The World Trade Organisation
an African Perspective, more than a decade later

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Publisher

tralac trade law centre for southern africa

Publication of this book was made possible by the support of the Trade Law Centre for Southern Africa (tralac) and the Swedish International Development Cooperation Agency (Sida). The views expressed by the authors are not necessarily the view of any of these institutions.

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Language editing by Alta Schoeman

First published 2009
Published by the Trade Law Centre for Southern Africa (tralac)
P.O. Box 224
Stellenbosch
South Africa
7600

ISBN 978-0-9584680-6-0

The book is only published electronically on the web at www.tralac.org

Foreword

The current Round of trade negotiations is the first 'Development Round.' Given the challenges of addressing development issues in the context of trade negotiations in the WTOm wguch is not a development institution, it should not be surprising that the current negotiations are proving extremely difficult.

The World Trade Organisation (WTO) remains however the core of the rules-based system of international trade governance, providing also the rules for RTAs that are still growing rapidly, both in number and in scope and coverage.

Thw WTO was established in 1995 as the institutional anchor of the multilateral trading system. Since then significant developments have taken place, on the trade agende as well as in the participation of developing countries in the WTO.

This collection of papers provides an African perspective on the first decade of the WTO. Substantive trade issues such as agriculture remain, despite their declining importance in terms of overall economic activity even in African countries, of key importance to Africa. Key issues on the agriculture agenda are not addressed on the Regional Trade Arrangement (RTA) agende and so the WTO remains the only forum within which to address these. Africa is still engaging at the margins of the international economy and this collection of papers explores some of the challenges as well as prospects for Africa within the WTO.

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Chapter 1

The WTO and Doha Round

by Taku Fundira[1]

The modern world is notable for its high levels of international trade. Economists broadly agree that international trade offers an opportunity to eradicate poverty and promote development. However, it is agreed that international trade must be carefully regulated to avoid social injustice, economic inequality, political instability, environmental degradation and cultural dispossession.

World Trade Organisation (WTO) law provides for the multilateral rules for the conduct of international trade. The basic principles and rules of WTO law relate to the following:

- non-discrimination;
- market access;
- unfair trade;
- conflicts between trade and other societal values and interests;
- special and differential treatment for developing countries; and
- decision making and dispute settlement.

With a current membership of 153, the WTO is a young international organisation with a long history. The origin of the WTO lies in the General Agreement on Tariffs and Trade (GATT) 1947, which, for almost fifty years, was the international institution for trade. Although GATT 1947 succeeded in reducing tariffs, related issues involving international trade in goods and services needed a more elaborate institutional framework. In December 1993 the Uruguay Round of trade negotiations under GATT 1947 led to an agreement on the establishment of the WTO. The WTO Agreement was subsequently signed in Marrakesh, Morocco, in April 1994 and came into effect on 1 January 1995.

[1] Taku Fundira is a researcher whose focus is on economic and trade policy issues. His interests include work related to agricultural trade, quantitative trade data analysis as well as trade and industrial policy analysis. He is also involved in capacity building on trade policy tools in Southern Africa.

Although the last round, the Uruguay Round, resulted in the formation of the WTO, some negotiations continued after the end of the round. More particularly, in February 1997, an agreement was reached on telecommunications services, with 69 members agreeing to liberalisation measures that went beyond those agreed in the Uruguay Round. In the same year 40 members concluded negotiations for tariff-free trade in information technology products, and 70 members concluded a financial services deal covering most of trade in banking, insurance, securities and financial information.

In 2000 new talks started on agriculture and services. These were incorporated into a broader work program, the Doha Development Agenda (DDA), which was launched at the fourth WTO Ministerial Conference in Doha, Qatar, in November 2001. The DDA added negotiations and other work on non-agricultural tariffs, trade and environment, WTO rules such as anti-dumping and subsidies, investment, competition policy, trade facilitation, government procurement, intellectual property, and a range of difficulties faced by developing countries in implementing WTO agreements.

The DDA was refined by subsequent Ministerial Conferences in Cancún (2003), Geneva (2004), and Hong Kong (2005). The Cancún Ministerial Meeting was intended as a stock-taking meeting where members would agree on how to complete the rest of the negotiations. This meeting was, however, marked by discord between the members on agricultural issues, including cotton, and ended in deadlock on the so-called ‘Singapore issues’ (i.e. investment, competition policy, trade facilitation and government procurement).

The most recent Ministerial Conference in Hong Kong recorded the progress made in the year and a half since a set of decisions of the General Council (referred to as the ‘July 2004 package’) sought to resolve the Cancún impasse. The Hong Kong Ministerial Declaration includes agreement on a range of issues and purports to emphasise the central importance of the development dimension in every aspect of the WTO work program.

However, an analysis of the specific outcomes in the declaration, including an assessment of the true beneficiaries of these outcomes, suggests the contrary may

be the case. Rather than promoting development through extensive reform of trade rules affecting agriculture, cotton, non-agricultural products, services and intellectual property, the declaration introduces a self-standing 'Development Package'.

The Development Package comprises high-sounding yet currently insubstantial commitments in relation to special and differential treatment of developing countries, technical assistance and capacity building for these countries, as well as specific commitments for least developed countries. A further component of the Development Package is 'Aid for Trade', which is meant to help build the supply-side capacity and trade-related infrastructure that developing countries need to assist them to implement and benefit from WTO agreements and, more broadly, to expand their trade. The Hong Kong Ministerial Declaration further states that Aid for Trade cannot be a substitute for the development benefits that will result from a successful conclusion to the DDA.

Given that developed countries are arguably the real beneficiaries of the outcomes contained in the declaration, and taking into account the complexity and pace of current WTO negotiations, questions remain as to how developing countries can ensure that development remains central to these negotiations and that the Development Package does not become the only outcome that could (possibly) benefit developing countries.

Current state of negotiations

Following the Hong Kong Declaration, members agreed to step up negotiations and reach an agreement on modalities by the end of April 2006. The 30 April 2006 deadline passed without any breakthroughs in agriculture and non-agricultural market access (NAMA). This deadline was further extended to 30 June 2006, but the deadline passed with no agreement in sight. Members failed to establish the modalities critical to the successful completion of the round.

The impasse was due to disagreement on a framework to cut farm subsidies as well as tariffs on both industrial and agricultural products. Reports streaming from the negotiations revealed that a series of meetings of the G-6 (comprising Australia, Brazil, India, Japan, the EU and the US) on 29 and 30 June produced little movement and that the high-level talks ended on 1 July (a day earlier than anticipated).

According to WTO Director General, Pascal Lamy, parallel progress was required to unblock the negotiations on a 'triangle of issues'. This would imply that

- the US would have to agree to make deeper cuts to domestic farm support;
- the EU would have to offer increased agricultural market access; and
- Developing countries such as Brazil and India would have to offer more on industrial tariffs.

However, no such concessions materialised during the gatherings. US officials continued to insist that the G-20's proposed tariff cuts were insufficient. Analysts believe that the central players in the negotiations were not keen to make the first move and hence waiting for each other to move first, did not 'put all their numbers on the table'.

To resolve to the impasse the deadline was extended to the end of July by which time the Director General was to broker a deal on the formulae for cutting duties and rich nations' farm subsidies. On 24 July 2006 Lamy announced the indefinite suspension of negotiations after talks between six major members (the so-called 'G-6' consisting of Australia, Brazil, the EC, India, Japan and the US) collapsed on Sunday 23 July. The suspension effectively halted all negotiations under the Doha work programme and Lamy indicated that the date for resumption of the negotiations would depend on the members.

2007 was another year full of optimistic talk and commitments to successfully conclude the round. On Saturday 27 January 2007, at the close of the World Economic Forum (WEF), the US, the EU and other key members agreed to resume the suspended global free trade talks. However, this again proved not to be. Revised draft modalities texts from the August texts (specifically for agriculture) which were expected to be presented to members in November, failed to materialise as members could not agree on the level of concessions.

High on everyone's list was the central role of agriculture, with the EU and US unwilling to make deep cuts in their farm support and the developing countries reluctant to encourage them by offering deep tariff cuts of their own. Developing countries explicitly linked the concessions that they were prepared to make on their

industrial products' tariffs to industrialised countries' willingness to limit their farm support and to lower agricultural trade barriers.

The Potsdam meeting (June 2007)

At Potsdam, the G-4 members attempted to bridge gaps in their negotiating positions. Unanimity among these members would have been helpful to pave the way towards multilateral convergence. However, the parties concerned failed to narrow down their differences.

The same rhetoric – although with a twist – was echoed after the meeting collapsed. Surprisingly, the EU and the US were on the same side although the flexibilities offered by the EU and US were not sufficient for India and Brazil.

Celso Amorim, the Brazilian Foreign Minister and Kamal Nath, the Indian Commerce Minister, complained that the US and EU appeared to have reached some sort of bilateral compromise on agriculture and had banded together to demand disproportionate liberalisation from developing countries.

Despite the impasse at Potsdam, some optimism for the successful completion of the Doha Round through multilateral negotiations still existed. The WTO Director General, Pascal Lamy, noted that the negotiation was an endeavour among the 150 (now 153) members of the WTO with a negotiating process driven by the chairmen of the negotiating groups, who had the responsibility of tabling compromise texts in their respective areas. He therefore called on the members of the G-4 to contribute to the multilateral negotiating process.

To add to the paralysis, 2007 witnessed France's election of a new President who criticised the European Commission's negotiating tactics. This subsequently led to the latter demanding more, not less, in return for existing European offers to liberalise. In the US, the Democrats, who took control of the Congress from the Republican Party in January 2007, blocked the renewal of President Bush's trade negotiating authority which expired on 30 June 2007. Without this authority, the US administration cannot submit any Doha Round deal to Congress without running the risk of the latter amending the deal beyond recognition.

2008 witnessed yet again a number of missed opportunities to clinch an agreement amongst WTO members that would have led to the completion of the Doha Round of negotiations. The July 2008 package following meetings in July was viewed as a stepping stone on the way to concluding the Doha Round. This latest attempt to salvage a deal in the Doha Round of trade talks broke down as ministers acknowledged that they were unable to reach a compromise after nine days of a high-level summit at the WTO. At the centre of the collapse was an issue which had never been at the core of the negotiations during that summit.

The main concern was the extent to which developing countries would be able to raise tariffs to protect farmers from import surges under a 'special safeguard mechanism' (SSM). Differences over cuts to farm subsidies and industrial tariffs, which had long seemed virtually intractable, appeared to be bridged to a significant extent during the 'mini-ministerial' gathering in Geneva. Even the always tricky issue of preference erosion was reportedly close to being finalised.

While the special safeguard mechanism was widely seen as the proximate cause of the collapse, the deadlock on the SSM meant that other contentious issues, notably cotton-specific subsidy cuts and protections for location-based food names like Parma Ham, never even got their turn in the spotlight.

2008 also witnessed the global financial crisis which sent some of the major developed economies into recession. Late last year the major developed economies – the US, the EU and Japan frantically searched for rescue packages for their financial sectors as threats of their economies entering a recession grew stronger. In the wake of this, the G20 held an initial meeting on 15 November 2008 to discuss the challenges facing the world economy and financial markets. At this meeting an action plan was adopted that laid the foundation for the reform of financial markets and regulatory systems.

The world leaders also made a commitment not to impose protectionist measures. However, according to Aaditya Mattoo and Arvind Subramanian (2009), 'the ink was barely dry before a number of countries took measures to protect domestic companies'. Russia imposed a number of import tariffs. India slapped restrictions on steel. France created a fund to protect French companies. The US and the European

Union contemplated state aid for the domestic automobile industry. And this while China had earlier increased its value-added tax rebate for exports and is now publicly worrying that the Renminbi is overvalued.

Despite the global financial crisis, 2009 has ushered a renewed commitment to the successful completion of the Doha Round and further calls were made to resist protectionism and promote global trade. The WTO General Council agreed to hold a Ministerial conference at the end of the year. The Ministerial conference will take place in Geneva from 30 November to 2 December under the general theme of the WTO, the Multilateral Trading System and the Current Global Economic Environment.

Amongst the issues to be discussed is the overall review of the WTO. Although focus will not centre on the Doha Round trade negotiations, it is likely that calls to reach a final conclusion of the Doha Round will be made bearing in mind the issues at stake. Some of the pitfalls of a failed Doha Round are highlighted below.

- A failed round implies that Europe and the US will lose new access to the markets of emerging economies like China, India and Brazil for their exported industrial goods and services.
- Agricultural exporters especially in African countries will miss out on the farm tariff cuts being offered by the EU. Furthermore, failure also means passing up on the recent multilateral agreement to grant duty-free quota-free market access to all Least Developed Countries.
- Poor farmers in developing countries will be hurt as the US and the EU continue subsidising their agricultural production, thereby artificially enhancing their competitiveness and leading to over-production and dumping.
- The credibility of the international trading system and the WTO as an institution could be questioned. This could undermine the legitimacy of the Dispute Settlement Body, which is currently the only supranational body capable of rendering compulsory judgements on disputes between countries.
- And lastly, a failure could signal a further increase in bilateral agreements and Free Trade Agreements (FTAs) to the benefit of developed countries. This will lead to the multiplication of trade rules and tariffs which would generate higher

transaction costs. Issues such as market access in agriculture that are holding up the Doha Round are often not included in FTAs. This is usually to the detriment of developing countries that depend mainly on agriculture.

Clearly the complete failure of Doha will be unfortunate, more especially to the developing world because of the lost opportunity to tackle the accommodation of developmental needs in the multilateral system. Furthermore, the collective and bargaining efforts that developing countries led by the G20 have demonstrated during negotiations will be completely eroded and any inroads into creating a conducive trading environment lost.

There seems to be an array of views over the failure to conclude the Doha Round, each with substantive arguments to support them. Speaking in parliament, the then South African President Thabo Mbeki noted that disagreement over access to agricultural markets – not industrial tariffs – was the main stumbling block in the Doha Round of world trade talks. ‘Agriculture remains the key to the round, setting both the pace and ambition for the other important negotiating issues,’ he said.

This sentiment seems to be shared by most developing countries as they still rely on agriculture for development. Developing countries have explicitly linked the concessions that they are prepared to make on their tariffs of industrial products to developed countries' willingness to limit their farm support and to lower agricultural trade barriers.

Although there still remains the ambition to complete the Doha Round sooner, the current global climate on the other hand may create hurdles for this achievement. Already, signs of increased protectionism, currency devaluations, reduction in export taxes, one-sided bail-outs and more stringent investment protection are just a few of the challenges that lie ahead.

For the developing countries, an appreciation of the benefits associated with liberalisation through the multilateral system rather than the bilateral or FTA approach is key to the revival and successful completion of the Doha Round.

There is therefore a need to ensure that all options are explored to ensure that the Doha Round is kept alive and well and completed in the shortest period of time –

bearing in mind that in July 2008 members had almost reached the verge of consensus.

Reference

Mattoo, A. and Subramanian, A. 2009. The world must go beyond Doha. *Financial Times* 01/06/2009.

Chapter 2

Trade and Development in the WTO – what happened during the first decade?

by Catherine Grant[1]

1. Introduction

Development issues have long been a component of the multilateral trading system and it is widely recognised that there is a strong link between trade and development. The nature of the link, however, has not always been the subject of consensus. Over time the trade and development paradigm has shifted and this is reflected in changes in the debate in the General Agreement on Tariffs and Trade (GATT) and subsequently in the World Trade Organization (WTO). This debate has been of much importance in both organisations – so much so that a Committee on Trade and Development has been addressing these issues specifically for over forty years after its establishment in 1964. This paper looks at trade and development with a specific focus on the first ten years of the WTO. Some background on discussions in the GATT is required and is set out in this introduction.

