the way. That has helped feed a misguided, misinformed public view of the institution. Individually, Members are not always the best guardians of the system.

361. Recent experience suggests that when the membership is unable or unwilling to move forward, the system's image and public support suffer. Members understandably portray the WTO in terms of domestic political preoccupations, seldom on the basis of the principles that underlie the system. **The WTO needs a convincing and persistent institutional voice of its own. If Members are not prepared to defend and promote the principles they subscribe to, then the Secretariat must be free to do so. Indeed, it should be encouraged, even required, to do so.** The legitimacy of decision-making is adequately protected by the consensus principle.

362. It is important, therefore, that there be some clarity on the respective roles of the Secretariat and the membership in the broad presentation of the WTO's activities and the promotion of the principles that underlie the trading system. Those principles are little known, yet as valid and valuable now as when they were established in the last century, notably in the years after the Second World War. In large part they are rehearsed in Chapter I.

363. **A helpful starting point may be to see the Secretariat as the guardian of the treaties that comprise WTO law.** At the operational level that infers both an institutional memory and detailed understanding of the system; understanding that should be respected and harnessed willingly by Members. At the public level it should be reflected in consistent, objective but politically sensitive presentation of a coherent system. Critics must be answered, but sometimes outside the framework of the constantly changing, politicized and potentially unbalanced debates, processes and negotiations undertaken by Members. **In short, the Secretariat and Director-General should get back to basics in the manner in which the WTO is presented and defended.**

364. On such a basis, the Secretariat could rightly lay claim to more independence of action and enhanced authority. But that requires mutual recognition by Members, their delegations and the Secretariat of their respective roles and duties. The reassertion by the Secretariat of a neutral role founded solely on the interests of the system ought to make the relationship more efficient and effective.

F. WE NEED A GREATER INTELLECTUAL INPUT FROM THE SECRETARIAT

365. **The membership should also encourage and stimulate a greater intellectual output from the Secretariat.** Clearly, research resources are limited. Publicly available current research is unadventurous although we welcome the launch of the new World Trade Report as a vehicle to deepen public understanding of trade issues. **However, the WTO should be making a pre-eminent intellectual input into public and political debate on trade policy matters, globalization, development and other pressing issues of the day on which the trading system impinges.** It can do so without compromising the negotiating positions or policies of Members - nor, indeed, of its own advice. We see no reason why the status and recognition accorded the WTO's chief economist should be any less marked than that given to his or her opposite numbers in other economic institutions - at least with respect to trade issues. There is no persuasive argument that the nature of the WTO is so different from that of other institutions, like UNCTAD, the World Bank, the IMF and the OECD, that there is something deeply threatening to the rights of Members from Secretariat research findings. Too often, indeed, it is left to those other institutions to make the case for the WTO - or to undermine it.

366. **Further, a clearer - though always careful - lead on policy issues should be emerging from the Secretariat. Members should not be afraid of asking the Secretariat to provide policy analysis.** In any event there is increasing demand for the Secretariat to give policy advice in the context of technical assistance to devel-

oping countries. It is not immediately clear why - outside of resource constraints - it should be more appropriate for other international institutions to provide counsel on WTO issues than the WTO Secretariat itself.

G. THE WTO'S BUDGET - NEW APPROACHES, RESPONDING TO NEW DEMANDS

367. Technical assistance demands, in particular, raise the question of the adequacy or otherwise of the Secretariat's manpower and financial resources. As has been noted in an earlier chapter, a large amount of such assistance is now available, funded and managed in many different ways - including through WTO trust funds, bilateral funding by governments and other institutions. Little technical assistance is funded directly through the WTO budget - a situation that could usefully be corrected to ensure some security and predictability for these efforts in the future.

368. Individually, no doubt, the institutions and governments backing technical assistance programmes, and the profusion of private consultants on which they rely, are achieving results. Are the results optimal? Probably not. Although greatly improved and strengthened over the past decade, the WTO's working relationships with the World Bank, the IMF, UNCTAD and others, in this area, still leave something to be desired. The Integrated Framework - which operates through these and other organizations - is a promising initiative that has had limited success. (See also Chapter IV.)

