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From Marrakesh to Singapore: The WTO and Developing Countries

Magda Shahin

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Chapter 1
Introduction

The establishment of the World Trade Organisation (WTO) as the custodian and guarantor of a rule-based multilateral trading system was one of the cornerstones of the Uruguay Round of Multilateral Trade Negotiations (MTNs) concluded at Geneva on 14 December 1993 and the signing of the Final Act as a 'single undertaking' at Marrakesh on 15 April 1994. The WTO is to be a dynamic framework for ensuring that trade rules and their effectiveness can keep pace with the evolution of the world economy and its Multilateral Trading System (MTS). There are no U-turns. One hundred and twenty countries have signed and are expected to abide by the WTO rules as well as its rulings.

The main reason—in my view—for developing countries signing the agreements in Marrakesh was the fear of being left behind, rather than truly being convinced of any benefit accruing to them from the agreements. It is no exaggeration to say that developing countries are still grappling with problems of implementation of the various agreements annexed to the WTO and striving to understand their full ramifications on their economies.

Whether developing countries are now better integrated in the global economy or into the so-called 'economic mainstream' will remain open until there is an effective implementation of the WTO agreements. No one can, however, deny that a number of developing countries participated actively in the Uruguay Round and contributed to the successful outcome of the negotiations, though only a few of them were considered as major players. Most developing countries made substantial commitments on market access, consolidating the results of their liberalisation

programmes undertaken unilaterally. For several developing countries the average Most Favoured Nation (MFN) tariff reduction on industrial products was comparable to or greater than that of the countries in the Organisation of Economic Cooperation and Development (e.g. India, Republic of Korea, Venezuela and Brazil). For others the reduction was proportionately smaller, but from a level that was in general higher than in developed countries. A number of developing countries emerged from the Uruguay Round with their entire tariff schedule bound, either as a result of the tariff negotiations themselves (e.g. Argentina and Brazil), or the negotiation of their accession to the General Agreement on Tariffs and Trade (GATT) during or immediately before the Round (e.g. Venezuela and Mexico respectively).

Notification Requirements

Being part of the system is not easy. Everyone agrees that one of the most cumbersome and problematic issues in the first phases of the implementation is the notification requirements. Although these requirements are supposed to be only procedural, they are so complex that it has taken all of 1995 to sort them out. We are still far from any adequate implementation and the majority of them has remained unnotified. Notifications are designed in the first place to secure transparency.

Debate is still going on in the working group on notification on how to avoid duplication and, in particular, to simplify the requirements for developing countries. A brief look at the notification requirements in the main agreements shows their complexity. Overall 175 notifications are required in the area of trade in goods i.e. in the agreements under Annex 1A of the WTO Agreement. In the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Intellectual Property Rights (TRIPs), the number of required notifications is around 40, giving a total of some 215 notifications under the WTO legal system. This

is the requirement for each country, regardless of whether it is a developed or developing country.

From this figure it is not difficult to deduce the burden laid on developing countries merely to meet the procedural requirements of the WTO. The response rate remains well below one-quarter for developing countries.

Chapter 2

Implications of the Various Agreements on Developing Countries

Looking now at some of the major agreements in the Uruguay Round from the perspective of developing countries and whether they would really benefit them and stimulate their trade, I perceive that the issue is still wide open. My analysis in this respect is based mainly on a number of studies provided by the United Nations Conference on Trade and Development (UNCTAD), as it remains the sole organisation still concerned with the developmental aspects and the general impact of the Uruguay Round on developing countries. It is also based on my own assessment, having closely followed the work of WTO throughout the last two years.

Agreement on Textiles and Clothing (ATC)

It is said that one of the main achievements of the Uruguay Round is the inclusion of the textiles and clothing sector under the discipline of the system. In the Uruguay Round, the phase-out of the discriminatory regime of the Multi-Fibre Agreement (MFA) became the main objective of a large number of developing countries. A key objective of the new ATC is to bring about the integration of the textiles and clothing sector into GATT rules and to thereby progressively diminish the scope of this agreement until it expires at the end of 2004.

The integration of products into the GATT is to be accomplished in four stages:

- to integrate in January 1995, 16% of the total volume of the 1990 imports of textile and clothing products;
- a further 17% will be integrated on the first day of the third year;
- another 18% on the first day of the seventh year;
- the rest, which is the bulk of 49%, at the end of the tenth year transition period.

It is worthwhile here to point to the risks developing countries have taken with an arrangement which was extensively negotiated and the best they could get, which simply aims at abolishing what constitutes in essence a derogation from GATT obligations for years.

The main risks are:

i) With the bulk of liberalisation (and removal of quota restrictions) left to the very end of the transitional period, protectionist forces will make use of this time to attempt to build up sufficient political pressure to achieve a postponement of the final stage.

ii) With the selection of products for integration left solely to the importing countries, it could be expected that products that have never been subject to restriction would be integrated first, while the integration of more sensitive products in each category would be postponed as long as possible, thus offering no new market access opportunities for developing countries.

iii) During the transitional period new restrictions can be negotiated or imposed under a 'transitional safeguard mechanism' (Article 6), on a discriminatory basis, when importing countries determine that imports of textile and clothing products are causing 'serious damage' to their domestic industries.

In fact, Article 6 thus continues to permit, under the so-called 'transitional safeguards' mechanism, the imposition for up to three years during the transition period, and on a discriminatory basis, of new quantitative restrictions by WTO members on products that have not yet been integrated into GATT 1994.

Thus, bilateralism, which we thought we had done away with, is still prevailing in the multilateral trading system and is most evident in the implementation of the ATC. Various bilateral agreements and arrangements are still taking place in the framework of Article 6 under the transitional safeguard mechanism. The imposition of new quotas (GALs/SALs), as well as Voluntary Export Restraints (VERs) constituting grey area measures which were supposed to have been prohibited are continuing under the new ATC. Numerous agreements are being struck between exporting and importing countries under the pretext that increased imports coupled with low prices have caused serious damage to the domestic industries. In my view, such agreements show clearly that the system remains largely politicised, where the importing countries always find their way to continue to impose export restraints and quotas.