Prior to the establishment of the WTO under the Marrakesh Declaration in 1994, trade and development discussions in the GATT were largely focused on two broad types of initiatives – the provision of preferential market access and of differential treatment for developing countries. These issues were addressed over decades starting from a low base. When it was first adopted in 1947, the GATT did not recognise the special situation of developing countries but rather adopted a fundamental principle that all rights and obligations should apply uniformly to all contracting parties (WTO, 1999: 11). This was to change shortly thereafter and after years of discussing issues relating to economic development, Article XVIII of the GATT was revised to give developing countries greater flexibility. In 1957 an expert panel, known as the Haberler panel, was set up to consider the failure of less-developed countries to develop as rapidly as industrial countries (WTO, 1999: 12). The result of the Haberler report was a number of changes made in favour of developing countries, including a Declaration on the Promotion of Trade of Less-Developed Countries adopted in 1961.

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During the 1960s further progress was made by the GATT in recognising the special circumstances of developing countries. Part IV of the GATT came into full effect in 1966 and specifically confirmed the concept of non-reciprocity in Paragraph 8 of Article XXXVI. It also mandated contracting parties to the GATT to take action to improve market access for developing countries. In practice this was reflected by the introduction of preferential rates of duty on the imports of certain goods produced in developing countries by Australia in 1965 and other developed countries in the years that followed (WTO, 1999: 15).

The Tokyo Round of negotiations took the issue of trade and development a step closer to the heart of the GATT and called for the negotiations to 'secure additional benefits for the international trade of developing countries' (WTO, 1999: 15). One of the major decisions made as part of the Tokyo Round was the adoption of the 'Enabling Clause' that provided for 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries'. Provision was also made for the special treatment of least-developed countries (WTO, 1999: 15). A number of the plurilateral agreements negotiated as part of the Tokyo Round took advantage of the 'Enabling Clause' and included specific measures for the differential and more favourable treatment of developing countries.

It was pointed out by the WTO Secretariat (1999: 17) that while the GATT made considerable improvements in favour of developing countries over the period until the end of the Tokyo Round, there were concurrently some adverse developments for these countries. These included a steady increase in protection and support for agricultural products from developed countries; the adoption of a multilateral framework for textiles and clothing that discriminated against low-wage or low-cost products; and the increasing use of bilaterally agreed 'voluntary export restraints' as substitutes for safeguard action. It is against this background that the Uruguay Round negotiations took place from 1986 to 1994.

The outcome of the Uruguay Round contained a number of specific results that had a positive impact on the interests of developing countries. For example, agricultural products were comprehensively included in the Round and agricultural trade became subject to much less discrimination than in the past. It was also agreed to phase out the discriminatory regime established for the trade in textiles and clothing under the

Multi-Fibre Arrangement. Additional limitations were placed on the use of emergency safeguard measures and 'voluntary export restraints' were prohibited. Customs duties on industrial products were reduced and the number of bound tariff lines increased. Developing countries accepted the single undertaking at the conclusion of the Uruguay Round and became party to the three major agreements which constituted the WTO Agreement – the Agreements on Trade in Goods, the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights – as well as most of the plurilateral agreements negotiated in the Tokyo Round (WTO, 1999: 17-18). The end result was the greater integration of developing countries into the multilateral trading system.

Among the 23 original signatories of the GATT in 1947, 11 were developing countries[2] (WTO, 1999: 5). The WTO now has a majority of members that are developing countries and this is growing every year. There is no definition of what constitutes a developing country in the context of the WTO and members are therefore able to self-select if they want to be a developing country. There are 32 least developed countries (LDCs) that are currently members of the WTO[3] and these are defined according to the list established by the United Nations. A number of developing and LDC countries are also seeking to accede to the WTO and others are currently observers.

Through greater participation in the global economy, the value of developing country exports has increased over time. However, the developing countries' share of world trade was at its highest just after the establishment of the GATT. There is also a growing divergence between developing countries with trade dominated by only a few. This has resulted in the marginalisation of many others, including most African countries. The benefits of trade have therefore not been equally shared among the countries of the world. The United Nations Development Programme (UNDP) claims that the 'rules of the game' are at the heart of this problem and contends that 'hypocrisy and double standards are not strong foundations for a rules-based multilateral system geared towards human development' (UNDP, 2005: 113).

[2] Brazil, Burma (Myanmar), Ceylon (Sri Lanka), Chile, Cuba, China, India, Lebanon, Pakistan, Southern Rhodesia (Zimbabwe) and Syria.

[3] Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda and Zambia.

It is in this context that the following sections seek to explore the trade and development debate in the WTO since 1995 — discussing the issues that have been on the agenda as well as some of the key events from a development perspective. Coalitions and groupings among developing countries are considered with a particular focus on the role of the African members of the WTO. With development placed at the centre of the Doha Round, specific consideration is given to the prospects of these negotiations making progress for developing countries. The chapter concludes with consideration of the future of trade and development issues in the WTO following the Hong Kong Ministerial.

2. The first five years: more trade than development

At the time the WTO was created the trade and development debate had reached a point where it was generally assumed that trade was an important part of economic development. The era of focusing on import substitution as a development strategy had ended and it was widely accepted that 'greater trade does offer enormous opportunities for human development' (UNDP, 2005: 113). The result was a willingness on the part of developing countries to accept a greater level of commitments than ever before at the conclusion of the Uruguay Round. For the first time, every developing country member of the WTO had schedules in the goods area (WTO, 1999: 18). Developing countries signed up to obligations on a wide range of matters, including intellectual property rights, services, customs valuation and technical barriers to trade.

In 1995 the concept of differentiation was also well entrenched in the multilateral trading system as is described in the introduction on trade and development in the GATT. It was accepted that developing countries needed special consideration in trade negotiations for a number of reasons. As outlined by Ismail (2005: 11), the first reason related to the significant differences in economic power and the relatively minor share of developing countries in global markets. The second reason recognised the major distortions in global markets caused by the protectionist policies of developed countries. As a result, the WTO agreements included a number of provisions specifically aimed at providing special and differential treatment (S&D) for developing countries. Hoekman (2003: 1) also points out that it was

acknowledged that 'very small and/or low-income economies lack the institutional development or minimum scale to manage the full panoply of WTO rules'.

The S&D provisions contained in the WTO agreements have been grouped in a number of ways by different commentators. Ismail (2005: 11) and the World Bank (Hoekman, 2003: 1) identify three main categories of S&D: preferential market access; longer tariff phase-down periods and flexibility in implementation of WTO rules; and offers of technical assistance and capacity building to developing countries. The WTO (1999: 18) uses five main groups: provisions aimed at increasing trade opportunities through market access; provisions requiring WTO members to safeguard the interests of developing countries; provisions allowing flexibility to developing countries in rules and disciplines governing trade measures; provisions allowing longer transitional periods for developing countries; and provisions for technical assistance. Many of these S&D provisions are effectively non-binding commitments that are not enforceable through WTO dispute settlement procedures. They are rather 'best endeavour' provisions.

In addition to S&D provisions, other trade and development work has also been taking place on an ongoing basis in the WTO. This is largely done in the Committee on Trade and Development as well as the Sub-Committee on Least-Developed Countries. Other WTO bodies consider trade and development issues as they relate to their specific areas of concern. The WTO Secretariat has also been active in the trade and development debate. In March 1999 it organised the High Level Symposium on Trade and Development. This provided an opportunity for a broad range of stakeholders to discuss the relationship between trade and development. In addition, the Secretariat has developed cooperative arrangements with other international organisations in the field of trade and development. Most notably there is the Joint WTO/OECD Trade Capacity Building Database, the Integrated Framework for technical assistance to least-developed countries and the Joint Integrated Technical Assistance Programme for LDCs. The WTO Secretariat also works with UNCTAD, the World Bank and International Monetary Fund on trade and development issues.

Despite the S&D provisions and ongoing trade and development work programme, the first five years of the WTO were largely focused on embedding the new system of

rules. With the change from the GATT to the WTO there was an adjustment period needed for all involved, including the Secretariat and the members. Member states were required to make the necessary adjustments in their domestic legislation and regulations to accommodate the commitments agreed to in the Uruguay Round. There was also a period of political change as members got used to the new expanded set of rules governing the multilateral trading system. Developing countries in particular were required to examine carefully their obligations under the new WTO agreements. Cuello Camilo (2005: 7) claims that 'it took developing countries several years to realize the magnitude and financial implications of the reforms required to implement their WTO commitments'. For many of them it was the first time that they had had to consider some of the issues now on the table, such as intellectual property rights and customs valuation requirements. With these additional issues came new WTO bodies and additional participation commitments in Geneva as well.

Two Ministerial Conferences were held between 1995 and 1998 – in Singapore from 9 to 13 December 1996 and in Geneva from 18 to 20 May 1998. The focus in Singapore was on the first two years of the operation of the WTO and the implementation of the Uruguay Round Agreements. In the Singapore Ministerial Declaration there were some general references to the role of trade in promoting sustainable development and economic growth. The new commitments undertaken by developing countries were acknowledged and it was agreed to provide additional technical assistance (paragraph 13). A Plan of Action for LDCs was adopted with specific reference to the provision of duty-free access for imports from LDCs. Of particular note at the Singapore Ministerial was the establishment of new working groups on the issues of investment, competition policy and transparency in government procurement. Trade facilitation was the fourth of what were to become known as the 'Singapore issues'.

At the Geneva Ministerial Conference trade and development was again on the agenda. The work of the Committee on Trade and Development was affirmed and it was agreed that effective implementation of S&D provisions was needed (Geneva Ministerial Declaration: par. 5). Ministers in Geneva set the agenda for the Third Ministerial Meeting and established a work programme that focused on identifying

issues to be discussed in Seattle. It was agreed that the WTO General Council would submit recommendations to the Third Ministerial Conference on the 'WTO's work programme, including further liberalisation sufficiently broad-based to respond to the range of interests and concerns of all Members, within the WTO framework'. This was broadly seen as leaving open the possibility of the launch of a further round of trade negotiations in Seattle.

The first five years of the WTO were also marked by a fraught and protracted debate over the appointment of a new Director-General in 1999. The membership was divided between the candidatures of New Zealand's Mike Moore and Thailand's Supachai Panitchpakdi. For well over ten months consultations took place in a bid to select the new Director-General. This resulted in the formation of two opposing coalitions made up of both developed and developing countries. In the end, it was not possible for the membership to agree on only one candidate, so a special arrangement was put in place that resulted in the post being shared with two terms of three years each. Mike Moore assumed office on 1 September 1999 and Supachai Panitchpakdi succeeded him on 1 September 2002. During the time taken to reach this agreement the WTO was effectively paralysed and little work was carried out on substantive issues. The Organisation was in fact leaderless for some months following the end of Renato Ruggiero's term at the end of April 1999.

3. Seattle Ministerial Conference

While the debate over the appointment of a new Director-General was taking place, preparations were also supposed to be under way for the Third WTO Ministerial Conference to be held in Seattle at the end of 1999. These were, however, derailed to a certain extent by the preoccupation of the membership with the Director-General debate. Nonetheless, with some concentrated effort, especially in the three months following Mike Moore's appointment, the WTO process in Geneva resulted in a draft text that sought to launch a new round of negotiations covering a broad range of issues. However, a successful outcome from the Seattle meeting was not to be.

The WTO Ministerial Conference in Seattle came at the end of the 1990s, a decade that witnessed a deepening of globalisation on many different levels. The 1990s were characterised by 'increased flows of trade, investment and technology in the

global economy' (Ismail, 2005: 14). Many countries prospered in this new environment and by 1997 developing countries' share of world merchandise exports reached 29% (WTO, 1999: 4). These benefits were, however, not equally shared. China, and East and South East Asian Newly Industrialised Economies accounted for the bulk of developing country exports in 1997 with a share of nearly 53% (WTO, 1999: 7). Some of the world's poorest countries in Africa were marginalised further during this period and at the same time were trying to come to grips with the commitments undertaken during the Uruguay Round.

The gathering of world leaders and trade ministers in Seattle provided a flash point for the build-up of pressure around globalisation. Anti-globalisation protestors descended on the city and 'unprecedented mass action by civil society groups' (Ismail, 2005: 14) took place. The WTO became a target for all the groups opposed to free trade, capitalism, globalisation, degradation of the environment, child labour and more. The tension among members of the WTO was fuelled by the action taking place outside the conference and the atmosphere became very tense. There was a strong sense among developing countries that attempts were being made to force them to enter into a further round of trade negotiations without proper consideration of the impact of the Uruguay Round commitments. Developing countries expressed dissatisfaction not only with the substantive issues on the table but with the way in which negotiations in the WTO were being handled. The 'Green Room' process, which involved a small group of countries discussing key issues, was a target for criticism from developing countries and civil society that felt that the WTO was not sufficiently transparent and accountable. African Ministers expressed strong feelings at being shut out of the process and at perceived attempts to impose a result on the majority of the membership.

The Seattle Ministerial was a turning point for the WTO as an organisation and for developing-country members in particular. Khor (1999) described it as a 'revolt' by developing countries, adding that 'the street protests by civil society and US-EU differences may have played a part, but the main factor that torpedoed the Seattle talks was the non-transparent and undemocratic nature of the WTO system, which many developing countries could no longer tolerate'. Developing countries were struggling to come to terms with the full extent of the WTO Agreements and objected

to what were perceived as attempts by the US, EU and others to put additional issues on the agenda, including biotechnology, labour standards, environmental issues, investment, competition, trade facilitation and government procurement. There was little hope by developing countries that they would achieve progress in the areas of particular interest to them, such as agriculture, without having to make untenable concessions on other matters.

Following Seattle, there was much soul-searching among member states and the WTO Secretariat led by Director-General Mike Moore. The trade and development debate was put into sharp relief for the first time. It became apparent that the implementation concerns of developing countries would have to be addressed if the agenda of the WTO were to advance in the future. Other priority areas such as agriculture would also require close attention. The Director-General also set about attempting to improve the internal workings of the Organisation. Greater participation by developing countries was encouraged. Additional resources for technical assistance and capacity-building were made available in order to better equip developing-country delegations to contribute to the negotiations. Attempts were made to also bring the key political decision makers in developing countries into the WTO fold in an active manner that would see them involved in the process in more ways than just simply attending ministerial meetings.

4. Doha Development Agenda

When WTO Ministers came together again in Doha, Qatar at the end of 2001 it was against the backdrop of the failure in Seattle as well as the terrorist attacks in the United States on September 11. There seemed to be a new spirit among the members and a recognition that the multilateral trading system would only survive if it took into account the views of all members and specifically addressed the concerns of developing countries. The Doha Development Agenda was christened and at the top of the list of issues were those of concern to developing countries in the areas of agriculture, labour-intensive manufactures and access to patented drugs (Hoekman and Newfarmer, 2003: 1). A timetable was put in place for the Doha Round and deadlines were sequenced in a way that saw the key areas of concern for developing countries being addressed first (Hoekman and Newfarmer, 2003: 1).

On trade and development issues specifically, two working parties were created – the Working Group on Trade, Debt and Finance and the Working Group on Trade and Transfer of Technology. A Declaration on the TRIPs Agreement and public health was adopted together with a waiver for the European Union-African Caribbean Pacific (EU-ACP) economic partnership agreements. The strengthening of special and differential treatment provisions was placed at the top of the agenda and a deadline of July 2002 was set for completion of the work. The Doha mandate on S&D was set out in paragraph 44 as follows:

> We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.

In the Doha Decision on Implementation-Related Issues and Concerns the work programme on outstanding S&D issues is set out in paragraph 12:

12.1 The Committee on Trade and Development is instructed:

(i) to identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002;

(ii) to examine additional ways in which special and differential treatment provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions, and to report to the General Council with clear recommendations for a decision by July 2002; and

(iii) to consider, in the context of the work programme adopted at the Fourth Session of the Ministerial Conference, how special and differential treatment may be incorporated into the architecture of WTO rules.