369. There may be more cost effective and efficient ways to deliver technical assistance. One response to the proliferation of largely uncoordinated and sometimes inconsistent policy advice being given to developing countries might be to move all official WTO-related technical assistance out of the respective secretariats and into a semi-independent agency. Staffing might be through short-term secondments from the relevant organizations, under WTO management and administration. Such an agency might also be charged with longer-term capacity building implementation assistance - including for the private sector in developing countries.

370. The Secretariat's capacity to deliver technical assistance is, of course, only one aspect of the general funding and manpower issue. Some divisions are hard pressed to meet their obligations as things stand - notably in the dispute settlement area. Others will find themselves stretched when Doha Round negotiations begin to advance in earnest and when implementation of the results gets underway. As we have suggested already, it is crucially important that the Secretariat has the capacity and expertise to present the institution and the multilateral trading system globally. That infers adequate resources for media relations - particularly with respect to developing countries - and innovative public information initiatives. In Chapter V, we noted the relative paucity of staff in the division taking prime responsibility for outreach to NGOs.

371. **While we would hesitate to recommend a vast increase in the WTO budget (though a case for that could easily be made), there will certainly need to be more meaningful increases, and annual growth rates in excess of other better-funded institutions.** Member governments must keep in mind that the WTO is a crucial instrument for managing a globalizing economy. Globalization is likely to proceed apace: that means fundamental changes to which the institution and its Members must respond. Thus, when considering the funding of the WTO, finance ministries need to have imagination and some flexibility, of a kind that has not always been evident since the WTO was established. Tying the hands of an institution like the WTO - which represents a miniscule share of national budgets yet delivers benefits far out of proportion with the investment - is, to say the least, counterproductive.

CONCLUSIONS

Principal conclusions and recommendations of the Consultative Board

Globalization and the WTO - make the case for liberalizing trade

1. The Consultative Board believes that the process of globalization and the role played by the WTO are widely misunderstood and seriously misrepresented. While the WTO represents the most dramatic advance in multilateralism since the 1940s, too many constituencies understand neither its benefits nor its limitations. The Report of the Consultative Board sets out some of the arguments.

Time to respond to the erosion of non-discrimination

2. **The Board is deeply concerned by the current spread of Preferential Trade Agreements (PTAs).** It is unconvinced by the economic case for them and especially concerned that preferential treatment is becoming merely a reward for governments pursuing non-trade related objectives. Meanwhile, non-discriminatory, most-favoured-nation treatment - a fundamental principle of the WTO - is close to becoming exceptional treatment. **Governments need to show restraint or risk more damage to the multilateral trading system. The first test of any new initiative should be that it clearly improves trading and development prospects of beneficiaries and does not harm the interests of those outside.**

3. **The long-term remedy to the "spaghetti bowl" of discriminatory preferences is through the effective reduction of MFN tariffs and non-tariff measures in multilateral trade negotiations. The need for success in the Doha Round is manifest from this perspective. A commitment by developed Members of the WTO to establish a date by which all their tariffs will move to zero should now be considered seriously.**

4. **Preferential trade agreements need to be subject to meaningful review and effective disciplines in the WTO.** Using the Trade Policy Review Mechanism to provide a vehicle for analysis and comment on developments within, and the external impact of, PTAs will help. Some tentative steps are being taken in that direction but more needs to be done.

Concerns over sovereignty and the WTO - more gains than losses

5. The WTO has competences and powers that were previously the monopoly of states. Ultimately what counts is whether the balance between some loss of "policy space" at the national level and the advantages of cooperation and the rule of law at the multilateral level is positive or negative. The Consultative Board's view is that it is already a positive for all WTO Members and will increasingly be so in the future.