What we presently witness in the Textile Monitoring Body (TMB) is frequent recourse to bilaterals, although with some strict discipline being attached to such arrangements. According to the ATC, the importing country has to notify and justify the recourse to bilaterals, restraining the quotas of the exporting country, which is to be done on the basis of paragraphs 2 and 3 of Article 6. In paragraph 2, it is clearly stressed that serious damage or actual threat must be directly linked with increased

quantities and not by such other factors as technological changes or changes in consumer preference. In terms of paragraph 3, the effect of a combination of factors should be examined in order to determine the serious damage or actual threat thereof, such as market share, exports, wages, employment and domestic prices. None of these, either alone or combined with other factors, can necessarily give decisive guidance. The TMB has the responsibility to look at these criteria, the justification presented and assess whether the bilateral arrangements agreed to are really in conformity with the letter and spirit of the ATC.

In a number of cases, exaggeration on the part of the importing countries had been deduced. The justification for serious damage given was largely based on the 'low-price factor', which is supposed to be but one of the factors, and not necessarily the main one among a whole range of factors stipulated under paragraphs 2 and 3 of Article 6.

In spite of this and the fact that the ten representatives of exporting and importing countries in the TMB are supposed to act in their personal capacity and be neutral, there are cases in which the TMB is being obstructed from reaching any consensus decision. To say the least, this undermines the credibility of the TMB. This is becoming a major issue for the exporting countries which intend to table the functioning of the TMB and the implementation of the ATC in general as one of the issues to be addressed at the Singapore Ministerial Conference.

General Agreement on Trade in Services (GATS)

For many years, developing countries had opposed the inclusion of GATS into the WTO. The notion of GATS was largely the result of an initiative launched by the US in the early 1980s, which triggered long and tedious negotiations among developed countries themselves first and then with the developing countries.

In terms of the content of GATS and the benefits for developing countries, the following advantages can be found:

i) in the provisions of the agreement itself, namely Articles IV, XII and XIX —the built-in safeguard measures.

ii) in the schedules where it is completely up to each country to define their varying levels of commitments. Countries are not required to open up their markets across the board. They can select to open up only those sectors they deem appropriate, a commitment which works equally for developed as well as developing countries.

iii) in the unconditional application of the MFN principle. During the negotiations, developing countries were concerned that a 'conditional' clause might be included which would have meant that they could not benefit from trade concessions in services, unless they themselves accept a certain level of liberalisation in the particular sector. (Though contrary to GATT principles, such a condition was imposed unilaterally by the US in the financial sector, as we shall see.)

Article IV

A major advantage is contained in Article IV regarding the 'Increasing Participation of Developing Countries'. It is up to developing countries, and it is their prime responsibility, to press for the effective implementation of the provisions of this Article so that it would not remain empty words. Article IV recognises the basic asymmetry in the area of services between developed countries and developing countries and establishes certain obligations on the part of developed countries to extend benefits to developing countries, notably with respect to three main points:

i) help strengthen the domestic services capacity of developing countries and its efficiency and competitiveness. It is also the only part where the agreement refers to access of developing countries to technology and the availability of services technology, though this is weakened by the fact that it is to be on commercial basis.

ii) the improvement of their access to information networks, which is becoming increasingly doubtful. The Quad countries (Canada, the European Union, Japan and the US) have initiated talks among themselves for an Information Technology Agreement (ITA), for cutting tariffs on information products among themselves. Whether this will be applied afterwards on MFN basis or be subject to MFN exemptions (under GATS) to force developing countries to undertake additional concessions in other services sector remain to be seen.

iii) the liberalisation of market access in sectors of export interest to developing countries. This, as we shall see, has hardly been implemented, as the commitments on Movement of Natural Persons, a sector of interest to developing countries, have been minimal, if at all.

Article XII

Article XII, 'Restrictions to Safeguard the Balance of Payments', is the equivalent to Article XVIII (b) in GATT, allowing a member facing balance of payments difficulties to adopt or maintain restrictions on trade in services on which it has undertaken specific commitments. It remains to be seen how this article is going to be used in the light of mounting pressure on developing countries to disinvoke it in the framework of the Committee on Balance of Payments.

Article XIX

Article XIX is mainly linked with Article IV by recognising the process of progressive liberalisation with due respect for national policy objectives and the level of development of members. Furthermore, it allows flexibility for developing countries to open fewer sectors, liberalise fewer types of transactions and progressively extending market access in line with their development situation.

Summary on GATS

Developing countries have succeeded to a large extent in GATS to preserve their interests—at least for the time being—and oblige developed countries to provide a special status for developing countries in recognition of the asymmetry prevailing in the development and competitiveness of the services sector.

But there are some negative aspects of the agreement, which basically show the wide gap existing between the agreement and its practical implementation, where power politics finds its way through pressures and arm twisting:

i) There is an imbalance in the level of commitments in the schedules of developed countries, where they have given little consideration to sectors of interest to developing countries. This has prompted a group of developing countries to include an annex on Movement of Natural Persons as an integral part of the agreement and submit a Ministerial Decision in this respect.

ii) Another main disadvantage of the agreement is the lack of any discipline imposed on anti-competitive behaviour in business operations, except the provisions in Article IX, which is no more than a statement of good intentions. Though Article IX clearly

states that the Restricted Business Practices (RBPs) of service suppliers may restrain competition and thereby restrict trade in services, it does not provide for any effective action, except for consultations, cooperation and exchange of information.

iii) Though the inclusion of the services sector in the integrated dispute settlement system should have come as no surprise, the fact, however, that this sector is considered as a new area and where developing countries have still much to learn about, the usage and application of cross-retaliatory measures on services would certainly put them in a more disadvantageous position.

Financial, Telecoms, Maritime Sectors

Negotiations on financial services, movement of natural persons, basic telecommunications and maritime transport services, as mandated by the Ministerial Decision in Marrakesh, have to date not moved in an encouraging manner. Throughout the last phases of negotiations in the Financial Services sector, the US was not satisfied with the levels of commitments offered, particularly by Japan, the Association of South-East-Asian Nations (ASEAN) and other developing countries. This prompted the US negotiator to place its entire financial service sector under MFN exemptions, which mainly means 'reciprocity'. The reciprocity approach is in direct conflict with the MFN treatment principle in GATT.