The work of the Committee on Trade and Development in this regard shall take fully into consideration previous work undertaken as noted in WT/COMTD/W/77/Rev.1. It will also be without prejudice to work in respect of implementation of WTO Agreements in the General Council and in other Councils and Committees.

12.2 Reaffirms that preferences granted to developing countries pursuant to the Decision of the Contracting Parties of 28 November 1979 ("Enabling Clause") should be generalised, non-reciprocal and non-discriminatory.

To date, the deadline for completion of the work on S&D has been extended four times – to December 2002, February 2003, July 2005 and December 2005. The Committee on Trade and Development (and the General Council in informal sessions) has since the Doha Round been working on the issues but no agreement has been reached. On the table originally were 88 agreement-specific S&D proposals that developing countries were seeking to make more 'precise, effective and operational'. Developing countries have become frustrated by the 'aspirational statements' (ICTSD and IISD, 2004: 2) of most S&D provisions and are aiming to receive real benefits as promised. The discussion has become bogged down, however, as some developed countries are not prepared to address specific S&D provisions until cross-cutting issues, such as eligibility, benchmarking, monitoring and the objectives of S&D have been resolved.

There was some hope of progress on S&D at the Cancun Ministerial. The Chair of the General Council, Perez del Castillo, submitted a proposal to divide the 88

agreement-specific proposals into three categories. Category I had 38 proposals that were thought could be agreed before Cancun. Based on these proposals 24 recommendations were sent to the Cancun Ministerial and were included in Annex C of the Draft Cancun Ministerial text together with three new proposals from the African Group. The failure of Cancun meant that these 28 recommendations were not adopted despite there being agreement in principle on them.

The Cancun Ministerial is interesting from a trade and development perspective for more than the failure to adopt the S&D proposals. For the first time since the establishment of the WTO, developing countries participated actively in the negotiations in a way that saw them move beyond simply playing a blocking role as had happened in Seattle. The negotiating dynamics of the WTO were changed for good. Strong developing country coalitions like the G20 emerged (refer the section on coalitions below) and demonstrated a high level of negotiating skill and technical knowledge. As Hoekman and Newfarmer (2003: 2) observe, 'the world's two largest trading blocs found themselves having to negotiate with a group expressing common concerns of countries comprising more than half of the world's population'. Developing countries arrived in Cancun with firm positions on a range of issues and were not afraid to promote their views. The negotiating process of the WTO was unfortunately not yet ready for this new reality in Cancun and the meeting collapsed.

Following the Cancun Ministerial, the discussion on S&D reverted back to the argument of the relative priority between agreement-specific and cross-cutting issues (ICTSD and IISD, 2004: 3). Little progress was made despite the best efforts of the then Chair of the Committee on Trade and Development, Faizel Ismail of South Africa. The July 2004 deadline arrived and a reference was included in the 'July package' calling for the review of S&D to be completed 'expeditiously' by July 2005. Again this deadline came and went.

In preparation for the Hong Kong Ministerial Conference, the Secretariat prepared a comprehensive note on the developmental aspects of the Doha Round of negotiations (WT/COMTD/W/143/Rev.1, 22 November 2005). It looks at all the subject areas included in the Doha Round and highlights the development dimension of each one together with the issues of interest to developing countries and the potential gains which could accrue to developing countries from the conclusion of the

negotiations. On presentation of the note, the WTO Director-General, Pascal Lamy, said that the package already on the table for developing countries was a 'good result' and that it would be disastrous if it disappeared because of negotiations not moving forward (WTO News Item, 2005: 5). It is not yet clear exactly what the outcome of the Doha Round will be but there is no doubt that if an agreement is possible development issues will need to be part of it for the result to be credible. 'Without strong SDT provisions it will be difficult to conclude the Doha Round' (IISD, 2003: 3).

5. Hong Kong Ministerial

As expected, development was one of the key topics discussed at the Hong Kong Ministerial Conference held in December 2005. From the beginning of the meeting considerable emphasis was placed on a number of initiatives aimed at improving the position of developing countries in the global economy. For example, in the first days of the Conference some of the larger developed country members of the WTO announced 'aid for trade' packages, including Japan and the European Commission. The group of least-developed countries (LDCs), under the leadership of Zambia, was vocal in their demands for progress to be made on the package of measures proposed to assist the LDCs with, among other things, duty-free and quota-free market access. Much of the public debate and discussion both at and in the margins of the Ministerial Conference was about the relationship between trade and development.

The Ministerial Conference itself highlighted the importance attached to the development dimension of the Doha Work Programme and did reach agreement on a few of the development proposals on the table. The Hong Kong Declaration (WT/MIN(05)/W/3/Rev.2) contains sections on S&D treatment, LDCs and technical cooperation together with individual paragraphs on other issues related to development, such as implementation. Among the key decisions adopted was the agreement to provide duty-free and quota-free market access for at least 97% of all products originating from all LDCs by 2008. The Committee on Trade and Development (under the renewed chairmanship of Faizel Ismail of South Africa) was asked to review all outstanding S&D proposals by December 2006 and work is still ongoing. The Director-General was invited to establish a task force to provide

recommendations on how aid for trade might contribute to the development dimension of the Doha Development Agenda (DDA). The task force presented its recommendations to the General Council in July 2006 and they were adopted in October 2006. Outcomes in other areas of the negotiations could also be said to be positive from a development point of view. Key among these was the agreement to the elimination of all forms of export subsidies by 2013.

So, while trade and development took up much time and energy in Hong Kong, the results did little to move the debate forward in real terms. The package for LDCs was held up by some as a concrete outcome but in reality the discussions were simply a repetition of many of those that have taken place at a range of multilateral conferences over the last few years. The stumbling blocks for a handful of WTO members could not be overcome and this is reflected in the reference to duty-free and quota-free market access for 97% of products from LDCs rather than for all products. In some ways, the issue of aid for trade was moved up the agenda at Hong Kong and is now a more central part of the development debate in the WTO. This was met with some suspicion on the part of developing countries (Ismail, 2006: 4). Concerns were expressed about the motivation behind the offers of considerable funds for trade capacity-building programmes as well as the way in which these resources would be used. It was made clear by developing countries that aid packages should in no way be seen as replacing real development gains to be made from greater trade liberalisation in sectors of interest to developing countries, such as agriculture.

6. Coherence of Developing Countries

Developing countries (usually known as the G77) have traditionally been a powerful force in the United Nations. In the WTO, however, there has not been that same level of coherence. This is due largely to the wide divergence of situations and trade prospects of developing countries (Halle, 2005: 4). Traditional alliances in the WTO have involved both developed and developing country members. A prime example is the Cairns Group of agriculture exporting countries. The membership[4] includes a

[4] Current members of the Cairns Group include Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rice, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, Philippines, South Africa, Thailand and Uruguay.

majority of developing countries from Asia and Latin America together with Australia, Canada and New Zealand. The broad objective of the Cairns Group is to seek the greater liberalisation of agriculture trade through the elimination of export subsidies, reduction of domestic support and improved market access. This group has been influential in the past in influencing the direction of WTO discussions on agriculture and was a powerful force in the negotiations. Other more informal groups of developed and developing countries included the Colorado Group on trade facilitation and the Friends of Fish group on the elimination of fisheries subsidies.

The lack of coherence between developing countries, however, is changing. Most significantly, the G20 emerged just prior to the WTO Ministerial Meeting in Cancun in 2003. Its establishment demonstrated a certain level of frustration among key developing countries about the progress being made on agricultural issues in the negotiations. The membership of the G20 has changed over time[5]. Brazil, India and South Africa, together with a handful of other countries, have, however, remained core members of the group and have been active in pursuing the positions of the G20 in negotiations, including taking the lead in the preparation of technical position papers. Hoekman and Newfarmer (2003: 2) have observed that 'the G20 was noteworthy for being a negotiating coalition, and not an agenda setting or blocking coalition'.

The initial reaction to the establishment of an alternative force within the agricultural negotiations was mixed. It certainly caught a number of WTO members, including the US and EU, by surprise. Those Cairns Group members who are not part of the G20 also seemed to feel slightly wrong-footed at the Cancun Ministerial. The arrival of the G20 resulted in the sidelining of the Cairns Group to a certain degree and it took some time for the Group to engage in a constructive manner with the G20. After the initial shock at the formation of the G20, there were reported attempts by the US and EU to undermine the Group's effectiveness. For example, a number of Latin American countries disassociated themselves from the G20 supposedly after pressure was applied by the US. Gaur (2003) described it as a 'hardening of the attitude of the developed world, especially the US, towards G20 nations'. These

[5] Current participants in the G20 include Argentina, Brazil, Bolivia, Chile, China, Cuba, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Tanzania, Thailand, Uruguay, Venezuela and Zimbabwe.

moves did dent the G20's momentum in the time immediately after Cancun but it has managed to regroup and shown itself to be a long-term player in the agricultural negotiations.

The G20 has also taken an active role in coordinating developing countries through regular consultations with other groups, such as the African Group, LDCs, ACP or G90, G33[6] and Recently Acceded Members (RAM). All these coalitions are made up of developing countries with the exception of the RAM where there are some emerging European economies included. They have become much more active over the last two years in particular. The focus of many of the activities of these groups has been the agriculture negotiations. Here they have all made clear statements and/or submitted written proposals on the issues under discussion. For the first time in the history of the WTO, developing countries have been engaging in technical discussions in a coordinated and coherent manner. In this regard, another historical first took place at the Hong Kong Ministerial Conference in December 2005. All the developing country members came together (informally as the 'G110') and issued a statement that emphasised the importance of development concerns in the Doha Round of negotiations.

One clear example of the effectiveness of action by developing countries as a group is the discussion on cotton. Prior to the Cancun Ministerial Conference a number of West African cotton producing countries[7] formed a coalition around a proposal to abolish export and other trade-distorting subsidies granted to cotton producers in the US, EU and China. The proposal also included a request for compensation to be paid during the phase-out period for the subsidies (Hoekman and Newfarmer, 2003: 3). This attempt to have a product-specific issue addressed in the broader negotiations met with some resistance from other members. The African cotton coalition stood firm, however, and the lack of movement on cotton was one of the reasons why negotiations on the Singapore issues were blocked in Cancun (Hoekman and Newfarmer, 2003: 3). Cotton is now on the agenda of the agriculture negotiations as a separate item and it is hoped that a package of both improved

[6] Current members of the G33 include Antigua and Barbuda, Barbados, Belize, Benin, Botswana, China, Congo, Côte d'Ivoire, Cuba, Dominican Republic, Grenada, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, Korea, Mauritius, Madagascar, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Zambia and Zimbabwe.

[7] The original cotton coalition included Benin, Burkina Faso, Chad and Niger.

market access and compensation will be agreed. Progress on this issue is seen by many as an important component of the development package of the Doha Round.

This new level of coordination and participation by developing countries does not always mean that they are speaking with one voice in the WTO. In the agriculture negotiations, the G20 is seen as representing the larger developing countries which are in favour of greater liberalisation of trade and which are likely to benefit the most from any changes. General liberalisation in the agriculture sector is of concern to smaller developing countries but they have different priorities. For example, the ACP or G90 is concerned about the erosion of its preferential market access. The LDCs are looking to secure concessions already made on duty-free and quota-free market access while at the same time retaining the policy space needed to address the special problems facing small-scale farmers. The G33 is concerned about food security, livelihood security and rural development needs. Its focus has been on the criteria for the 'special products' exception proposed for developing countries and the maintenance of 'flexibility' for developing countries in the application of the new agriculture rules.

7. The African Group

The African Group has not traditionally been an active participant in the WTO negotiations but this has changed dramatically in the years since the start of the Doha Development Agenda. The African Group has become more organised, more active and engaged. It demonstrated its ability to be a key player in the negotiations by blocking progress on the Singapore issues at recent Ministerials. The technical capacity of many of the African delegations to the WTO has also increased and they are therefore better able to participate in the negotiations. Whilst the African Group discusses the broad range of issues on the WTO agenda, agriculture is of particular interest to many of the African members.

South Africa has an important place within the African Group. It is one of the largest members in terms of the size of its economy and its share of global trade. Many from outside the continent also see it as an economic driver or the 'powerhouse' of Africa. This places South Africa in the rather unenviable position of a being a key member of the African Group, with the resources to participate actively, while at the same time

needing to balance perceptions that it is trying to dominate discussions. Due to its different level of development, South Africa also has different domestic interests to pursue in the WTO negotiations than many of its African neighbours. This is certainly the case in agriculture and may in part explain South Africa's ongoing active and simultaneous participation in the Cairns Group and the G20.

The agriculture sector in South Africa is quite different in many respects from agricultural sectors in other African countries. For example, there is not only subsistence agriculture in South Africa whereas that is a large part of the economy and society across the rest of the continent. South African agriculture reflects the popular concept that South Africa is effectively two economies – the first a thriving commercial one and the second an emerging one made up of smaller businesses that are predominantly Black-owned. This has implications for South Africa's trade policy overall and more specifically for its interaction with the African Group. South Africa has a good deal of sympathy and support for the overall ambitions of the African Group, especially those that relate to problems faced by the emerging farmers in South Africa. This is reflected in its support for special and differential treatment measures for developing countries. This has to be balanced, however, by the interests of the commercial farming sector in South Africa. This sector is relatively competitive and would have the potential to benefit from market access opportunities provided by developed countries and a more level playing field achieved as a result of the elimination of export subsidies and the reduction of domestic support. Such a statement is not necessarily true for other African countries even though it is clear that African countries do not gain from maintaining the status quo.

The dynamics within the African Group are not only affected by differences in domestic interests but by relations with the international community. For many years the majority of African countries have relied on market access concessions provided by the EU under the Cotonou Partnership Agreement (and its predecessors) and more recently the United States under the African Growth and Opportunities Act (AGOA). South Africa, because of its history and its economic size, has had a different experience from most African countries. While it is a member of the African-Caribbean-Pacific (ACP) group, it has negotiated its own free trade arrangement

(FTA) with the EU – the Trade, Development and Cooperation Agreement (TDCA). This was approached by South Africa in a similar way to other FTAs and the balance of power did not rest solely with the EU as was evidenced in areas such as fisheries and wine. Other African countries are having a different experience with the work under way on the Economic Partnership Agreements to replace the Cotonou arrangement. Many African countries are desperate to hold on to the preferential access they have to the European market and are prepared to demand little by way of other changes from the EU. If such a position continues to be adopted, South Africa could become further isolated from the rest of the African Group in the future.

The African Group tends to rely on statements as its key means of participation in the WTO negotiations. It has not yet begun to develop detailed position papers, although there are some instances where the general approach of the group will be set out in writing or where a subset of the African Group will present a paper on a certain issue. The most recent comprehensive statement of the position of African Union Trade Ministers was made in the Cairo Declaration and Road Map 5–9 June 2005. On development issues, the African Ministers reaffirmed the importance of incorporating development explicitly into all areas of the negotiations (Cairo Roadmap on the Doha Work Programme: par. 9(a)). Flexibility was requested taking into account steps already taken by Africa to liberalise trade.

South Africa's role in the African Group raises the question of the influence of broader foreign policy objectives in the development of trade policy. South African foreign policy has in recent years placed great weight on the importance of African solidarity. This has been evidenced in a number of arenas, including human rights discussions in the United Nations, and in specific initiatives, such as the New Partnership for Africa's Development (NEPAD). Within the WTO, South Africa has also displayed the importance it places on maintaining a strong, coordinated African position. For example, in the recent race for the position of Director-General it was decided that the African Group would support the candidate from Mauritius (African Union Executive Council, 2005). South Africa was part of this decision despite the fact that the Mauritian candidate had put forward positions on a number of issues that were not in line with those of South Africa. A more natural fit in trade policy terms

may have been for South Africa to support the Brazilian candidate but it appears that political, foreign policy concerns won the day.