Coordination and coherence - better global governance

6. Cooperation with other intergovernmental agencies generally adds value and legitimises the activities of the WTO.

7. However, the Consultative Board is convinced that the creation and interpretation of WTO rules is for WTO Members alone and should be preserved from undue external interference. The issue of observer status by other organizations in WTO Bodies should not be examined in relation to the political tensions and conflict that prevail in other fora. The WTO is not part of the United Nations, nor should it be so. The WTO is a *sui generis* international organization and **observer status should be granted solely on the basis of potential contribution to the WTO's role as a forum for trade negotiations.** In the absence of such potential, observer status should not arise.

8. Developing countries, as they increasingly turn to trade liberalization, often cannot afford adjustment mechanisms to cushion the

short-term impact on employment and other aspects of social welfare. **International development agencies, chiefly the World Bank, should have, or should improve, programmes to fund trade policy related adjustment assistance for developing countries.** They should do so in close cooperation with the WTO and other agencies.

9. Achieving coherence in global economic policy-making should be a priority for all multilateral economic institutions. **The General Council gave the WTO's Director-General a mandate, in 1996, to pursue a serious coherence agenda.** Some useful steps have been taken. He should now review options for expanding and intensifying WTO activities in this area.

Dialogue with civil society - responsibilities on both sides

10. Much has been achieved in the area of external transparency over the past few years. Nevertheless, the framework for the WTO's relations with non-governmental organizations as well as with the public generally should be kept under review.

11. It must be recognized that the primary responsibility for engaging civil society in trade policy matters rests with WTO Members. While the WTO's relations with civil society have their own integrity and dynamics, they are inextricably bound to government /civil society relations at the national level.

12. **The membership should develop a set of clear objectives for the WTO's relations with civil society and the public at large.** Within the general framework of these objectives, the 1996 General Council *Guidelines for Arrangements on Relations with Non-Governmental Organizations* should be further developed so as to guide Secretariat staff in their consultations and dialogue with civil society and the public. Guidance should include the criteria to be employed in selecting organizations with which the Secretariat might develop more systematic and in-depth relations. **However, no single set of organizations should be constituted to the permanent exclusion of others. Further, the Secretariat is under no obligation to engage seriously with groups whose express objective is to undermine or destroy the WTO.**

13. **A special effort should be made to assist local civil society organizations dealing with trade issues in least-developed countries, especially in Africa.** This might be done in collaboration with continent-wide and regional organizations and think tanks.

14. The administrative and financial implications of a more active programme of civil society engagement should be carefully assessed. The World Bank and other intergovernmental organizations that have developed extensive relations with civil society have done so with substantial budget support. **Improved WTO relationships with civil society cannot be achieved without more resources.**

Dispute settlement - a success that can be reinforced

15. The Dispute Settlement Understanding (DSU) is a significant and positive step forward in the general system of rules-based international trade diplomacy. Although it believes that caution and experience are necessary before any dramatic changes are undertaken, the Consultative Board makes a number of proposals.

16. Any measures or ideas for reform that would create a sort of "diplomatic veto" or the opportunity for specific disputants to "nullify" or change aspects of the final adopted panel report should be strongly resisted.

17. **The Dispute Settlement Body (DSB) should occasionally select particular findings**

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

18. The principle of allowing the Appellate Body to remand a case to the first level panel should be pursued and clarified, especially if remands can be achieved without adding delays to the process.

19. **To ease the particular problems that have been witnessed in panel selection, consideration should be given to utilizing a combination of roster and ad hoc appointments for designating the membership of first level panels.**

20. With regard to *amicus curiae* briefs, the Consultative Board agrees generally with the procedures already developing for acceptance and consideration of appropriate submissions of this type. **However, to fairly and appropriately handle *amicus curiae* submissions to first level panels and the Appellate Body, general criteria and procedures should be developed, balancing worries about resource implications with fairness, and a general recognition that such submissions can improve the overall quality of the dispute settlement process.**

21. To alleviate some anxieties about transparency, as a matter of course, first level panel and Appellate Body hearings should generally be open to the public. This new practice would be susceptible to a motion by a panel (or Appellate division) or by a disputing party arguing there is a "good and sufficient cause" to exclude the public from all or part of a hearing.