According to GATS, developing countries were fully entitled to move gradually in the opening of their markets for services. Although developing countries had made a number of substantive offers, the US took this position unilaterally close to the end of the negotiations in June 1995.

As for Basic Telecommunications and Maritime Transport services, there is hardly any movement to date especially on the latter. As for the former,

we continue to read threats by the American Telephone and Telegraph Company (AT&T) and MCI favouring bilateral and regional arrangements.

On the other hand, opening up the telecommunications sector in developing countries for free competition does not necessarily mean affordable phone services for everyone. On the contrary, as developing countries still follow subsidised pricing for internal telephone networks which is being done through cross-subsidisation from the more expensive international calls, opening up telecom-markets will end such policies. It is well known that foreign companies will be mainly competing on the more beneficial international lines, fax machines, etc. They are hardly interested in building a domestic infrastructure at affordable prices to the population. Thus, such a policy will be to the detriment of increasing telephone lines to the masses, and governments will be unable to continue their subsidisation policies. That is why monopolies should continue in developing countries until they can afford to be more competitive, and that should be done through gradual opening up.

Developed countries have taken and continue to take all their time to liberalise their agricultural, textiles and clothing sectors. Why then should developing countries be so much pressed into opening up their services sector? Opening up at this stage can only be to the benefit of the giant telecommunication companies of the developed countries.

As for maritime services, the negotiations involving 42 countries which was to have been wrapped up at the end of June have hardly moved an inch, and it is said that there is almost no prospect of an accord by the deadline. The US has not even put its offer on the table and argues it needs better proposals from other countries to do so.

Annex on Movement of Natural Persons

It is to be noted that the annex on Movement of Natural Persons supplying services under GATS was mainly triggered by a number of developing countries, among which Egypt, India, the Philippines and others were particularly active. The objective of such an inclusion was to make clear that concessions with respect to all categories of natural persons were open to negotiation in the framework of the agreement. But this in fact never took place.

The main criticisms addressed on the part of the developing countries to the commitments made are:

i) The movement of personnel is linked to commercial presence in the schedules of developed countries. Few developing countries are in fact in a position to benefit from the commercial present mode of supply, given the high cost of establishment in the developed countries and the weakness of the firms in most developing countries.

ii) The conditions attached to the commitments are so onerous as to render many of the commitments void of any liberalising content.

For example, there are conditions on market access such as:

- visas, residency permits, and work permits—in the most extreme case their use may lead to the need to acquire all three separate documents to be obtained from three different authorities, each with different qualifying criteria;

- quotas—they may be based on the requirement of the industry or the general occupation;

- subjective test— in this case, the national authorities—Immigration or Labour—are left with broad discretionary power.

There are also conditions on national treatment such as:

- employment is restricted to the job petitioned for and to the location of the petitioned job. The visa or permit holder cannot change jobs and/or the location of the job unless the petitioner reapplies for a visa and/or work permit;

- qualifications and conditions on the location and type of housing accommodation;

- qualifications and conditions on access to health care and other social insurance benefits;

- differential tax rate;

- qualifications and conditions on the right of the spouse of the primary visa and/or permit holder to accompany the alien or to be gainfully employed;

- qualifications and conditions on financial transfer and remittances by aliens.

One can generally say that the expectations of developing countries, especially countries like Egypt, India, Pakistan and the Philippines were largely not met in this sector. Little has been offered on the part of the developed countries in terms of opening their markets or facilitating the administrative arrangements. Much worse is the continued differentiation in the area of national treatment between aliens and national workers. Even after the strong linkage made by countries like Egypt and India, at the time of the final stages of negotiations between financial services and the movement of natural persons, to urge developed countries to

come forward with additional commitments, there was hardly any response, except in a few cases.

The European Union (EU) made few additional commitments in the movement of natural persons. However, they have all been limited to a three months period not extendable in the same year, which is in itself an onerous condition.

Another major constraint included in the EU commitment is that an individual cannot apply for any work in his own right or on an individual basis; he should be an employee of a company who is sent in to do a specific task. He must also have been employed by this company for a number of years (three years in the case of the EU) and is not being hired for the purpose.

Likewise for Canada, little has been offered, as their offers have been limited to basically three professions: foreign legal consultants, urbanists (town planning) and information technology (software).

The time span has also been limited to a maximum of three months as in the case of the EU. In addition, mutual recognition of universities is determined by the Canadians themselves, i.e. the importing and not the exporting country (regardless of whether it is at Government or at the sub-federal level).

In fact the main message is that liberalisation of trade in services is at the same time a must and a risk. It is double-edged. It is without doubt that developing countries need the contact with innovative technology and be integrated into the global information network. On the other hand, one should certainly approach this very cautiously to avert the negative effects on the economy. This is because a modern service sector has to have an effective pulling force on the economy and avoid what may be called a dual economy.

Agreement on Agriculture

Trade in agriculture has been traditionally characterised by a considerably lower degree of multilateral discipline and market access commitments than those governing trade in industrial products. The major trading countries succeeded, through waivers and so on, to protect and subsidise domestic agricultural production and exports. This led to a situation of overproduction, border protection and export subsidy competition, which was the cause of an almost continuous series of trade disputes.

In addition to the two major players in this area, the US and the EU—it was their Blair House accord at a belated stage of the negotiations that became the essence of the Agreement and made it possible—there were two groups of countries which were very interested in the course of the negotiations. They were the Cairns group, the exporters of agricultural products from both the developed and developing countries, which was in fact the initiator and driving force behind the Agreement, and what has been known as the Net Food Importing Developing Countries (NFIDCs). It was only close to the end of the negotiations that they realised what risks they were being dragged into, as they perceived that the proposed solutions with respect to agricultural subsidisation would result in increases in the cost of their food imports. They adopted a coordinated approach to seek a solution that would mitigate the difficulties they would face. Their efforts triggered the decision at Marrakesh on the possible negative implications of the Uruguay Round on NFIDCs.