In line with the overall approach outlined above, South Africa has been particularly active in advancing the interests of African countries in the trade and development debate. During his time as Chair of the Committee on Trade and Development, the South African representative Faizel Ismail presented a number of progressive ideas aimed at achieving a result in the discussions on S&D. Some of his thinking is described in the following section on the future of the trade and development debate. Ismail's other contribution is to attempt to steer the discussions in the Committee on Trade and Development towards concrete outcomes. He has suggested that members look at 'horizontal issues or underlying causes' behind the agreement's specific provisions for S&D (ICTSD and IISD, 2004). This would enable issues such as technical assistance, supply-side constraints, capacity, coherence, flexibility and monitoring to be addressed while excluding the more controversial cross-cutting issues (ICTSD and IISD, 2004).

• 8. The future of the trade and development debate

The future of the trade and development debate in the WTO has the potential to be shaped by decisions made as part of the Doha Round of negotiations. A marker was set at the Ministerial Conference in Doha when the Doha Development Agenda was adopted and it was declared a development round of negotiations. The voices of developing countries had been clearly heard by the broader WTO membership and it was recognised that if the multilateral trading system were to be strengthened, development concerns would need to be effectively addressed. Hoekman (2003: 1) goes so far as to suggest that 'the medium-term viability of the global trading system is dependent on an effective mechanism that allows all developing countries (that is the majority of the WTO membership) to fully benefit from increased international trade'.

A number of commentators have made suggestions as to what would be needed to set the trade and development debate in a positive context for future consideration in the WTO. The United Nations Development Programme (UNDP, 2005: 147) has called for a 'down-payment' on development through progress on three key issues:

market access, agricultural support and S&D treatment. Its specific suggestions include the elimination of tariff peaks; reduction of tariff escalation; provision of duty-free and quota-free market access for all exports from low-income Sub-Saharan Africa and other LDCs; relaxation of rules of origin; and establishment of a trade adjustment compensation fund for those countries facing preference erosion. Agriculture is seen as the key sector if a truly development-oriented multilateral trading regime is to be achieved. The UNDP (2005: 148) also proposes that the WTO rules need to be rebalanced in other areas if development goals are to be met – industrial and technology policy, intellectual property, services and commodities.

At a more general level, Ismail (2005) has proposed a possible four-point agenda for the development debate in the WTO. He suggests that the trade and development dimension of the WTO can be unpacked into four elements: fair trade, capacity building, balanced rules and good governance. Ismail (2005: 17) argues that 'by removing the distortions in global markets, caused by their domestic trade policies, and creating greater coherence in global economic policy, developed countries will contribute significantly to allowing the theory of comparative advantage to work, stimulating increased growth and global economic welfare for both developed and developing countries'. Again, reform in the agriculture sector is suggested as the most urgent. Like the UNDP, Ismail favours a global trade adjustment fund and calls for greater resources to be put towards building the trade capacity of developing countries. On the point of good governance, Ismail (2005: 20) proposes reforms to the decision-making procedures of the WTO in order to ensure that it is not dominated by the big and powerful countries. Shared leadership is desirable if the legitimacy and sustainability of the WTO is to continue.

There are other related issues that are likely to be on the future trade and development agenda of the WTO and these include some of those that were discussed at the Sixth Ministerial Conference in Hong Kong in December 2005. There is the 'aid for trade' package that is under consideration as a way to assist developing countries build the institutional and trade capacity needed to benefit from better access to markets (Hoekman, 2003: 5). There are already substantial resources available for trade capacity building programmes and technical assistance. The key for any new initiative is to ensure that 'aid for trade' provided is in line with

the priorities of developing countries and is not simply used as a tool to get them to sign up to further WTO commitments. It is important for trade-related technical assistance to be embedded in national priority-setting processes that are used by developing country governments and the donor community (Hoekman, 2003: 5).

One of the most controversial issues on the trade and development agenda remains to be addressed: the question of differentiation. In the WTO, members self-select whether to be classified as 'developing' or not. There is only one official sub-category within the broader grouping recognised by the members: LDCs. It has been argued by some developed country members that this limits the extent of preferential treatment available as it must be offered to a wide range of developing countries, not just the poorer ones (ICTSD and IISD, 2004: 2). The point is made that 'differentiation among developing countries would make it possible to offer the poorer ones deeper S&D' (ICTSD and IISD, 2004: 2). The lack of differentiation in the existing system has been blamed for the ineffectiveness of S&D provisions (Hoekman, 2003: 6). Developed countries have in the past attempted to focus the trade and development debate on the issues of differentiation of developing countries and eligibility for S&D. This has been strongly opposed by developing countries themselves.

Most commentators do, however, suggest that the question of differentiation will have to be addressed at some stage by the WTO. Hoekman and Newfarmer (2003: 8) make it clear that greater differentiation between countries is a minimum requirement for successful S&D provisions in the WTO. The International Institute for Sustainable Development (IISD) (2003: 3) points out that it has already been accepted that one size does not fit all when it comes to WTO rules and that this concept is also reflected in the domestic economic development policies of most WTO members. Paugam, Perrin and Novel (2005: 6) call for a 'strategic overhaul' of S&D, including the issues of differentiation and preferences. That said, it is not going to be easy at either a technical or a political level for this question to be resolved in the WTO. Developing countries have opposed any attempts made to date to separate them into different groups. Even if there were agreement to pursue further differentiation, achieving consensus on the criteria would be extremely difficult. One possibility may be to seek differentiation within specific agreements rather than at a broad level for

all forms of S&D, which is an option presented by Hoekman (2003: 4). Needless to say, this issue will require considerable thought and discussion in any future trade and development debate.

- **9. Interests and implications for Africa**

What do the issues discussed above mean for the African members of the WTO? Are the concerns of Africa represented in the trade and development debate? How could the African Group best participate and contribute to discussions in the WTO? These are questions that do not appear to have been considered in any real detail by African members of the WTO or by commentators involved in the trade and development debate. Africa includes many of the world's least-developed countries and much of the development assistance funding provided by donor nations and organisations is spent on the continent. Africa is currently the one region in the world that is not likely to be able to achieve the Millennium Development Goals. The interface between trade and development is therefore of direct relevance for African countries. Their voice must be heard in the debate if a meaningful outcome is to be reached.

As noted in the preceding sections, South Africa has been an active participant in the trade and development debate, largely through the role played by its representative Faizel Ismail as Chair of the Committee on Trade and Development (CTD). Under his leadership Ismail has tried to take the debate in the CTD to a new level but despite these efforts the Committee has remained unable to make concrete progress on many of the issues on its agenda. Delegations from both developed and developing countries have continued to participate in a half-hearted manner in the debate and CTD meetings are often lacklustre affairs. If the concerns of Africa and other developing countries are to be advanced within the WTO system, better use should be made of the CTD. This Committee has the potential to act as a driver of the trade and development agenda. For this to happen, delegations need to be prepared to participate actively in the meetings and put forward concrete proposals for discussion.

With greater participation in the CTD, African members would also be in a better position to advance issues of key concern to the continent. To date there has been

some concern that the trade and development debate has been dominated by the larger developing countries such as India, Brazil, Malaysia, Indonesia and Pakistan. Some of these countries were behind the original drive to address implementation problems and it was felt by some commentators that the resulting list of implementation demands largely reflected the domestic circumstances of these members rather than priority development problems faced by other developing countries. A similar criticism has been levelled at the G20 in the context of the agricultural negotiations. It has been contended that many of the positions put forward by the group would not be of direct benefit to the majority of developing countries, especially African ones.

The African Group itself is a diverse coalition of countries. It could, however, usefully develop positions on a number of the broader trade and development issues that are currently on the table. For example, the question of differentiation of developing countries is of relevance for African members. To date the African Group has joined others in opposing attempts to further differentiate among developing countries but it is not clear if this position is based on a well thought through policy. It would be worth considering whether African members might in fact benefit from greater differentiation. As some of the poorest members of the WTO, African countries might receive greater levels of technical assistance under such a system and also receive additional market access opportunities in the larger developing countries. These potential positives need to be weighed against the implications of further divisions among developing countries.

It would also be valuable for the African Group to develop a coordinated position on the question of aid for trade. In Hong Kong the issue was referred to a special task force under the leadership of the Director-General. Recommendations made by the task force were presented to members of the WTO in July 2006 and adopted by the General Council in October. As major recipients of much of the trade-related capacity building provided by donors, African countries have a direct concern in how the aid for trade package is shaped. The initiative has great potential but only if it reflects the priorities of developing countries themselves and considers new ways to improve the participation of these countries in the global trading system.

• 10. Conclusion

There is no doubt that trade and development are inherently linked. The WTO will therefore continue to deal with these issues on a day-to-day basis and in many different bodies for years to come. Developing countries have made it clear since the Seattle Ministerial that they are determined to achieve a multilateral trading system that takes into account their specific needs and that provides them the policy space needed to improve the lot of their citizens. While the WTO is 'essentially a trade negotiating body and not a development institution' (Ismail, 2005: 13), the Doha Development Agenda provides an opportunity for the rules of the global economy to be changed in favour of developing countries. It will be up to the membership to seize this opportunity and to make real changes aimed at halting the marginalisation of many of the world's economies.

The UNDP (2005: 146) has called for human development to be placed at the centre of the WTO remit and for the WTO to provide a framework for the voices of the weak to be heard. This would be in line with the commitment of all to the Millennium Development Goals adopted at the United Nations Millennium Summit in September 2000. The WTO is no doubt 'an essential part of the global effort needed to achieve these aims' (Ismail, 2005: 21) but it cannot do it alone. The international community must make a commitment to development that involves greater cooperation and coordination among all the multilateral institutions concerned. Developing countries themselves need to ensure that trade is incorporated into broader development strategies and is part of a coherent, integrated approach aimed at improving the lives of the people. It will only be with action across these broad fronts that the true potential of trade to have a positive impact on development will be realised.

References

African Union Executive Council. 2005. *Decision on African Candidatures for Posts within the International System* (EX.CL/Dec.190(VI)). Addis Ababa: African Union.

African Union Ministers of Trade. 2005. *Cairo Declaration and Road Map on the Doha Work Programme* (AU/TD/MIN/Decl.1 (II) Annex, June 2005). Addis Ababa: African Union.

Cuello Camilo, F.A. 2005. *What makes a Round a 'Development Round? The Doha Mandate and the WTO Trade Negotiations*. Geneva: Friedrich Ebert Stiftung.

Gaur, S. 2003. *Politics of Cancun Failure: US Stance Hardens Towards G20+ Nations.* [Online]. Available: http://www.iseas.edu.sg/viewpoint/sg6oct03.pdf (3 August 2005).

Halle, M. 2005. *Where Are We in the Doha Round?* Winnipeg: IISD.

Hoekman, B. 2003. *World Bank Trade Note: More Favorable Treatment of Developing Countries and the Doha Development Agenda.* Trade Note 3, May 29 2003. Washington: World Bank.

Hoekman, B. and Newfarmer, R. 2003. *World Bank Trade Note: After Cancun: Continuation or Collapse?* Trade Note 13, 17 December 2003. Washington: World Bank.

International Centre for Trade and Sustainable Development (ICTSD) and the International Institute for Sustainable Development (IISD). 2004. *Doha Round Briefing Series: Developments Since the Cancun Ministerial Conference: Special and Differential Treatment,* Vol. 3, No.13, December 2004.

International Institute for Sustainable Development. 2003. *Trade and Development Brief: Special and Differential Treatment.* No. 2, Spring 2003. Winnipeg: IISD.

Ismail, F. 2006. *An Assessment of the 6th WTO Ministerial Conference, Hong Kong, 13th-18th December 2005*. Unpublished.

Ismail, F. 2005. Mainstreaming Development in the World Trade Organisation. *Journal of World Trade*, 39(1): 11-21.

Khor, M. 1999. *The revolt of developing nations*. Third World Network. [Online]. Available: http://www.twnside.org.sg/title/deb1-cn.htm (2 December 2005).

Paugam, J-M., Perrin, S. and Novel, A-S. 2005. *The Future of Special and Differential Treatment: The Twin Challenges of Preference Erosion and Developing Countries' Differentiation.* Paris: IFRI-AFD Conference.

United Nations Development Programme. 2005. *Human Development Report 2005: International Cooperation at a Crossroads – Aid, trade and security in an unequal world*. New York: UNDP.

World Trade Organization News Item. 2005. *Lamy says the Round's development potential must be preserved*. 28 November 2005. [Online]. Available: http://www.wto.org/english/news_e/news05_e/stat_lamy_28nov05_e.htm (30 November 2005).

World Trade Organization Secretariat – Development Division. 1999. *High Level Symposium on Trade and Development: Background Document.* Geneva: WTO.

Chapter 3

The Multifibre Agreement – WTO Agreement on Textiles and Clothing

by Eckart Naumann[1]

1. Introduction

Quantitative restrictions to limit international trade in certain goods have existed for a long time already, but in no sector have they been as common and broadly applied as in the textile and clothing industries. Likewise, no other sector has seen such a rigid institutionalisation of quantitative restrictions, which in turn have had very wide-reaching intended and unintended consequences. In fact, quotas in this sector have been the common denominator that has shaped the development path of this industry, and – many would argue – have been the single most important factor contributing to its worldwide diffusion in recent decades.

This chapter tracks developments from the early beginnings of quantitative restrictions in the textile and clothing sector, through its institutionalisation leading to the Multifibre Agreement and eventual phasing out under the World Trade Organization (WTO) Agreement on textiles and clothing. Trade developments under the quota regime and post-quota developments emphasise the impact that these trade restrictions have had and how once again some countries are beginning to make use of measures to counter the threat of surging imports.

2. A chronology of events leading to the Multifibre Agreement

International trade policy has for many decades utilised quantitative restrictions on imports as a means of achieving specific developmental outcomes. This form of protection provides a limited shield to local industry against foreign competition, competition which would have been the case if foreign goods were to compete freely on the domestic market. Quotas differ fundamentally from other policy tools such as tariffs in that they restrict competition from imports irrespective of any direct price considerations. In other words, quotas remove some of the incentive for foreign

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suppliers to compete on price notwithstanding the presence of import duties, as quantitative restrictions completely remove costs and prices from the equation.

In tracking developments leading up to the Multifibre Agreement (MFA) and later the WTO Agreement on Textiles and Clothing (ATC), it should be noted that quantitative restrictions on textiles and clothing violated the original word and spirit of some of the basic principles contained in the General Agreement on Tariffs and Trade (GATT). Having entered into force at the start of 1948, this Agreement contained provisions that directly or indirectly relate to quantitative restrictions. For example, Article XI (*General Elimination of Quantitative Restrictions*) explicitly prohibits quantitative restrictions (and related import and export licensing), except under a small number of exceptional circumstances (such as export restrictions to temporarily relieve domestic food shortages). Further, Articles I (*General Most-Favoured-Nation Treatment*) and XIII (*Non-discriminatory Administration of Quantitative Restrictions*) state that any trade measures taken by countries must not discriminate between supplying countries.

In the United States (US), early trade restricting measures affecting the textiles and clothing sector were in the form of domestic agricultural policy that restricted the importation of cotton. This followed a surge in imports, which was threatening prices and price stability of local cotton producers. The resultant upward pressure on the price of cotton meant that downstream textile and clothing manufacturers had some of their competitiveness eroded. Later, the US concluded a bilateral agreement with Japan (one of the country's major foreign suppliers of cotton and cotton textiles) that would limit the latter's exports of textiles to the US for a number of years, concurrently setting sub-quotas on various specific product categories.