22. The issue of compliance with panel and Appellate Body rulings is important and, in some respects, worrisome. In particular, the notion that the DSU provides a free choice to losing parties whether to implement obligations or, otherwise, to provide compensation or endure retaliation is erroneous. "Buying out" of obligations is harmful to the system, to trading conditions and, especially, to the interests of developing country complainants which cannot resort to a credible retaliatory option. Monetary compensation to poorer complainants, as a temporary measure pending full compliance, might be an approach worthy of experimentation.

23. It is self-evident that the better informed are diplomats, government officials and legislators on the fundamentals of international dispute settlement the better. **The WTO Secretariat should encourage and facilitate technical assistance to instill broader understanding of the role of "rule orientation" in treaty implementation, as well as the general approaches that virtually all juridical institutions, national and international, take to their work.**

24. The dispute settlement system needs to be better understood, not only by the diplomats and public officials that have to engage in it, but also by the general public who provide the constituencies that are being served by the system. **Further efforts should be made to inform and educate, perhaps including some by expert groups appointed by the WTO or by the DSB.**

Moving negotiations forward - a new look at decision-making and variable geometry

25. The Consultative Board believes that the consensus approach to decision-making in the WTO has many strengths. There is however, reason for serious further study of the problems of achieving consensus in light of possible distinctions that could be made for certain types of decisions, such as purely procedural issues. **In this context, the Consultative Board urges the WTO Members to cause the General Council to adopt a Declaration that a Member considering blocking a measure which otherwise has very broad consensus support shall only block such consensus if it declares in writing, with reasons included, that the matter is one of vital national interest to it.**

26. In recent years, WTO Members have faced considerable difficulties in making substantive progress in major negotiations. The experience is not new and reflects a variety of factors. Nevertheless, the Consultative Board believes that different approaches to negotiations should be reviewed outside the context of the Doha Round. **For example, there should be a re-examination of the principle of plurilateral approaches to WTO negotiations.** This should pay particularly sensitive attention to the problems that those not choosing to participate might face. Further, the approach should not permit small groups of Members to bring into the WTO issues which are strongly and consistently opposed by substantial sections of the rest of the membership. On that understanding, **if there is political acceptance of the principle, it is suggested that an experts group be established initially to consider and to advise on the technical and legal implications. In certain circumstances, a GATS "scheduling" approach would be an appropriate option. These two concepts should be further explored together.**

27. **Wherever possible, new agreements reached in the WTO, in future, should contain provisions for a contractual right, including the necessary funding arrangements, for least-developed countries to receive appropriate and adequate technical assistance and capacity building aid as they implement new obligations.**

Organizational changes to secure political reinforcement and efficient process

28. The Consultative Board considers that the performance of the WTO would be enhanced by more intensive political involvement. It makes a number of proposals. **First, Ministerial conferences of the WTO should normally take place on an annual basis. Second, the Director-General should be required to report on trade policy developments to ministers, in writing, on a six-monthly basis. Third, a WTO Summit of World Leaders should be held every five years.**

29. There is a need to place WTO negotiations and other activities in a much broader policy environment than is currently the case. Work in Geneva is, necessarily, tightly focused and not always clearly related to the large-scale political, economic and development issues with which governments must deal domestically. **The Consultative Board therefore proposes that a senior officials' consultative body to be chaired and convened by the Director-General be established to meet on a quarterly or six-monthly basis without executive powers and with a broad agenda. Membership should be limited and composed on a partly rotating basis.** Funding should be available to ensure senior officials from the capitals of developing countries attend. When necessary, the consultative body could meet wholly or partially at ministerial level.

30. Having already proposed the establishment of a senior officials' consultative body, it is further proposed that such a body meet prior to Ministerial meetings to ease the working transition between the two levels.