The Agreement on Agriculture provides a framework for further negotiations aimed at more meaningful liberalisation. It represents what could be described as a binding 'standstill and rollback' of protectionist measures in this sector.

There are three major measurements in the Agreement which are supposed to affect the liberalisation trend in agriculture.

I shall not address in detail their liberalisation effects, as I am going mainly to focus on their impact on the price level with their major implications on the NFIDCs.

Briefly, the three are:

- the tariffication process, where the EU and the US have often succeeded to replace non-tariff barriers by such prohibitive tariffs ranging from 200-500%, the impact of which on market access remains highly questionable;

- the 'Aggregate Measure of Support' (AMS), in which domestic support reduction commitments are applied on aggregate, rather than on particular policy measures, thus allowing them to 're-balance' the support among sectors and permitting the application of much lower reductions in the sensitive sectors;

- bound reduction of export subsidies, as defined in Article 9:1 and laid out in detailed schedules.

Whereas it is generally said that these measurements combined have had little effect on additional market access for the Cairns group countries, they have had some enormous effects on the increased world prices of cereals affecting thus the NFIDCs.

The factors that have a bearing on the effective price paid by NFIDCs include the following:

i) ***Nominal price increases***: This was partly due to the structural changes and partly to weather-related aspects. On the structural side, there has been a clear shift on the supply side away from government intervention and towards the rule of the market. In the European Community, the area set aside programme under the Common Agricultural Policy (CAP) reform and cuts in

intervention prices were essentially responsible for the reduced cereal output. In the US the reduced cereal output this season was a result of both the area reduction programme as well as adverse weather. FAO analysis indicates that the increase in cereal prices is a permanent change;

ii) ***Reduction in food aid***: After accounting for 16% of the imports of low-income food importing countries in 1992/93, food aid is estimated to account for only 8.5% in 1995/96. Therefore, a greater volume of cereals is imported under commercial terms.

As food aid has been historically linked to surpluses of major developed countries, mainly the US and the EU, such surpluses are unlikely to be there in the future in view of the structural changes on the supply side which were mentioned above. In addition to this are the budgetary constraints in these countries. Thus, it is doubtful that food aid will find its previous levels in the near future;

iii) ***Export subsidies***: The situation in the current season has seen a dramatic change compared to the past. The EU has suspended export restitutions since July 1995 and subsidies under the US Export Enhancement Programmes (EEP) have been insignificant this season.

While it is not expected that subsidies have gone for ever, they nevertheless are clearly disciplined under the Agreement on Agriculture.

Overall, the separate as well as combined effect of all three factors on the cereal import bill of NFIDCs is that this group of countries is expected to effectively spend some US$3 billion more on their cereal imports in 1995/96 than they spent in 1994/95. On the positive side, however, the higher effective price of food imports, if passed down to the farmer can stimulate

increased domestic production in the NFIDCs and decrease their dependence on imported supplies, but that certainly would be in the long run as compared to the short and medium negative effects.

It is also worth referring to the difficulties the NFIDCs have encountered in the Committee on Agriculture. Throughout last year with a number of other net food importing countries, Egypt has been trying to render the Ministerial Decision operational. We have reached an agreement that NFIDCs would be on a self-election basis while identifying some basic criteria supportive to their nomination. The bulk of the negotiations, however, will take place bilaterally with the Donors and the Multilateral Financial Institutions (MFIs). Now NFIDCs are faced with a major dilemma and that is to induce WTO members to reach a common ground between the two extreme assessments provided by the MFIs and the Food and Agriculture Organisation (FAO), with regard to establishing whether the increase in the world prices of agricultural products was also due to the Uruguay Round policies in the area of agriculture or only to other reasons, such as the weather, drought and the bad harvest in Russia. They also have to work out how to bring to the attention of the Ministers in Singapore for their consideration and assessment the declining trend in food aid level, a matter strongly opposed by the US and the EU and the role incumbent upon the World Food Summit which is to take place in November in Rome.

Agreement on Trade-Related Intellectual Property Rights

The scope and intensity of the obligations contained in the Agreement on TRIPs go far beyond what had been envisaged at the beginning of the negotiations.

The TRIPs agreement establishes disciplines for copyright, trade marks, geographical indications, industrial designs, patents, and so on going

beyond the provisions of existing World Intellectual Property Organisation (WIPO) instruments, notably the Paris, Berne and Rome Conventions.

There are no special provisions to facilitate the transfer of technology to developing countries. Differential and more favourable treatment is confined to extended time-limits for the implementation of the Agreement. For the first time, the protection of intellectual property rights was discussed within multilateral trade negotiations which aimed at linking intellectual property rights to multilateral trade rights and obligations as a component of the international trading system where developed countries insisted that the TRIPs should centre more on the establishment of substantive and uniform standards involving a higher level of protection for intellectual property rights.

The implications of the Agreement for developing countries are:

- Costs will be incurred by developing countries from the application of this stronger regime for intellectual property protection. These will be related to the increases in royalty payments to foreigners;

- In addition, significant administrative costs will be incurred; developing countries will have the obligation to substantially improve and enlarge their judicial, administrative and enforcement frameworks, including the setting up of a customs control machinery, and to mobilise and develop the necessary human resources, which merit international support;

- The profound changes introduced by the Agreement in the traditional standards of intellectual property rights will influence competition in the world economy, as well as the generation and diffusion of technological innovations, and, ultimately, the technological development prospects of developing countries.