In Europe, quantitative restrictions on certain imports went even further, covering most of the textiles and clothing sector. Relief was in the form of GATT Article XII (*Restrictions to Safeguard the Balance of Payments*), which, however, failed to define the degree of balance of payments disruptions sufficient to trigger a response, thus leaving the door open for countries to address their concerns through this facility.

Under pressure from various countries, most notably the US, a formal forum was established within GATT during 1961 to deal with the increasing market disruptions (and threat thereof) in major importing countries. This forum resulted in the conclusion, first of a 'Short-term Arrangement Regarding International Trade in Cotton Textiles' (STA) – note the explicit reference to cotton textiles – and pursuant to this, a 'Long-term Arrangement Regarding International Trade in Textiles' (LTA).

The STA, which was adopted by almost 20 countries, provided for the unilateral imposition of quotas on cotton-based textiles and clothing in cases where the exporting country did not itself voluntarily and satisfactorily restrict its exports. The LTA, initially covering a five-year period but subsequently renewed in 1967 and 1970, provided the basis for further, yet more targeted, restrictions. But since both the STA and LTA covered only cotton-based textiles, the growing trade in man-made fibres remained largely unaffected by these trade measures.

Voluntary agreements were nonetheless concluded mainly between the US and various key suppliers of man-made fibre products, as well as of wool products. These agreements sought to restrict key suppliers' exports to the US and thus limit domestic market disruptions brought about by this surge in foreign competition. While this approach initially provided a fair measure of relief, its fragmented nature made it an onerous policy tool in the long run. At the same time, many European countries – which until then had benefited from the more limited LTA – experienced an increasing inflow of non-cotton textile imports. The uncertainty associated with the bilateral approach under the LTA likewise appeared to find little favour with developing countries, some of which had become substantial players in the global textile and clothing industry.

All these developments contributed to the negotiation and subsequent conclusion in 1973 of the MFA. It came into force at the start of 1974, and expanded the product coverage of the LTA. The Agreement was welcomed by many countries for setting targets for increased trade through slightly higher agreed minimum growth rates (6% per annum against 5% per annum under the LTA) and more progressive liberalisation of textile trade. The Agreement also provided for the conclusion of bilateral treaties, which in effect permitted countries to tailor quantitative restrictions differentially according to their own particular requirements. This demonstrated the

MFA's most significant departure from GATT rules, particularly that of non-discrimination.

The MFA's first years of existence saw the conclusion of a significant number of 'bilaterals', mainly between the US and Europe, the chief quota imposing countries. But many of these agreements went even beyond what the MFA envisaged, with restrictions that differed from the word and certainly the spirit of the MFA. 'Reasonable departures' from the original text became common cause in these bilateral agreements, eventually spurring quota-restricted (developing) countries into providing a more coordinated response. This eventually led to the removal of the 'reasonable departures' facility, although little real progress was made beyond non-binding commitments on the part of quota-imposing countries.

Over the ensuing years, the time-bound MFA was renewed on various occasions, notably in 1977, 1981 and 1986. In the most recent guise, the MFA's product coverage was extended (to include, among others, vegetable fibre products), although it also removed provisions that could have provided the basis for a tightening of existing quotas. Positions around quotas became increasingly polarised, with major importing countries (such as the US and EU) pressing for a broadening of the MFA, and developing and exporting countries opposing it. While the latter continued to call for a liberalisation of textile and clothing trade, it was only in 1991 that versions of what was to become known as the Agreement on Textiles and Clothing (ATC) – negotiated as part of GATT's Uruguay Round trade negotiations – were presented. A final version of the ATC, which set out a definitive plan for the structured removal of quantitative restrictions, was finally implemented on 1 January 1995.

3. The WTO Agreement on Textiles and Clothing and the structured removal of quotas

3.1 The Agreement to phase out MFA quotas

The Agreement on Textiles and Clothing (ATC) heralded the much-anticipated beginning of the formal process for the removal of global quotas on textiles and clothing. As a WTO Agreement, it was binding on all its member states, although it would soon become clear that the practical implementation of the Agreement

sometimes lagged behind its theoretical prescriptions. The inherent flexibility of the Agreement, not so much in relative quantity but in scope, also provided countries with substantial leeway in the actual implementation and interpretation of its clauses.

The ATC set a four-stage quota liberalisation schedule, and is outlined in Article 2 of the Agreement. Each phase foresaw the integration of a specific percentage of textile categories based on 1990 levels. The first stage lasted three years, the second lasted four years, and the third covered three years. The final stage was the date of full integration (1 January 2005). As the following table (Table 1) indicates, the first phase of quota removal (between 1995 and the end of 1997) would see quantitative restrictions lifted from a minimum of 16% of imports, followed by batches of a minimum of 17%, 18% and finally 49% (the remaining categories).

An 11-member quasi-judicial textile monitoring body (TMB), appointed by WTO member countries, was established to supervise compliance with the provisions of the ATC. The membership of the TMB was not based simply on a selection by popular vote, but rather on a unique system of constituencies. In other words, there was representation from various geographical regions, including one each from the (a) ASEAN countries, (b) the European Community, (c) the United States, (d) Canada and Norway, (e) Korea and Hong Kong, (f) India and Egypt/Morocco/Tunisia, (g) Japan, (h) Turkey/Switzerland and Bulgaria/Czech Republic/Hungary/ Poland/Romania/Slovak Republic/Slovenia, (i) Latin American and Caribbean members, and (j) Pakistan and China (following the latter's WTO accession).

Besides regulating quota removal and the integration of textiles and clothing trade with normal GATT disciplines, the ATC in Article 2(13) – (14) also required a concurrent increase in the remaining quotas. In other words, the ATC sought to ensure not only ongoing liberalisation, but also undertaking the process with some momentum. These increases, expressed as a percentage and shown in the last column below, refer to an increase of quota levels *beyond* the increases foreseen by the MFA. For example, where the annual quota increase foreseen for a particular country and category is 5%, it would have to be increased by 16%, i.e. from 5% to 5.8% (5% @ 16% annual growth), 5.8% to 7.25% (i.e. 5.8% @ 25% annual growth) and 7.25% to 9.21% (i.e. 7.25% @ 27% annual growth) in the third stage. Smaller developing countries are recognised in ATC Article 2(18), in that where a country's

restricted exports were 1.2% or less of the volume of a particular importing country's restrictions, such country should be fast-tracked to benefit from the next stage of quota growth rates.

Table 1: Schedule of phasing out of quotas under the ATC

Stage	Date of implementation	Percentage of products to be integrated with GATT Rules	Increase in post-MFA quota growth
1	1 Jan 1995 – 31 Dec 1997	16% minimum, using 1990 imports as base	16% (i.e. from 5% to 5.8%)
2	1 Jan 1998 – 31 Dec 2001	17% minimum	25% (i.e. from 5.8% to 7.25%)
3	1 Jan 2002 – 31 Dec 2004	18% minimum	27% (i.e. from 7.25% to 9.21%)
4	1 Jan 2005 Full integration into GATT (final elimination of quotas, termination of ATC)	49% maximum	n/a (full integration)

As a time-limited and thus self-destructing agreement, the ATC simply ceased to exist on 1 January 2005. By that date, all MFA-type quantitative restrictions on textiles and clothing had to be removed. It is clear from the schedule, though, that the real impact of quota removal would be most pronounced only in the latter stages of the ATC – and of course the post-quota era – as the Agreement's heavily back-weighted nature effectively allowed countries to integrate trade in those categories first which posed either little or no threat to domestic concerns, or where quotas were in effect inconsequential as actual imports did not breach the quota ceiling.

The ATC only prescribed a textile and clothing liberalisation schedule relative to 1990 levels of trade – applicable to the total imports of each country individually – and that during every stage products from each of four predefined categories were chosen for integration. These four categories consisted of 'tops and yarns', 'fabrics', 'made-up textile products' and 'clothing'.

The ATC's flexibility also made it less effective, at least initially. The percentage scales applied to the integration schedule were based on 1990 volumes, not values, and consequently provided a measure of bias against efficiency improvements and

natural growth that may have taken place over the ensuing years. Further, the Agreement's back-loaded nature meant that by far the largest integration would take place at the end of the period, raising the possibility of significant market disruptions in the immediate post-quota period. The fact that the Agreement was largely nonprescriptive in terms of which specific products were to be integrated also meant that sensitive sectors – and in most cases those that were of particular interest to exporting countries – were integrated only 10 years after the ATC entered into force.

3.2 Slow pace of implementation

As expected, the pace of effective trade liberalisation took place much slower than anticipated. In fact, virtually no quotas had been lifted by the key quota-imposing countries (EU, US, Norway and Canada) during the first stage of the ATC that lasted until end 1997. As can be seen in the table below, only six items were integrated (by Canada) in Stage 1, with the pace picking up only very slowly at the next stage.

Table 2: Progress of quota removal under the ATC

	No of items restricted at outset of the ATC	**Stage 1** (1 January 1995 - 31 December 1997)	**Stage 2** (1 January 1998 – 31 December 2001)	**Stage 3** (1 January 2002 – 31 December 2004)	**Stage 4** (1 January 2005)
USA	758	0	14	43	701
Canada	295	6	23	27	239
EU	218	0	14	27	167
Norway	54	0	46	8	0

Source: WTO (2001)

There were many reasons for the slow integration of textile and clothing trade, but most were driven by protectionist elements where rapid trade liberalisation would negatively affect certain stakeholders in quota-imposing countries. The flexibility of the ATC, despite its guiding principles, was certainly fully exploited. Most significantly, the list of products included in the ATC was extremely broad and included many products that had not previously been restricted by quotas. But their inclusion permitted the large importing countries to 'integrate' such products first, or certainly include them as part of the products that had been brought into line with GATT principles. For example, an Oxfam (2004) report indicated that '37 per cent of products mentioned in the ATC list had never been restricted by the USA'. The report goes on to cite the example of the EU, which in 1995 'pseudo-integrated' (previously

unrestricted) items such as parachute parts, typewriter ribbons and dolls' clothes. Of the four countries listed above, Norway stands out as having made the most rapid progress in integrating textile and clothing trade under the ATC.

While certainly contrary to the spirit of the ATC, these moves perhaps most pertinently exposed the inherent weaknesses of the ATC. Others may argue that it is this very flexibility that initially led to an agreement on such a key topic, and the ATC is certainly seen today as one of the notable successes of the Uruguay Round trade negotiations. Nevertheless, the natural consequence of the back-loading of quota removal was that the final stage was the most disruptive of all, both on importing as well as on exporting countries.

4. Some objectives of quantitative restrictions

As is clear from the preceding analysis, any measures that physically restrict or prevent the inflow of goods into a certain market will have implications for a wide range of stakeholders. While both quotas as well as import tariffs have a number of similar aims, they nevertheless differ in many ways, resulting in different outcomes.

Import tariffs are used to raise the landed cost of a good produced elsewhere and imported into the domestic market. Such tariffs may be calculated on an *ad valorem* (percent of value) basis, or otherwise, for example, on some form of quantitative denominator such as volume, surface area, unit or weight. Combinations of these methodologies are also possible. Tariffs thus provide a relative rather than an absolute measure of protection that is based on the denominator used. Besides raising the cost of imports and thereby improving the competitiveness of locally produced competing goods, import tariffs also serve as a means of collecting revenue. In many developing countries in particular, this form of revenue collection is frequently of critical importance and supersedes any objective of local industry protection.

But tariffs offer little protection to local firms where the landed cost (including a tariff) is still substantially below that at which a similar product can be produced locally. This has been the case in the textile and clothing sector in particular, where low labour costs and other factors (some of which are listed below) have led to the massive growth of the sector in countries with low factor costs. As a result,

quantitative restrictions imposed by developing countries have provided a much broader shield against competition from abroad, and from a protectionist angle, further have the following characteristics and objectives:

- Quotas provide an absolute measure of protection to local producers in that they limit physical quantities of imports;
- Quotas are not susceptible to any (declining) price movements in the price of foreign produced goods;
- Quotas are immune to movements in the exchange rate, for example where the devaluation of a foreign currency may make that country's products more competitive in the domestic market;
- Quotas (on textiles and clothing) do not fall under countries' binding commitments *vis-à-vis* the reduction in tariffs on industrial goods;
- Quotas (on textiles and clothing) are usually set individually against specific countries and on specific products, and are thus particularly effective in shielding local producers from specific foreign competition;
- Quotas negate much of the impact of foreign subsidies and other measures (such as the impact of non-unionisation, non-adherence to human and worker rights, access to subsidised finance and other industrial incentives) on reducing the price of a foreign good, and therefore increased competition from abroad.

Quotas impact on a wide range of stakeholders, although not all of these outcomes are desirable even from the point of view of quota-imposing countries. Since quotas necessarily raise the price of goods that are subject to quantitative constraints, in that they reduce foreign supply and with it the impact of price pressures from abroad, they reduce competitive pressures on local producers.

On the one hand, this may preserve jobs which would otherwise have been lost to foreign competition, and at the same time creates demand for upstream inputs. Quotas may also assist the orderly functioning of the 'market', whereby the presence of domestic production capacity ensures a steady supply irrespective of variables such as exchange rate movements, logistics problems, foreign supply interruptions

and so forth. On the other hand, a physical and absolute reduction in supply (through a lessening of competition from abroad) also means that domestic consumers invariably pay more for each item, leading to a loss of consumer welfare. Likewise, quotas reduce the competitiveness of downstream producers, for example the clothing sector, as it has less choice in the sourcing of raw materials and is in many cases restricted to local suppliers. Quotas also act as a disincentive to local producers to maximise production efficiencies, as a lessening of competition invariably introduces pressure on the local production chain.

It is certain that quotas on textile and clothing trade have had far-reaching consequences, both intended and unintended. It is also clear that while quotas may have enhanced the orderly functioning of markets, there have also been significant impacts on consumer welfare both in quota-imposing as well as quota-constrained countries.

5. Outcomes under the MFA and ATC

Trade-restricting quotas on textiles and clothing have changed the global nature and location of production. The two key outcomes with regard to geographic location have been the protection of production centres in quota-imposing countries, mainly the United States and Europe, and the concurrent dispersion of production in quota-unconstrained locations. An absence of quotas would in all likelihood have lead to higher concentrations of textile and clothing production centres in a small number of low-cost destinations.

Even the two decades preceding the formalisation of a quota regime under the MFA in the early 1970s saw a rapid rise in production and exports mainly from South East and East Asian countries. The MFA slowed down this trend and thus played an important role in the further growth and development of this sector in industrialised countries. Protectionist measures ensured the continuation of an incentive for the sector to operate in an environment characterised not merely by low input costs, but also by other competitive factors such as design, technical attributes and fashion elements, which were allowed to flourish. Since quotas provide an absolute rather than a relative measure of protection, as discussed earlier, they immunised to a large extent against the downward pressure on prices that other countries' increasing

competitiveness and generally low-cost base brought with them. Quotas therefore played a key role in preserving and expanding the sector in the countries such as the US and the EU.

But besides developing the sector in industrialised countries, quotas also helped drive a much broader worldwide dispersion of the sector than would have taken place otherwise. Since quotas were imposed in a discriminate manner on certain countries, and in specific quantities (at the product level), quantitative restrictions created a set of incentives whereby production would locate in less constrained countries. This was particularly evident where production was intended to cover more than just the domestic market and was also geared towards exports, notably the EU and US markets.

With quotas against Chinese producers having long been particularly restrictive, many producers there began locating outside of that country or at least forming strategic production and sourcing partnerships. In fact, anecdotal evidence suggests that Chinese and Taiwanese producers formed the bulk of this textile 'diaspora' and were to a significant extent responsible for the development and growth of textile and clothing facilities in many parts of the world. Many African countries in particular, notably Lesotho, Madagascar and Kenya, have seen a revival of their sectors owing to investments from Chinese and Taiwanese industrialists.