31. **The Director-General and Secretariat should have the capacity and the standing to be at the centre of negotiations during Ministerial meetings.** Deputy Directors-General and divisional Directors should work alongside facilitators throughout the proceedings.

32. **To further improve transparency and inclusiveness, the Director-General should explore with the relevant groups the potential for increased coordination and group representation in restricted meetings.**

Getting the best out of the Director-General and Secretariat

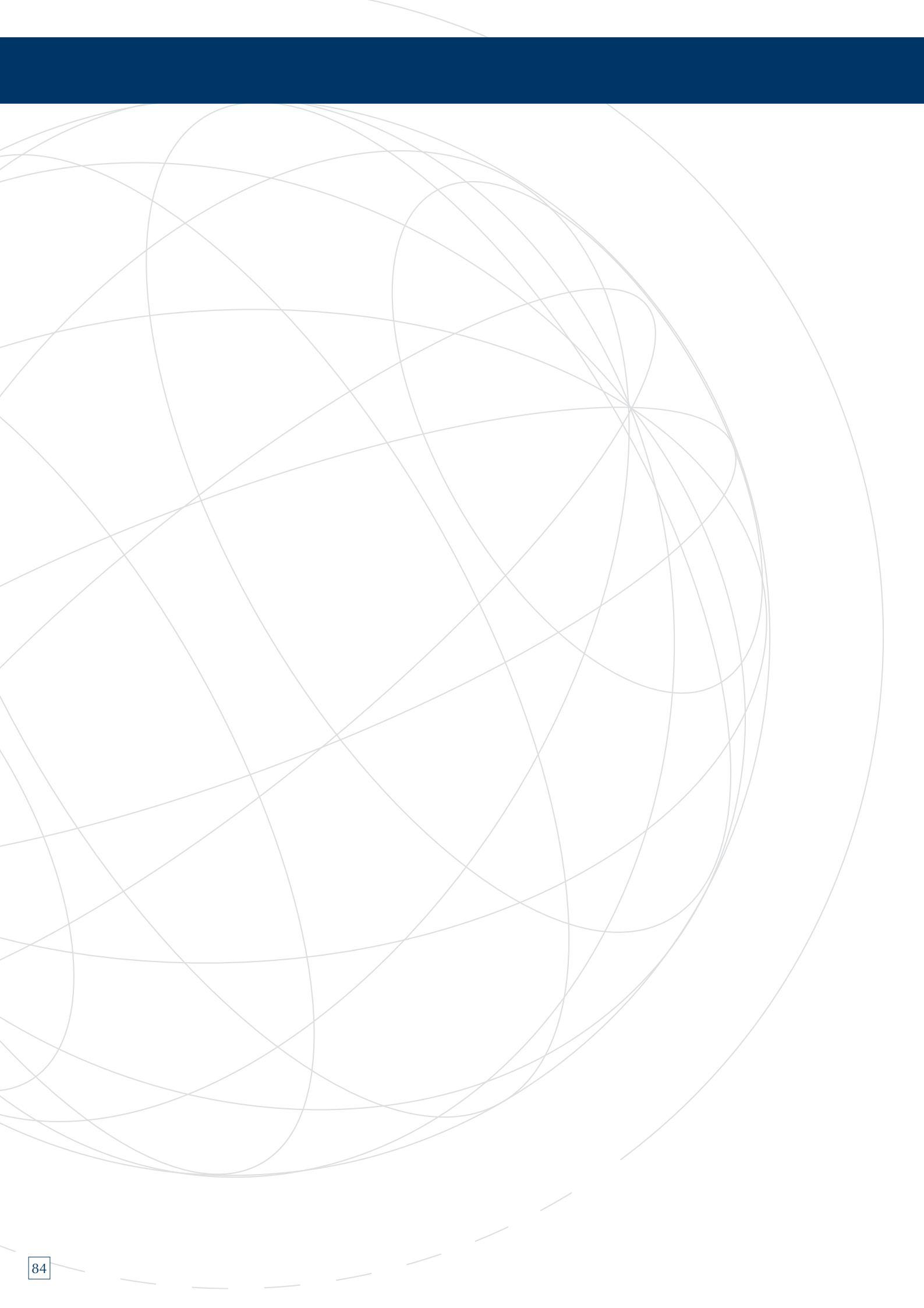
33. **As required by the Marrakesh Agreement, the "powers and duties" of the Director-General should now be spelled out clearly by the General Council,** in part on the basis of the advice of present and past holders of the post.