The impact of the changes can thus be far-reaching, though at this early stage it is difficult to assess the full implications of the Agreement;

- Developing countries are fairly well-positioned to promote biotechnological innovation owing to such factors as climate and geography, which endow them with genetically diverse raw materials on which the developed countries increasingly depend. Besides acquiring ownership rights, developing countries interested in promoting biotechnological pursuits need to conserve their natural genetic endowment for future exploitation;

- In the area of computer development and information technology, such rapid advances are being made that developing countries not in the market may find it increasingly difficult to catch up. Even those already in the market are handicapped by a lack of infrastructure;

- One of the concerns of developing countries is that the strengthening of intellectual property protection under the Agreement would open up opportunities for monopolistic abuses by suppliers of technology. In particular, they fear that suppliers would be in a stronger position to impose restrictive conditions on the licensing of technology which would distort international trade;

- In terms of a time-frame, the developing countries would probably need to embark on two stages of adaptation; namely, immediate tasks after the general entry into force of the Agreement and tasks to be carried out during the transitional period. The immediate task would be to comply with the provisions on national treatment and those on most-favoured-nation treatment. Both need to be incorporated into their national legislation. During the transitional period, the tasks would consist of changes in national legislation in accordance with the standards

laid down in the Agreement and elaboration of judicial procedures for enforcing laws.

Given the type, nature and scope of the legal and institutional changes called for by the provisions of the Agreement, the tasks involved in such adaptation will indeed entail considerable costs for developing countries;

- Compulsory licensing: Article 31 lays down detailed conditions for the use of patents without the authorisation of the patent owner, which could be one of the major points to be used by developing countries. To this end, Article 31(b) implicitly allows countries to impose compulsory licenses when, despite negotiations with the right holders, the latter have failed to license the patented technology 'on reasonable commercial terms and conditions'.

The WTO Dispute Settlement System

It is widely believed that the main gain for developing countries from the WTO is a strong rule-based system to safeguard their interests. Whether this is accurate or not is still to be seen. Nevertheless, at this point one can advance some basic arguments to consider the extent of the effectiveness of the Dispute Settlement System (DS) within the WTO.

The GATT/DS has been characterised in the past as ineffective. Critics have centred their complaints essentially on three points:

i) the ineffectiveness of the DS in the GATT was often attributed to the 'consensus' rule, which operated at three different levels:

- the establishment of the panel,
- the adoption of the panel report,
- the adoption of countermeasures as a last resort.

Parties could block the procedure at any one of the three aforementioned stages.

ii) In addition, complaints had often been voiced relating to the time taken in the procedures.

iii) Lack of transparency was often criticised as well, where the panel procedures remained confidential, even after the adoption of its report.

The Thrust of the DS System

A number of questions were raised by very competent and well-experienced people working in the system, which I am simply going to reiterate in this context to be able to make a judgement though preliminary on the functioning of the system in general.

These are as follows:

- Who is the DS favouring? According to the 'Bargaining Power Theory', when negotiations stop, DS starts. In the negotiations, bargaining power is dominant. In the dispute settlement power becomes irrelevant as the legal considerations become then the dominant factors. The DS is supposed to be fair and legal, thus disfavouring power politics to the benefit of the weakest partner, i.e. the developing countries, and thus safeguarding their rights.

- Did the system provide the appropriate incentives that would persuade players to use the multilateral context? Did it truly

provide a rules-oriented system to the society, where all play fair or does it work on the basis of a dominant hegemony? The second option should be discarded on factual grounds. If the first option is factually correct, what is needed for the option to work? The notion of credible threat in the game theory comes to mind. Is there such a notion in the GATT/DS—the role of remedies?

Anyway, whether the system will really be resorted to depends to a large extent on two main points:

i) How is the Appellate Body going to react to the panel decisions?

ii) What if the powerful country at the end does not abide by the panel rulings?

There is nothing in the system which forces the strong country to adhere, except moral obligations. Though the disputing party is certainly allowed to impose sanctions, there is no Security Council Chapter 7 in WTO, which would allow the international community to take any kind of common and the only type of effective sanctions against the country which does not implement the panel rulings. There is, however, what has been known as cross-retaliation. But it would certainly be wise to think in whose interest such a course of action would serve in the first place. Certainly it is the country which has the leverage to use it. China could, but what about a country like Egypt, or an even smaller one against the US, the EU or even Japan? In that sense one may question the validity of the implied threat within the system.

Assessment of the WTO/DS System

To repeat basic arguments put forward by legally competent people in the WTO , let me state the following:

- The consensus rule has been changed, from consensus to negative consensus: (Article 6 says: "..... unless the Dispute Settlement Body (DSB) decides by consensus not to establish a panel". Negative consensus at all three levels would make implementation easier, as there can be no blockage;

- In addition, easier access to countermeasures is provided for through the possibility of cross-retaliation. Whereas it remains doubtful whether developing countries have truly the leverage to use it, cross-retaliation can even entail a higher risk as it can be easily used against them. Though cross-retaliation has to a large extent been disciplined, in that one cannot go from one sector to the other unless all possibilities have been exhausted in the one area and then in the sector itself, it is nevertheless a very strong tool for sanctions in the hands of the stronger countries;

  The very pertinent question was raised whether the hurdle in DS has been moved one step further—from refusal to adopt the panel report to refusal to comply in the absence of any credible threat. The answer to this question remains to be seen;

- Strict deadlines now are well in place—six months for normal procedures, possibly extended up to nine and three months for urgent cases, mainly for food that can go bad;

- The Appellate Body, whose mandate is strictly confined to the examination of the legal part of the dispute, was established.

It is argued that the WTO/DSU (Dispute Settlement Understanding) took care of some procedural impediments without addressing the substance of the problem, namely what is being called the establishment of a credible threat in the system equal to what is known as Chapter 7 in the Security Council.

Future practice is awaited with a lot of interest. But future practice in what context? The Dole proposal? The creation of the Legal Office in 1986 and the reasons behind its creation? Does history repeat itself?

Nevertheless, the overwhelming majority emphasises that the WTO has strengthened the scope of rule-oriented policies to the detriment of what is known as 'power politics' and its frequent application in the past. It is also argued that developing countries have very small retaliatory possibilities in trade in goods. However, their leverage is more pronounced in the area of services and TRIPs. Cross-retaliation basically means that you can suspend your obligations for a certain period of time, which would mean in a sense that you can stop protecting the intellectual property or close your market for some time for foreign service. But then the question arises: how would that affect your own economy as a developing country?