There is of course some debate as to the long-term sustainability and indeed desirability of some of the developments that have taken place. As is discussed in greater detail later in the section dealing with value chains, textile and especially clothing production is known to be notoriously fickle and mobile. With clothing production requiring a relatively lower skilled workforce than many other sectors, as well as lower capital investment (most of which can be easily moved in and out of specific locations and countries), location decisions are often the result of short-term incentives and opportunities rather than a long-term commitment on the part of the investor. These factors, and the highly competitive nature of the industry, particularly within the lower value-added commodity type segments, have all contributed to driving down wage rates and increasing mobility of industrial entities.

Nevertheless, these factors, together with the incentive provided by the absence of quota restrictions in certain countries, have likewise played an important part in facilitating the much wider development of this sector. With clothing manufacturing in particular providing in many cases a first 'entry point' for non-agricultural production and economic upgrading, countries such as Mauritius and Lesotho have long ago integrated these factors into their respective industrial strategies. Both were able to offer investors quota- and tariff-based preference margins *vis-à-vis* access to key international markets that quota-constrained countries did not have.

With the WTO Agreement on Textiles and Clothing providing a scheduled removal of MFA quotas over the decade 1995 – 2005, little global change relating to quota phase-out took place during the early stages of the Agreement. As was illustrated earlier, the flexibility granted by the ATC, together with the level and coverage of products on which it was based, meant that the integration of sectoral trade with normal GATT disciplines took place only much later. Considering also that the sector is highly mobile, certainly when compared with other production sectors, both producers and buyers (retailers) felt little pressure to reorganise production or sourcing decisions. While setting the scene for future quota removal, the ATC had very little impact in practice for at least half its period of application.

The period covered by the ATC was also significant for other developments, notably a broad reduction in import tariffs on industrial goods. This also impacted on the textile and clothing sector, with the key outcome being that margins of preference for countries not constrained by quotas, or in possession of additional market preferences beyond those agreed to under the WTO, took on further importance. China, which until its WTO accession late in 2001 did not benefit from Most-Favoured Nation (MFN) principles that member states extended toward each other, was thus constrained not only in absolute terms (quotas) but also in relative terms with respect to the margin of preference due to generally lower tariffs or within specific preferential trade regimes and agreements. This helped sustain the continued dispersion of the sector.

Other factors also contributed to the apparent short-term sustainability of these locational patterns. The rise in non-tariff barriers, in particular technical standards (for example the use of ecological criteria and the rise of eco-labelling), additional

customs procedures and requirements (ranging from elaborate administrative criteria to pre-shipment inspections), rules of origin and so forth, all contributed to the relative importance of preferential trade agreements. For African countries, successive Lomé Conventions and later the Cotonou Agreement, as well as general GSP and 'Everything-But-Arms' programmes, provided preferential access to the European market which further increased the relative benefit accruing to quota-unconstrained countries.

The conclusion of preferential trade agreements and arrangements between developed and developing countries – while not entirely new – are generally a more recent phenomenon. While there is no direct link between the removal of quotas and the growth in bilateral and multilateral trade arrangements, these have nevertheless contributed indirectly yet significantly to the impact that the ATC quota regime has had on many developing countries.

For example, in 2001 the United States' African Growth and Opportunity Act (AGOA) substantially improved market access for items such as clothing when shipped from eligible African countries. Although preferential clothing exports are subject to special provisions and origin rules, as well as a quota, this applies only to the duty-free preferences offered rather than overall market access for clothing exports. However, AGOA's quantitative limits are set well above Africa's current exports to the US and therefore do not currently act as a *de facto* restriction. Once again, these trade preferences are attractive largely on the back of quota restrictions faced by many Asian exporters. The tariff preference margin *per se* is unlikely to have been sufficiently attractive for the development of additional export-geared manufacturing units in Africa.

6. Textiles and clothing in the developing world

According to WTO estimates, world exports of textiles and clothing have increased from US$212 million in 1990 to US$395 million in 2003. This indicates an increase of approximately 86% and represents an annual growth rate of 4–5%. Of the total increase, clothing exports have more than doubled, while textiles have increased by a substantially smaller margin.

Among the leading textile and clothing exporting countries, as shown in the following table, a large number are from the ranks of countries classified as developing countries. Although the European Union is shown as the leading exporter of textiles and clothing, much of this trade takes place within Europe. This establishes China as the leading exporter globally, even without taking into account the contribution of Hong Kong. When aggregating China and Hong Kong's exports (not including Hong Kong 're-exports'), China's dominance as a leading clothing exporter was already obvious in 2003. Other leading clothing exporters include Turkey, Mexico, India, Bangladesh and the United States. Among textile exporters, the list includes the United States, Korea, Chinese Taipei, India and Pakistan. As this cross-sectional data is currently available only for 2003, it does not capture the likely significant growth in exporters recorded mainly by South East Asian countries in subsequent years. However, the section on post-quota trade developments illustrates recent surges of textile and clothing imports into the EU/US from China.

While a comparison of absolute values is indeed of interest in illustrating the global dynamics of textile and clothing trade developments over the past decade and a half, the relative importance of the sector to each country is better shown by contrasting total textile/clothing exports of each country with that country's total value of merchandise exports. The higher this percentage, the greater a country's reliance on textile and clothing exports, and in turn the more significant any impact following changes in the global trade and regulatory environment within this sector.

Among the leading textile and clothing exporters indicated in the table below, the WTO data shows that Bangladesh has the highest sectoral reliance within this sector, with clothing exports in 2003 accounting for over 62% of total merchandise exports. Morocco, Pakistan and Hong Kong (excluding re-exports) also have a high sectoral reliance on clothing exports. Smaller exporters by value, yet likewise with a high reliance on clothing exports, include Cambodia (76% in 2003), El Salvador (63%), the Dominican Republic, Sri Lanka (50%) and Mauritius (50%). While these WTO data does not list Lesotho, it is well known that the country's merchandise exports consist mainly of clothing. This is backed up by data from the UN's *Comtrade* database, which indicates that clothing exports (classified under chapters 61 and 62

of the harmonised system nomenclature) accounted for approximately 65% of the total exports of Lesotho.

In the textile sector, leading exporters after China are the United States, Korea, Chinese Taipei, India, Japan and Pakistan. Here, the reliance on textile exports (measured as a proportion of countries' total merchandise exports) is generally somewhat lower than is the case in the textile industry. Here Pakistan stands out, with 49%, in the list of the world's leading textile exporting countries. Other smaller exporters with the next highest reliance on textile exports are India (12%), Chinese Macao (12%), Turkey (11%) and Bangladesh (7%).

Table 3. Leading exporters of clothing and textiles and share of country total merchandise exports

Clothing	Value (USD mn at current prices)			% of country's total merchant-dise exports		Textiles	Value (USD mn at current prices)			% of country's total merchandise exports	
(i)	(ii)	(iii)	(iv)	(v)	(vi)	(vii)	(viii)	(ix)	(x)	(xi)	(xii)
	1990	1995	2003	1995	2003		1990	1995	2003	1995	2003
World	108,130	158,350	225,940	3.2	3.1	World	104,350	152,320	169,420	3.0	2.3
European Union (15)	40,782	48,457	59,947	2.3	2.1	European Union (15)	50,795	62,196	58,938	3.0	2.0
Intra-EU	29,444	33,518	40,903	2.5	2.3	Intra-EU	35,672	40,218	32,567	3.0	1.8
Extra-EU	11,338	14,939	19,044	2.0	1.7	Extra-EU	15,123	21,978	26,371	2.9	2.4
China [1]	9,669	24,049	52,061	16.2	11.9	China [1]	7,219	13,918	26,901	9.4	6.1
Hong Kong, China	15,406	21,297	23,152	12.2	10.1	Hong Kong, China	8,213	13,815	13,084	7.9	5.7
re-exports	6,140	11,757	14,952	8.2	7.2	dom. exports	2,171	1,814	757	6.1	3.9
dom. exports	9,266	9,540	8,200	31.9	41.9	re-exports	6,042	12,001	12,327	8.3	5.9
Turkey	3,331	6,119	9,937	28.3	21.3	United States	5,039	7,372	10,917	1.3	1.5
Mexico [1]	587	2,731	7,343	3.4	4.4	Korea [2]	6,076	12,313	10,122	9.8	5.2
India [2]	2,530	4,110	6,459	13.0	11.5	Taipei, Chinese	6,128	11,882	9,321	10.5	6.2
United States	2,565	6,651	5,537	1.1	0.8	India [2]	2,180	4,358	6,510	13.7	11.6
Bangladesh [2]	643	1,969	4,326	52.7	62.3	Japan	5,859	7,178	6,431	1.6	1.4
Indonesia	1,646	3,376	4,105	7.4	6.7	Pakistan	2,663	4,256	5,811	53.0	48.7
Romania	363	1,360	4,069	17.2	23.1	Turkey	1,440	2,527	5,244	11.7	11.3
Thailand [2]	2,817	5,008	3,615	8.9	4.5	Indonesia	1,241	2,713	2,923	6.0	4.8
Korea [2]	7,879	4,957	3,605	4.0	1.9	Canada	687	1,377	2,265	0.7	0.8
Vietnam [2]	...	...	3,555	...	17.6	Thailand [2]	928	1,937	2,162	3.4	2.7
Morocco [2, 1]	722	797	2,834	16.9	32.5	Mexico [1]	713	1,283	2,102	1.6	1.3
Pakistan	1,014	1,611	2,710	20.1	22.7	Czech Republic [1]	-	1,323	1,649	6.2	3.4

Notes: (1) includes significant exports from processing zones (2) includes WTO estimates

Source: WTO database www.wto.org (accessed 2005)

While no Sub-Saharan African (SSA) countries count among the world's leading textile and clothing exporters, this is in no way a true reflection on the sector's economic importance in Africa. Changes in the global dynamics of textile and clothing production and trade, many brought about or influenced by the MFA and subsequently ATC regime, thus have a direct bearing on the economies of the affected countries in Africa.

Many parts of Africa have a long history of textile and clothing manufacture due to the abundance of cotton-sustained downstream processing industries, from basic

ginning to the more complex fabric weaving activities. To this day Sub-Saharan African countries form an important source of cotton to the European market. According to the EUROSTAT database (2005), key suppliers to the EU in 2004 include Cameroon (€26 million), Chad (€27 million), Ivory Coast (€9 million), Mozambique (€ 9 million), Mali (€42 million), Sudan (€14 million) and Zimbabwe (€22 million).

The African textile sector, however, suffered a protracted decline in the 1970s to the 1990s, which can be attributed to a number of factors including domestic-economic policies (often with socialist tendencies), weak cotton prices, a general lack of competitiveness, especially *vis-à-vis* South East Asian nations, restricted access (for example through onerous origin requirements) to international markets, and low levels of regional economic integration.

But more recently, largely as a result of improved US market access under AGOA and the continuing quota-based restrictions that prevailed at the time, the clothing sector once again rapidly grew in importance in various African developing countries. A waiver of US import duties on a large range of items – including garments – when exported from qualifying African countries, meant that the sector's exports now enjoyed a substantial preference margin over those from other countries. More importantly, favourable rules of origin, which allow most African countries to source fabrics from anywhere in the world, implicitly recognised that globally competitive textile manufacturing was the domain of a dwindling number of countries. Nevertheless, this package of 'benefits' led to substantial upgrading and new investment across a number of African countries, which were able to compete in the US market thanks to their margin of (tariff and quota) preference together with *de facto* quota-unconstrained trade under AGOA.[2]

SSA developing countries with key interests in the textiles and especially clothing sector, and which have benefited from the quota imposed on other countries under the MFA, include Lesotho, Kenya, Madagascar, Mauritius, Swaziland, South Africa and Namibia. With the exception perhaps of South Africa, the sector has provided

[2] While AGOA's clothing provisions do contain a quota, these preference-linked quantitative restrictions have been set at a level that is unlikely to be breached, meaning that clothing trade remains *de facto* unconstrained.

these countries with an important opportunity to diversify their respective economies, especially since many of them have largely agro-based economies. Clothing exports in particular, seen as a proportion of total merchandise exports, have become important drivers of this sector, particularly in Lesotho, Mauritius, Swaziland, Madagascar and Kenya. While not uncompetitive *per se*, these economies are nevertheless extremely vulnerable to any shift in the global sourcing of textiles and clothing away from African countries to low-cost South East Asian nations. These dynamics are discussed further in the analysis of value chains in this sector, as well as recent developments following expiry of the WTO ATC.

7. Value chain dynamics in the textiles and clothing sector

Value chains describe the dynamics of value-adding activities along a product or industry's production cycle. Analysis of value chains thus provides an opportunity to identify the economic actors within a production cycle that are able to exert a defining influence on the production activities, including sourcing, logistics, distribution and pricing. Whereas the concept of value chains originated in the 1960s and 1970s, when analysts used it to describe the developmental path of mineral-exporting economies, it was only in the mid-1980s that this form of analysis was popularised by Michael Porter, and applied more broadly to industry analysis.

Value chain theory also questions the traditional view that value is added mainly in the production process of a good, and shows that far greater value is often added in the design, marketing, branding and distribution of a product. Further, there is recognition of the fact that in an increasingly globalised and connected economy, production and production decisions often take place in various different locations at any given time. This is particularly true for the textile-clothing pipeline.

The concept of value chains has different dimensions, including the input-output structure (encompassing the five elements: design, inputs, production, wholesale and retail), spatial scale (the geographic dimensions of the elements listed above), and the control over activities (encompassing the influence that various actors can extend over the value chain) (Gereffi: 1994).

Each of these concepts is of importance in understanding the dynamics within a sector. Whereas the input-output structure categorises the key generic elements of a

value chain, the spatial scale will define the locational characteristics of a sector. In the 'tex-clo' sector, for example, design of a garment and fabric pattern may be undertaken in the United States of Europe, contracted to a South African company, which in turn may outsource certain production stages to Lesotho or Swaziland based manufacturers.

The third concept, that of influence and control over the activities within a given value chain, is of key relevance. Typically, value chains are categorised as producer-driven or buyer-driven, with the textile and clothing sector having evolved into a typical example of the latter.

Producer-driven value chains are usually found in sectors that are capital and technology-intensive, such as the automotive or computer industries.

Buyer-driven value chains usually apply to industries where design and marketing play an important role, but where production is relatively labour intensive. More importantly, production is usually sufficiently non-specialised for it to be undertaken within any number of competing countries worldwide. Key barriers to entry relate to design aspects, distribution, market intelligence, branding and advertising; but few barriers exist in the actual production stages. As a result, the sector is mainly driven by large brand name owners and retailers (i.e. those stakeholders with significant control over design and marketing aspects) rather than by the producers themselves. Leading firms in this industry are thus able to exercise decisive influence over 'their' value chain without having to take direct control of large parts of the production process.

Since clothing production in particular does not rank as being capital and skill intensive, there are relatively low entry barriers on the production side. But despite these perceived low barriers, it is the purchasing decisions of large multinationals that invariably drive the sector, and manufacturers are compelled to increase their production efficiencies if they are to stand a chance of securing orders for mainstream markets. This pressure invariably leads to a gravitation of production facilities to locations that offer least-cost solutions to buyers, while at the same time maintaining the ability to produce textiles and clothing with the requisite quality characteristics and lead times in place.