34. It is vital for WTO Members to get the best-qualified people possible at all levels in the Secretariat; in particular, at the top. **Technical competence and appropriate experience should be prerequisites in the appointment of Directors-General. The Consultative Board would favour the abandonment of the agreement that permits WTO Members to make nominations only of their own nationals, or that candidates must have the backing of their own governments. Any tendency towards alternating between developing and developed countries and any regional sequencing should be avoided.**

35. **The Consultative Board would like to see a strengthened management culture in the Secretariat, perhaps through the appointment of a chief executive officer who would be the equivalent of a deputy to the Director-General.**

36. The role of the Secretariat as the guardian of the WTO system should be reaffirmed. **The membership should encourage and stimulate a greater intellectual output and policy analysis from the Secretariat.**

37. **A vast increase in the WTO budget may not be realistic in the current climate but there will certainly need to be meaningful increases and annual growth rates in excess of other better-funded institutions.**



GLOSSARY

ACP
African, Caribbean and Pacific countries. Group of 71 countries with preferential trading relations with the EU under the former Lomé Treaty now called the Cotonou Agreement.

APEC
Asia Pacific Economic Cooperation forum.

Appellate Body
An independent seven-person body that considers appeals in WTO disputes. When one or more parties to the dispute appeals, the Appellate Body reviews the findings in panel reports.

ASEAN
Association of Southeast Asian Nations.

CAP
Common Agricultural Policy - The EU's comprehensive system of production targets and marketing mechanisms designed to manage agricultural trade within the EU and with the rest of the world.

Customs union
Members apply a common external tariff (e.g. the European Union).

Distortion
When prices and production are higher or lower than levels that would usually exist in a competitive market.

Dispute Settlement Body (DSB)
When the WTO General Council meets to settle trade disputes.

Dispute Settlement Understanding (**DSU)**
The WTO agreement that covers dispute settlement - in full, the Understanding on Rules and Procedures Governing the Settlement of Disputes.

GATS
The WTO's General Agreement on Trade in Services.

GATT
General Agreement on Tariffs and Trade, which has been superseded as an international organization by the WTO.

LDCs
Least-developed countries.

Members
WTO governments (first letter capitalized, in official WTO style).

MERCOSUR
Argentina, Brazil, Paraguay and Uruguay.

MFN
Most-favoured-nation treatment (GATT Article I, GATS Article II and TRIPS Article 4), the principle of not discriminating between one's trading partners.

NAFTA
North American Free Trade Agreement, comprising Canada, Mexico and the US.

National treatment
The principle of giving others the same treatment as one's own nationals.

Panel
In the WTO dispute settlement procedure, an independent body is established by the Dispute Settlement Body, consisting of three experts, to examine and issue recommendations on a particular dispute in the light of WTO provisions.

S&D (Sometimes "SDT")
"Special and differential treatment" provisions for developing countries. Contained in several WTO agreements.

Safeguard measures
Action taken to protect a specific industry from an unexpected build-up of imports - generally governed by Article 19 of GATT.

SPS
Sanitary and Phytosanitary measures or regulations - implemented by governments to protect human, animal and plant life and health, and to help ensure that food is safe for consumption.

Uruguay Round
Multilateral trade negotiations launched at Punta del Este, Uruguay in September 1986 and concluded in Geneva in December 1993. Signed by Ministers in Marrakesh, Morocco, in April 1994.