Although the WTO/DS seems generally to have attracted more praise than criticism, it is those apparent plus points, such as its automaticity and the so-called binding nature of its mechanism (which is certainly debatable, as I have tried to show) that attract the most criticism from the US, and draws the fire of American critics. How decisions can be handed down by representatives of small countries and Third World countries sitting in judgement over US actions puts doubt about the US future compliance and stirs controversy.

Parties to a disagreement cannot block the panel's findings, as they could have done under the GATT. The losing side can appeal, and the appellate body's ruling is final. It is still to be seen whether the DS is the new teeth of the WTO or not.

The question will remain, however, whether the purpose of the WTO is to be an international policeman and thus in a sense an 'enforcement mechanism' or a negotiating forum and a dispute resolution forum, thus acting at best as a 'catalyst'. The latter has proven effective in a number of cases, such as the first dispute case brought to the WTO between two friendly developing countries—Singapore and Malaysia. The case was brought to the WTO by Singapore. However, this was settled outside its framework. The US complaint against South Korea's use of shelf-life regulations to limit packaged food imports was settled outside the WTO framework also. The US/Japan automobile case was settled in the same manner.

It may work for the system, when we say that 1995 saw an increasing involvement of developing countries in the WTO dispute settlement processes. In total, about 50% of the cases brought to the DSU (the total number of requests for consultations/dispute settlement actions reached 25) were initiated by developing countries.

A major point would be for the WTO to strengthen technical assistance to developing countries in this domain with a view to showing its good faith in enabling the developing countries to use the system and profit from it. In addition, developing countries themselves should aim at strengthening their national capacity in this respect, as the Dispute Settlement Mechanism will remain a key to their integration in the Multilateral Trading System and to their becoming active players using their rights as well as discharging their obligations.

Chapter 3

New Issues on the Road to Singapore

Trade and Environment

Trade and Environment will be one of the major issues addressed in the Singapore Ministerial Conference. Whereas developed countries believe that some issues are ripe enough for certain disciplines and some basic rules could already be set, notably in Multilateral Environmental Agreements (MEAs) and Eco-labelling, developing countries in general have a different view. First, they believe that these issues, though they have been negotiated at length, are still controversial and it would be difficult to start setting some disciplines for them. In addition, developing countries are keen to preserve a certain balance in the issues addressed and especially with regard to those of special interest to them, such as Market Access and Competitiveness and how the stringent environmental standards would impact on their exports and products. Also the issue of the transfer of sound and clean technology becomes very pertinent in this respect.

The important question is whether multilateral trade obligations conflict with the achievement of an appropriate level of domestic environmental protection, in accordance with their national priorities, and whether they permit transborder and global environmental concerns to be addressed. The basic point here is that the GATT allows for any action to be taken at the national level to protect their environment. As soon as such action would have any transborder effect, the principles of GATT should be respected, particularly those of Article II (MFN) and non-discrimination and Article III of national treatment as well as least trade restrictiveness.

Article XX (General Exceptions) permits countries to depart from their GATT obligations to serve legitimate policy objectives, which include measures necessary to protect human, animal or plant life, or health and the conservation of exhaustible natural resources. The Technical Barriers to Trade (TBT), based on the fundamental principles of MFN and national treatment, requires that technical regulations and standards should not be formulated or applied in such a manner as to constitute unnecessary obstacles to trade.

It was the famous dolphin/tuna fish case between Mexico and the US which brought the environmental concerns to the attention of the GATT. The Tuna panels' rulings were based on a number of issues, including attempts to exercise extraterritoriality in the US environment protection laws. In the 1991 case involving Mexico, the panel considered that if the broad interpretation of Article XX (b) suggested by the US was accepted, each contracting party could unilaterally determine the life or health protection policies which other contracting parties should then follow.

The panel also pointed out that any environmental protection or conservation of natural resources beyond national jurisdiction should be sought through international cooperation and agreements in multilateral forums and not unilaterally.

Connected with this issue were similar cases like the tropical timber case between ASEAN and Austria, where the latter attempted again to impose extraterritorial measures under the pretext of Article XX exceptions.

Proposals are being presented to the Committee on Trade and Environment (CTE) wherein requests were being made for the Singapore Ministerial Conference to look into amending Article XX to take care of the environmental concerns more adequately. In other words, this would mean not leaving the benefit of doubt to any panel in this regard.

The three basic approaches to deal with this matter are:

- the status quo approach;
- the ex-post approach which is recourse to a waiver in accordance with Article XXV or;
- the ex-ante approach, i.e amending Article XX.

Positions of developing countries vary between the status quo and the waiver approach, but not one developing country wants at this stage to start amending any article, least of all Article XX.

Most developing countries have made the following points:

i) Article XX is flexible enough to allow for exceptions as to accommodate environmental objectives, i.e. to allow trade measures inconsistent with the other obligations of the GATT to be used to achieve among others environment protection.

   Furthermore, the conditions contained in Article XX reflect the checks and balances in the GATT system that are intended to prevent the abuse of such exceptions. One of the key issues in Article XX is that there are safeguards to ensure fair and equitable treatment of WTO members in the application of the trade measures. Any attempt to tamper with this delicate balance will entail such enormous risks for the future that we might not even be able to envisage at this point in time.

ii) Preference for the ex-post approach where granting a waiver under Article XXV:5 could provide us with adequate and reasonable solutions to the Multilateral Environmental Agreements (MEAs) that have trade measures inconsistent with WTO. Such an approach is also based on the rationale that no challenges

have so far been raised on the trade provisions contained in no more than 18 out of approximately 160 Environmental Agreements. Thus, the urge or even the need to change or even reinterpret Article XX in order to accommodate environmental objectives is not based on any strong or valid argument.

We are certainly aware of the number of arguments invoked against such an approach, such as the WTO taking precedence over MEAs and the uncertainty surrounding the granting of a waiver, their limited duration which is not suitable for the long-term and global problems addressed by MEAs in addition to the time consuming and cumbersome nature of the process itself.

By the same token, one can argue that an amendment or collective interpretation to Article XX would also raise the problem of hierarchy between WTO and MEAs, but here in favour of the latter, by making environmental protection overriding the multilateral trade rules.