There is therefore clearly a relationship between value chain dynamics and quotas, particularly in buyer-driven value chains, as is the case in textiles and clothing. Quotas have resulted in a much wider global dispersion of textile and clothing production, as they have held back the natural value-chain driven gravitation towards low-cost (mainly South East Asian) locations. In other words, quotas have worked against the natural or expected outcomes in buyer-driven value chains, which in all likelihood would have seen production concentrate in only a very small number of countries. In buyer-driven value chains the bargaining powers of buyers exceed that of producers, especially with regard to switching costs (switching to other sources of supply), transaction volumes and order dependency, availability of market and price information, as well as overall price sensitivity. In effect, buyers determine prices, and producers are required to match these.

8. Structure of EU and US imports and post-quota developments

The looming end to quota restrictions in line with the ATC caused much debate internationally among stakeholders, especially those that were likely to be affected by the phasing out of these quantitative measures. One such initiative, known more formally as the 'Istanbul Declaration', proposed an extension of quotas for a further three years following the expiry of the ATC. Behind this declaration stood leading American and Turkish industry associations, which were soon joined by approximately 130 similar organisations from over 50 countries. Support from Africa included South Africa, Lesotho, Swaziland, Zambia, Mauritius and Kenya, all of which have significant interests in the textile and clothing sectors. Besides industry associations in Europe and the US, the majority of supporters of such a delay in quota removal came from developing countries, which feared a substantial loss in competitiveness if textile and clothing trade were to proceed without some of the existing measures in place in the post-2005 period.

Proponents of further quantitative measures emphasised the likely impact that a full integration of the sector's trade would have on their economies, especially where these were highly dependent on textile and clothing exports, and where their competitive advantage lay predominantly in categories that were quota-constrained elsewhere.

As expected, China was vocal in its opposition to any change in the agreed term for quota removal, arguing that any such moves would severely undermine the credibility of the rules-based global trading system, and by extension the WTO. It further claimed that its textile and clothing sector had invested heavily in anticipation of this deregulation, that the sector provided significant employment to its citizens, and that the country should not be further discriminated against simply because of its substantial competitive advantage in these types of manufacturing activities. As discussed earlier, value-chain dynamics sectors contribute heavily to China's dominance in global textile and clothing production (and exports).

In the end, even an emergency meeting of the WTO Goods Council in October 2004 failed to induce changes to the existing liberalisation framework. In line with the terms of the WTO ATC, quotas on textiles and clothing trade were lifted on 1 January 2005. Some emergency measures had in the meantime been put in place, for example by the US, which continued to restrict imports from China shipped but not landed prior to that date. These were allowed into the US in small monthly increments.

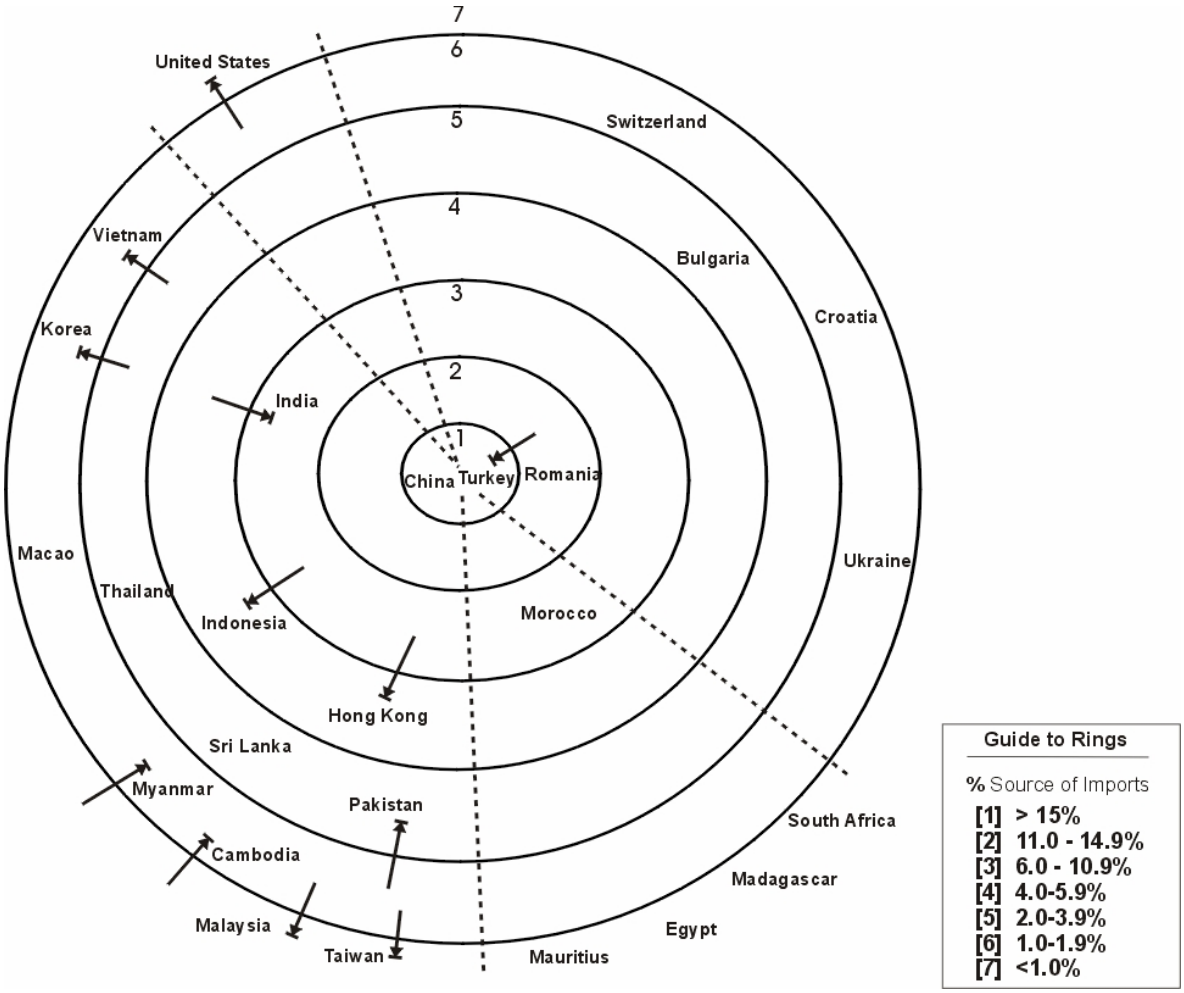
The arrival of 'D-Day' for textile and clothing trade led to a much anticipated and substantial surge in textile and clothing exports from China. This surge did not take place in all categories, as many had already previously been integrated with WTO disciplines, or demand did not exceed permissible supply (within the given quota constraints). However, many of the categories in which trade was integrated for the first time on 1 January 2005 experienced a growth in imports that exceeded most predictions.

An appreciation of the structure of EU und US clothing imports, in terms of key sources of supply, provides a useful indicator of future trends as well as regional competitiveness in this sector. It further also underlines the nature of buyer-driven value chains, where production competitiveness is a key determinant of the locational characteristics of a given sector. In the textile but more particularly clothing manufacturing sector, it emerges that the key drivers of supply choice with respect to the United States and Europe are geographical proximity and (low) cost base.

Figure 2 shows the locational demographics of suppliers of clothing to the EU market, based on trade data for HS Chapters 61 and 62 (clothing). Clothing imports

from specific countries are shown as a proportion of total EU clothing imports from all sources using two time points, namely the years 2000 and 2004. This five-year time frame has been used, as any relative movements over this period (being the five years immediately preceding the expiry of the MFA) are likely to be a closer indicator of current and future developments than would have been the case if contrasted with a much more distant point in time.

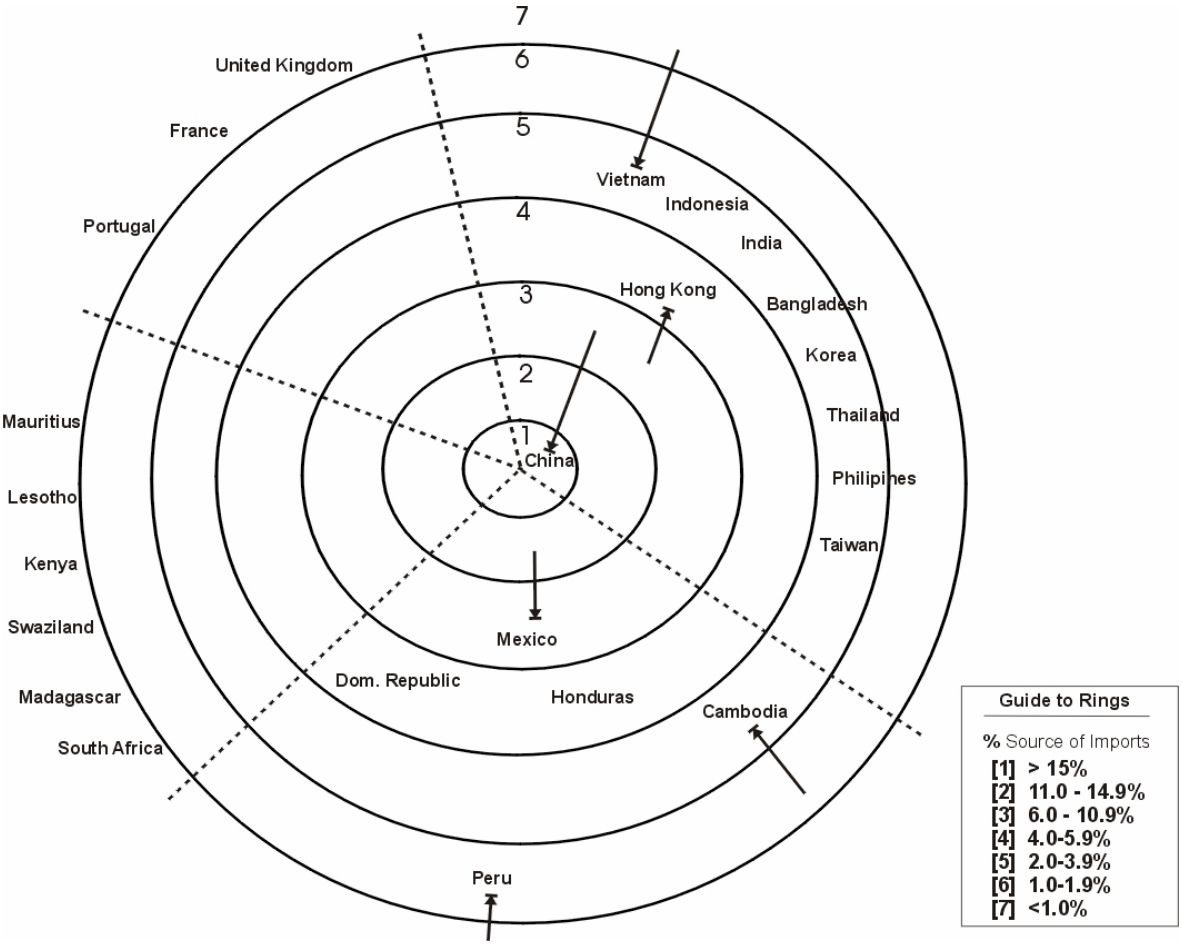
Figure 1. EU sources of apparel imports 2000 and 2004



Source: Eurostat database (own calculation)

The previous diagram shows that the largest foreign suppliers of clothing to the EU are China and Turkey, with the former accounting for 20.4% of total imports (up from 14.5% in 2000). Romania, Morocco and India make up the next tier of sources of suppliers. Together, these five countries accounted for almost 75% of EU imports of clothing, with the low cost base of China and India and the geographic proximity of Turkey and Morocco (with special market access to the EU) likely being key determinants of this supply configuration. While a number of Asian countries likewise form significant sources of supply, only few other European countries feature. No African country accounts for more than 1% of EU clothing imports.

Figure 2. US sources of apparel imports 2000 and 2004



Source: US International Trade Commission Dataweb database (own calculation)

A much clearer picture presents itself with recent clothing imports into the US. China is the leading foreign supplier, having jumped two bands between 2000 and 2004 (from 10.5% to 16%). China's dominance, however, is not nearly as pronounced as is the case with Europe (as shown in the previous diagram). Within the Americas, with their geographic proximity, Mexico, Honduras and the Dominican Republic, which in addition also benefit from preferential market access to the US, are important suppliers, together capturing approximately 18% of the US import market. Interestingly, there has been an almost perfect switch between Mexico and China during the period 2000 to 2004.

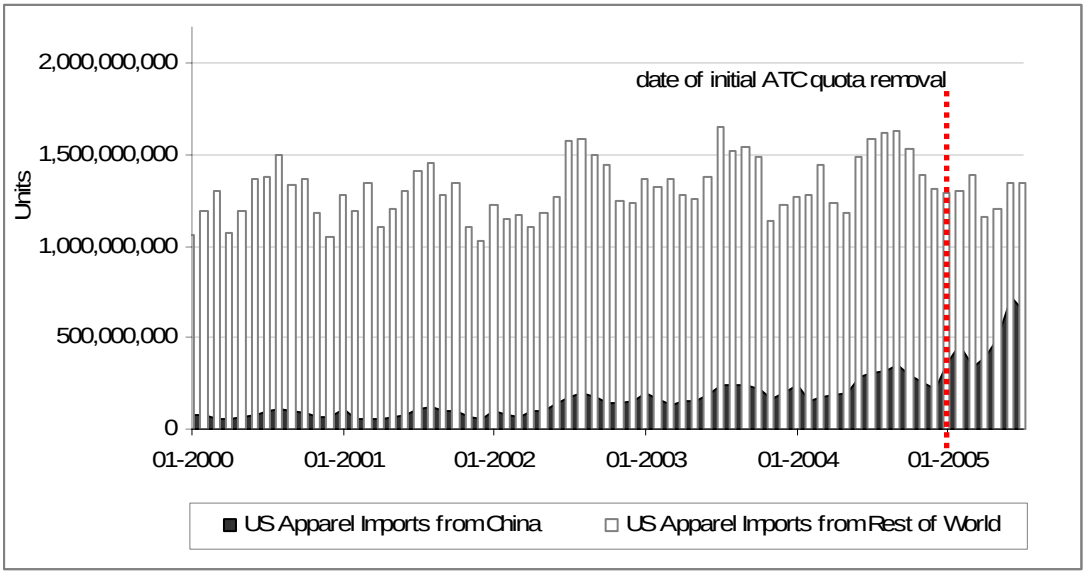
The diagram provides a very clear indication of the relative importance of Asian suppliers, with no less than eight countries each holding between 2% and 4% import market share. This stands in stark contrast with African or European suppliers. Despite preferential market access (duty-free and *de facto* quota free), African

suppliers together accounted for fewer imports than any one of the Asian countries in the 2 – 4% band.

While the United States experienced a year-on-year increase in clothing imports (HS61 and 62) of approximately 10% (*by value*) over the first half of 2005, imports from China grew at a much larger rate. Both HS61 (knitwear) and HS62 (wovens) imports from China recorded year-on-year growth of close to 100%, with selected categories far exceeding this average. Figure 3, which plots monthly clothing import *quantities* from January 2000 to July 2005, clearly illustrates the surging volume of Chinese imports following the lifting of quota restrictions.