It would also be appropriate to ask if we start now by amending Article XX to suit environmental purposes, where would that lead us down the road with all the issues now being brought up (to satisfy various domestic pressure groups) with a view to integrating them at some point in time in the WTO process?

We are neither seeking to turn WTO into an environmental organisation nor adapt it to deal with structural problems of the environment, which are the sole competence of MEAs. When we are speaking of a waiver approach, we are effectively seeking to redress an exception and not to address the norm because this concerns only a few agreements which contain trade provisions. The possibility that disputes may be raised on their applicability in WTO based on past experiences is small, if not minimal.

Challenging such trade provisions is not non-existent. Why should any WTO member give up his acquired rights? Therefore, an ex-post approach in terms of granting a waiver could prove to be necessary and at the same time sufficient to deal with situations arising from present MEAs.

As regards future MEAs, it has been stressed time and again by a number of delegations from developed and developing countries alike, that in order to ensure consistency between trade provisions in MEAs and WTO obligations, coordination should take place at the national level by the parties to both the MEAs and the WTO and to include a trade representative or a WTO expert in delegations negotiating environmental agreements.

Furthermore, it would be relevant to raise the question as to whether trade has been the root cause of the environmental problems, which would thus make trade measures necessary to address them.

iii) MEAs should continue to preserve their comprehensive character, advocating positive measures within the framework of international cooperation for the pursuit of environmental objectives and protection. Attempting to give trade measures a special status goes against the overall goals and balance attained in the MEAs and undermines the rationale of their existence. Such a special status can only amount to elevate trade sanctions, which are basically negative measures over the whole set of positive measures incorporated in MEAs.

Thus, developing countries remain hesitant and unconvinced of the necessity for elaborating new rules in this area.

The issue of eco-labelling is the second issue of interest mainly to developed countries, and the issue has lately gained wide attention in the

WTO, especially in the light of pressures exerted to reach some kind of multilateral recognition on the validity of setting eco-label standards.

Developing countries have made their views known in this respect, as the main risk attached would be the introduction of what is called Product and Process Methods (PPMs) in the WTO. These views are:

- to make clear that we don't want any standardisation of eco-labelling or anything on PPMs being introduced through the backdoor in WTO, especially those which are not related to the end product;

- the US particularly argues that the TBT agreement includes non-product PPMs. For the developing countries, such a question is still wide open. Furthermore, environmental standards including PPMs are based on values which differ from one society to another. Therefore, it would be very difficult to attempt to internationalise PPMs and require all countries to follow the same production methods, as they are based on values and public policy.

On the other hand, we have nothing against dealing with environmental standards which are product-related, such as disposal and handling, which have at any rate to be distinguished from the non-product related.

However, we certainly would favour disciplining eco-labelling schemes on the basis of equivalencies and mutual recognition, where each country has to set its standards according to its own values as stipulated by Agenda 21. Aiming at this point in time to harmonise or internationalise PPMs on the basis of any set of multilateral guidelines is practically contradicting with what the international community has agreed upon unanimously.

Multilateral Agreement on Investment

One of the main concerns of developing countries during the earlier stages of the Uruguay Round was that the negotiations on TRIMs and on trade in services could be used to link trade and investment issues in such a way that national treatment and right of establishment for investors would somehow become incorporated in the GATT system.

These areas are addressed rather in GATS, which clearly provides that neither 'establishment' nor 'national treatment' are 'rights', but can be the subject of qualified concessions exchanged on a reciprocal basis within the framework of the Schedules of Commitments.

The European Community (EC) is lobbying to introduce a foreign investment treaty (or 'multilateral investment agreement') in the WTO. Such a treaty would give rights to foreign companies to establish themselves with 100% equity in all sectors (except security) in any WTO country, without restrictions, and to be given 'national treatment'. In that sense, national policies/laws that favour local enterprises or facilities would be deemed discriminatory, and thus WTO-illegal.

The EC is trying to get developing countries to accept that foreign companies should have the 'right of entry and establishment' in their countries. In other words, should a foreign company want to enter and set up operations in a country, the government should not have the power to stop it from doing so, unless there are exceptional reasons (which are multilaterally agreed on).

The EC paper proposes that once they have been given entry and have been established in a country, foreign companies should then be given 'national treatment'. The EC paper says 'in general, the host country should treat the foreign investor and his investment operating in its territory in the same way as a domestic investor or firm'. Furthermore,

there should not be discrimination between investors from different foreign countries.

The EC paper asks also for favourable 'accompanying measures', i.e. the freedom to make financial transfers. Expropriation of a foreign investment is only possible in exceptional and internationally recognised cases and must be accompanied by adequate, effective and prompt compensation.

The present TRIMs agreement is bad enough. It prevents governments from imposing conditions on investors that could affect trade conditions, such as specifying local content in domestic manufacturing and limiting imported inputs of a firm to a certain percentage of its export earnings.

Most countries today are trying to attract foreign investments. However, experience shows that for foreign investment to play a positive role, governments must have the right and power to regulate their entry, terms of conditions and operations. The key problem is that the proposed treaty seeks to remove these government rights and powers. By doing so, the negative aspects of unregulated and uncontrolled foreign investment inflow and establishment could overwhelm the positive aspects. Each government will no longer have the freedom to choose its own particular mixture of policies and conditions on foreign investments. The major policies would already be determined by the multilateral set of investment rules, and the choice available would be very much constrained to more minor aspects.

Under the Services Agreement (GATS) in the WTO, national treatment is to be given to those sectors which are put on offer by a country. In other words, there cannot be measures discriminating in favour of local services, facilities or enterprises. The Services Agreement applies only to those sectors or activities that the country has put 'on offer'. The proposed foreign investment treaty would be a catch-all agreement, in which all

sectors and activities are included, unless specifically excluded. Thus, any 'affirmative action' measures that promote local industries or services (through subsidies, preferential tax treatment, specified conditions for investment, even R&D subsidy) could be seen as 'discriminatory' against foreigners and thus prohibited.

The threat of cross-retaliation is what gives the WTO its clout, as this can be used effectively to discipline the weaker countries. If the investment treaty is accepted into the WTO then the pressures of having to comply could be tremendous. It is precisely because the WTO has teeth that the Northern countries have chosen the WTO as the vehicle of choice to introduce this treaty as well as bring forward other issues into the WTO.

Issues that link investment measures to trade are already covered by the TRIMs (trade-related investment measures) agreement in the WTO. The acceptance of this agreement in the Uruguay Round was already a major concession by developing countries. (TRIMs for instance prohibits countries from having a local content policy for their industries, thus restricting the South's development potential.) The WTO should stick to having TRIMs and not broaden its scope by incorporating investment regimes as a whole.

There is an important role for foreign investments in developing countries. But this role can be positively fulfilled only if governments retain the right to choose the types of foreign investments and the terms of their entry and operation.

Labour Standards

Developing countries continue to object to any linkage between trade and the so-called social clause, and in no way want it to be part of the WTO agenda, not even for examination purposes. They suspect and rightly so, that the most vocal advocates of action on trade and labour standards

(France and the US) are less interested in keeping their markets open than in seeking pretexts to close them. It is worthwhile noting that the G-7 meeting in Lille, France, at the beginning of April 1996 also did not set any specific social and labour standards to be introduced into world trade agreements, due to the resistance of countries like Japan, Germany, the United Kingdom and Canada.

Any initiative in this area, even if asking for a simple study of labour and trade by the WTO, will be hotly contested by developing countries which regard stated concerns for worker rights as an excuse for protectionism.

Chapter 4

Conclusion

In an election year, the Clinton Administration is likely to push for strict implementation of the Uruguay Round to demonstrate its benefits to sceptical voters. But the White House may be slow to launch ambitious initiatives that political critics might characterise as 'give-aways' to foreigners. Consequently, in the short term, the WTO's record may depend on the willingness of Europe and Japan to assume greater roles in shaping this new organisation. Ironically, any leadership these countries demonstrate could further tarnish the organisation in the eyes of the American critics.

It is even doubtful how much support developing countries might expect for their demand of quickening the pace of the tariff cuts and quotas in sectors of interest to them, notably in textiles and agriculture, in an election year in the US. With advocates of freer trade on the defensive there and elsewhere, such ambitions are unlikely to be realised.

It is certainly true to say that the WTO's eventual success or failure may depend on how seriously it is taken by Washington. For that, the US Trade Representative has created a monitoring and enforcement unit to identify and assign priorities to a wide range of initiatives that will help keep other WTO members in line and otherwise demonstrate America's resolve. Also, the special commission to be established in the Congress as proposed by Senate Majority Leader, Dole, will have its impact in Washington.

A hot topic in international trade circles these days is whether the ministerial conference should be a launching pad for a new round of multilateral trade negotiations or whether it should be a far less ambitious low-key affair.

WTO is still fragile in the view of many of its members, whether they are developing or developed countries. Expectations for the Singapore Ministerial Conference should be reasonable. Many issues still remain controversial. For the Ministerial Conference to succeed, it needs a balanced agenda which meets the interests of all its members. Developing countries which are hardly in any position to demand take in general the following view:

- They are overburdened with having to cope with the aftermath of the Uruguay Round and cannot deal with new issues at this stage being forced upon them in the WTO;

- Countries cannot be overstretched further to deal with new issues such as labour standards, multilateral agreement on investment, competition policy and stringent environmental standards;

- The Ministerial Conference should stick to its original mandate of reviewing the problems arising from the implementation of the Uruguay Round. It should in particular review problems faced by developing countries from having to meet their WTO obligations. We should also look at how to assist developing countries to implement their obligations and compensate those which will suffer losses resulting from the Uruguay Round;

- Developing countries should also seek to inscribe on the agenda of the Singapore Conference the inadequacy of implementation of all the articles related to technical assistance in the various agreements, which were in essence to balance the agreements

somehow and to allow developing countries to implement them. I shall not go through all such provisions, suffice to refer to the Decision on NFIDCs or Article 67 of TRIPs, which both explicitly referred to financial as well as technical cooperation. Developing countries have found enormous difficulties throughout 1995 to operationalise such articles. Particularly in TBT, provisions in practically all agreements pertaining to services have hardly been addressed. The argument frequently given was that we focused to a large extent on notifications. We should negotiate how to table such concerns on the Singapore agenda;

- If there are to be new issues to be discussed, they should be those clearly distortive to trade, such as the impact of fluctuating exchange rates on the South's trade, the effects of low commodity prices, the continuing debt problem and its impact on the South's trade earnings and balance of payments. These are genuine problems faced by the South and figure on the long shopping list of Marrakesh along with the other issues which are of more interest to the North.

Furthermore, developing countries could begin by calling for faster implementation of liberalisation agreed to in the Uruguay Round. On current plans, the US should start honouring its promise to dismantle textiles and clothing quotas. The EU should be urged to accelerate the liberalisation especially of processed products. They and other industrialised economies should also be pressed to negotiate stricter disciplines on the abuse of anti-dumping policies, which too often undermine progress made in dismantling other trade barriers.

Given the present state of bargaining power in the WTO, it is always expected that the North will have its way at the very end. Therefore, the entry of China as a full member becomes all the more urgent as it will give impetus to the legitimate demands of developing countries in this

organisation and become its partner and its strong advocate, which is much needed.

In general, it remains questionable whether developing countries will have dire needs and requests on their Agenda for any potential horse trading. Will the Singapore outcome be another 'Single Undertaking'? To date we have seen trade-offs between the so-called Quad group. There are reports of Canada and the EC acquiescing on labour standards in return for the US going along with bringing Trade and Investment issue into the WTO at Singapore. This had earlier not been favoured by the Administration, which argued that it would be premature before a Multilateral Agreement on Investment is reached in OECD at the highest standards.

If these two new issues are part of a gentlemen's agreement in the Quad, ending by both or at least one of them being dumped on the WTO in Singapore, what would be the trade-off for developing countries in exchange? The Singapore Conference might become even more expensive for the developing countries than the Round itself. The costs at stake are too high.

I ardently hope that at least some of us will not get tired of saying 'NO' in Singapore.