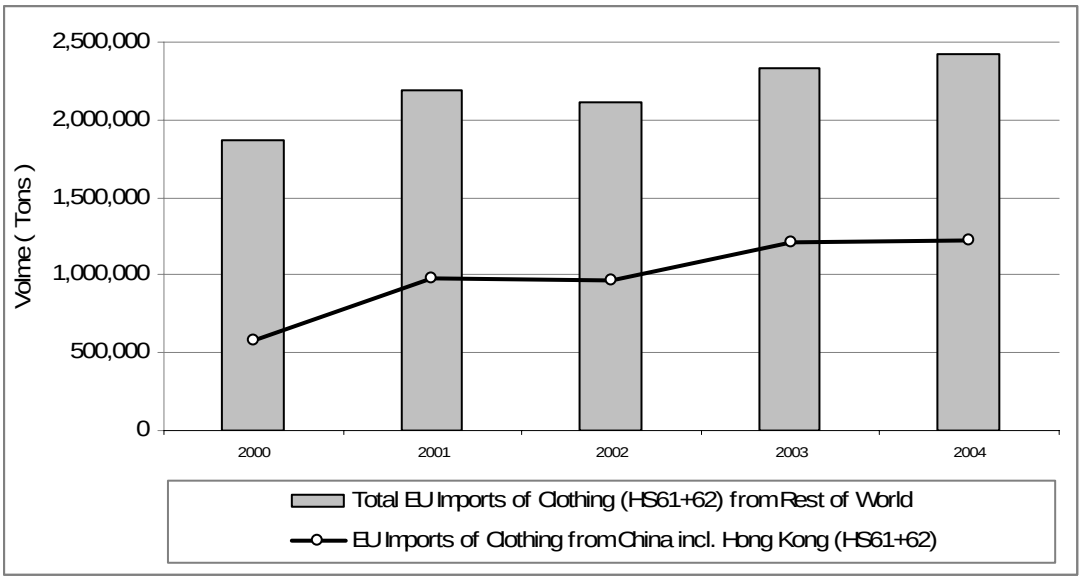
Figure 4, which shows 2000 – 2004 trade of clothing imports into the EU, likewise illustrates China's growth in imports on the back of overall EU imports. The data shows the volume of imports (in kg) and thus removes certain potentially distorting variables such as higher quantities at lower average cost. It should be noted that the EU and US employ different classification systems with regard to the monitoring of textile and clothing imports, and can therefore not be directly compared. The data nevertheless portrays Europe's substantial share of clothing imports that is sourced from China *vis-à-vis* the rest of the world.

Figure 3. US imports of apparel from China and Rest of World January 2000 – July 2005 (monthly data)



Source: US Office of Textiles and Apparel (OTEXA)

Figure 4. EU imports of apparel from China and Rest of World 2000 – 2004 (annual data)



Source: EUROSTAT Database

While both the US and EU governments officially resisted the growing chorus of stakeholders calling for an extension of the quota regime (either to extend the WTO ATC or to implement immediate alternative measures), imports from China continued to surge in the months following the opening of textile and clothing trade. As one of the more important agreements to emerge from the Uruguay Round of trade negotiations, and in many respects a flag bearer for the WTO's stated objective of liberalising world trade within a rules-based environment, the ATC rapidly became the WTO's ultimate litmus test.

The predicament that policy makers and WTO member states found themselves in was clear: any extension of quantitative restrictions would undermine the consensus Agreement reached 10 years previously, for which countries had a decade to prepare. Likewise, any extension would go against the substantial structural changes and investment that would have taken place in anticipation of the removal of quotas, especially in China, which since the end of 2001 was in any case a fully-fledged WTO member with all its rights and obligations.

On the other hand, the removal of quotas threatened the sustainability and with it the existence of a basic manufacturing sector, one which is often seen as the first entry point for countries as they diversify their economies away from, for example, a simple

reliance on raw material exports or agriculture. In many developing countries the clothing sector in particular had become the mainstay of formal economic activity, for example in Lesotho and Bangladesh. Since few countries are able to compete internationally (or against competition from abroad) without some form of direct or indirect protection, any threat to the sector in these countries becomes a threat to employment generation, investment inflows, manufacturing output and much-needed foreign exchange earnings. Such a threat likewise undermines any hard-won economic diversification from a previous reliance, perhaps, on resource-based exports.

While the ATC provided the overall framework for textile and clothing quotas, and the integration of trade in this sector with normal WTO disciplines, it is not the only instrument that permits countries to restrict textile and clothing imports. Alternative WTO measures, together with clauses in China's WTO accession agreement (Article 242), provide countries with at least some form of relief against any surge in imports that threatens domestic industries.

WTO-compliant measures that may be taken are largely contained in the 'safeguards' clauses, which permit member states to temporarily protect a specific industry through certain trade restricting measures (including, but not limited to quotas). Likewise, the Agreement whereby China earned full member status of the WTO contains clauses that allow member states to take trade-restricting action against any surge in textile and clothing imports from China that threatens market disruptions and the orderly development of trade (interestingly, neither 'market disruptions' or 'orderly development of trade' are closely defined). Specifically, these clauses permit growth in import to be confined to 7.5% per annum, and may be used until the end of 2008.

The months following final expiry of the ATC saw a number of these measures implemented by countries affected by the predicted surge in imports. The US was the first major importer that made use of the 'China safeguards', using its rights under the China WTO Accession Agreement rather than the more lengthy process of using WTO measures. Earlier, a WTO Goods Council meeting that was to discuss impacts and issues related to the removal of export quotas was shelved indefinitely, following China's objection to formal discussions on these issues.

The surge in textile and clothing imports of Chinese origin into the US included cotton knit shirts, cotton trousers, cotton and manmade fibre underwear, cotton and manmade fibre shirts, manmade fibre trousers and so forth. Figure 5 below, which plots monthly imports from China in selected textile and clothing categories, clearly illustrates the significance of the post-quota rise in US imports from that country.

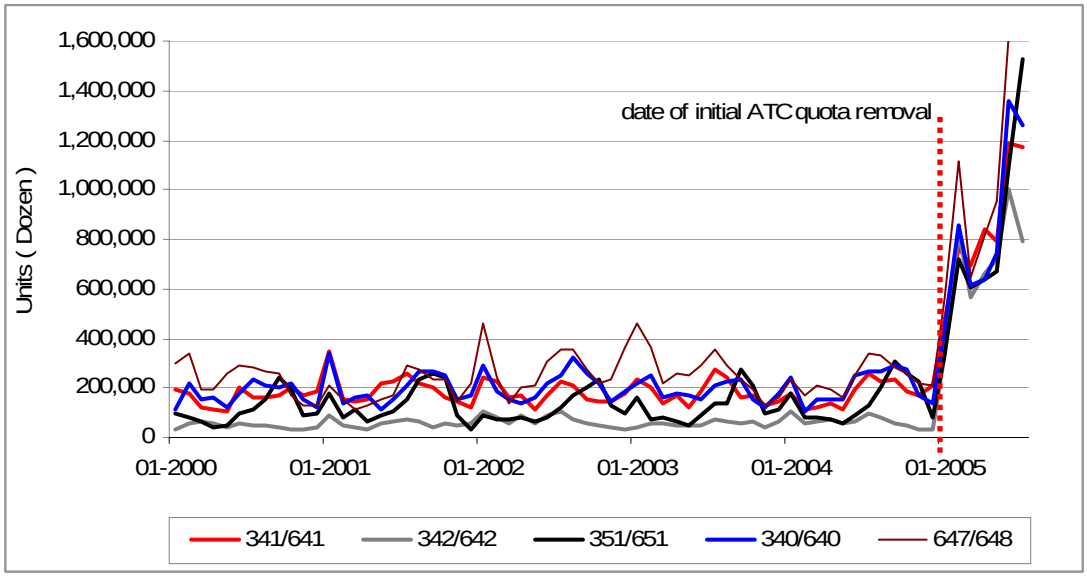
In the middle of May 2005, US authorities announced the re-imposition of quotas in three categories, namely cotton knit shirts and blouses (category 338/339), cotton and manmade fibre underwear (category 352/652) and cotton trousers (category 347/348). This triggered a mandatory 90-day period of consultations with China in accordance with clauses in that country's WTO accession agreement, consultations which by the end of August 2005 had failed to reach a satisfactory conclusion. Days later, a further four categories were added to this list, namely combed cotton yarn (category 301), men's and boys' cotton and manmade fibre shirts (category 340/640), manmade fibre knit shirts and blouses (category 638/639) and manmade fibre trousers (category 647/648). While an injunction against the use of safeguard measures was filed by certain domestic US stakeholders (mainly retail representatives who stood to lose from the imposition of safeguards), this was reversed less than a month later, in June 2005.

In the meantime, China unilaterally imposed voluntary tariffs on 74 textile and clothing products (Just Style.com, 2005). This was clearly in response to impending trade measures taken by its key trade partners; and there was an implicit recognition of other countries' rights (both under WTO rules as well as under Article 242 of China's WTO Accession Protocol) to restrict imports from China where these threaten the 'orderly' development of trade and thus 'threaten' to damage the domestic industries of its trade partners. However, this export tax was both short-lived and ineffective in breaking the surging volume of exports. In response to US measures to follow through with imposing further safeguards against its exports, China withdrew these self-imposed measures less than two weeks after their introduction.

The cause of these safeguard measures was year-on-year growth of imports (from China) into the US, which in some cases neared or exceeded 1,000%. Based on US import data by the US Department of Commerce (International Trade Administration)

covering comparative data January – June 2004/2005, the following category-specific growth rates can be computed: 340/640 (+343%), 341/641 (+451%), 342/642 (+866%), 347/348 (+1,765%), 351/651 (+633%), 647/648 (+369%), and 352/652 (+539%).

**Figure 5. US imports from China in categories with new quotas*
January 2000 – July 2005 (monthly data)**



Source: US Office of Textiles and Apparel (OTEZA)
* Key to product categories illustrated above:

The United States employs a unique textile and clothing categorisation system. Broadly, each product is categorised according to its core characteristics, comprising yarns, fabrics, apparel and made-up miscellaneous textiles. Each product is then further classified according to its material content, entailing mixed cotton/man-made fibre (200 series), cotton (300 series), wool (400 series), man-made fibre (600 series) and silk blends or non-cotton vegetable fibres (800 series).

- Category 341/641 – cotton/man-made fibre non-knit shirts
- Category 342/642 – cotton/man-made fibre skirts
- Category 351/651 – cotton/man-made fibre pyjamas/nightwear
- Category 340/640 – men's and boys' cotton and man-made fibre shirts, not knitted
- Category 647/648 – manmade fibre trousers

Meanwhile, European imports of Chinese textiles and clothing also grew unabatedly. Just prior to the expiry of the ATC, in December 2004, the EU introduced a textile surveillance system to specifically monitor the 35 product categories affected by the pending removal of quotas[3]. The EU had also previously (in 2003) enacted a transcript of relevant provisions of China's WTO Accession Protocol (mainly Article 242) into its own legislation, thus providing the legal standing for any future safeguard measures based on China's WTO membership rather than WTO rules *per se*.

The EU approach to dealing with this development differed somewhat from the approach taken by the US. Matters were complicated by the fact that decisions by the European Commission are based on a form of consensus among its member states that have to individually ratify extraordinary measures taken to restrict imports from a certain country. European countries, however, have divergent interests in the textile sector, with some of the 'southern' states having long-established domestic manufacturing industries (including Spain and Italy) while some of Europe's 'central' and 'northern' states have strong multinational retail sectors. Retailers favoured unrestricted development of trade (and with it, unrestricted growth and choice in importing), while those countries with domestic manufacturing sectors favoured a more orderly development of imports that would not undermine domestic producers.

Following substantial growth in imports from China, the European Commission and China in June 2005 held bilateral consultations within the framework of Art. 242. Once again, the negotiating parties chose a bilateral approach rather than the more elaborate process directly involving the WTO. A resulting Memorandum of Understanding (MoU) dealt with 10 product categories that were 'threatening the orderly development of trade within the meaning of Art 242' of China's WTO Accession Agreement and the equivalent legislation earlier enacted by the European Commission. These consisted of Categories 2 (cotton fabrics), 4 (T-shirts), 5 (pullovers), 6 (trousers), 7 (blouses), 20 (bed linen), 26 (dresses), 31 (brassieres), 39 (table and kitchen linen), and 115 (flax or ramie yarn).

[3] Council Regulation (EC) No 2200/2004. OJ L 374, 22.12.2004, p.1

The MoU between the EU and China agreed to specific quantitative limits for the year 2005 in the 10 categories listed above. Table 4 provides an overview of the growth rate per category of imports that formed the basis for these new limits, and covers the period January – April 2005. Column 5 shows the ratio (expressed as a percentage) of actual imports from China during that period against the EU's predefined and category-specific alert levels. All percentages are based on data by the European Commission's import monitoring database SIGL[4] and published in a Council Regulation[5].

Table 4. EU imports from China in textile categories under surveillance January – April 2005

Category	Description	Year-on-year growth (Chinese imports)	Year-on-year growth (all other sources)	% of alert level	Average per unit price change (China)
2	Cotton fabrics	71%	4%	124%	-21%
4	T-shirts	199%	24%	197%	-37%
5	Pullovers	530%	14%	194%	-42%
6	Trousers	413%	18%	312%	-14%
7	Blouses	256%	4%	207%	-30%
20	Bed linen	158%	6%	107%	-34%
26	Dresses	219%	1%	212%	+2% *
31	Brassieres	110%	6%	145%	-37%
39	Table and kitchen linen	64%	10%	110%	-39%
115	Flax or ramie yarn	55%	40%	150%	+3%**

Notes:

* Corresponding Eurostat data shows a drop in average price of 42%
** Corresponding Eurostat data shows no change in average price
Source: European Union / Commission Regulation (EC) No 1084/2005 (based on SIGL)

Shortly after the European Commission's publication of new limits, imports in some of the affected categories reached or exceeded these quotas and were barred from

[4] SIGL: EC DG Trade's integrated system for the management of licences for imports of textiles, clothing, footwear and steel to the EU.
[5] Council Regulation (EC) No 1084/2005. OJ L 177/19, 9.7.2005, pp. 1 – 2.

entering the European Union. Necessary import permits were no longer being issued to importers and goods began stockpiling in ports and warehouses across Europe. Amid the confusion that resulted from the blockage and stockpiling of around 80 million garments that had exceeded their newly agreed 2005 limits, EU and Chinese trade officials sought a solution to the growing crisis which, with the winter season not far away, threatened to severely disrupt European retailers. Once again, the deep divisions on this matter within Europe came to the fore, with proponents of newly imposed quotas arguing that any shift in policy would severely harm domestic suppliers and undermine EU trade policy on this matter. Retailers on the other hand urged a more pragmatic approach, warning that they (and ultimately the consumers) stood to incur significant losses.

By early September a compromise to this untenable situation was reached, namely to release the affected textile and clothing articles into circulation. While this solution was sensible considering the circumstances, the backtracking on Europe's initial stance (and established policy guidelines) may be interpreted by some as a sign of political weakness. In effect, Europe made only limited use of its rights under the China Accession Agreement while not using the general measures available to it under the somewhat more laborious WTO process.

The essence, the outcome of the EU-China bilateral textile agreement was to release all stockpiled garments into circulation, with the proviso that half would be counted against agreed quotas for the 2006 period. According to media reports, China's Commerce Minister has indicated that the allowance that is to count against 2006 quotas constitutes less than 2% of China's expected textile exports in that year, and is thus unlikely to have a significant overall impact on that country's textile exports (Just-Style.com). Goods shipped before the agreed cut-off date of 11 June 2005, the date that new quotas were published in the Official Journal of the European Union, would escape censure. The Agreement confirmed annual growth rates agreed at the June consultations for EU imports from China in affected categories, ranging from 8% to 12.5% per annum for 2005, 2006 and 2007. In categories not covered by the initial agreement, the EU undertook to exercise restraint in the application of its rights under China's WTO Accession Agreement.

9. Concluding remarks

Far from leading to the seamless and full integration of textile and clothing trade with ordinary WTO disciplines, the phasing out of quotas has caused a flurry of activity intended to stem the natural development of free trade. As anticipated, the scheduled removal of quotas in accordance with the final stage provisions of the ATC has had the most deep-seated impact.

While the conclusion of the ATC can be credited with being one of few agreements under the WTO banner that has (for the most part) run its course in accordance with an agreed framework and time schedule, it has also resulted in an extraordinary number of actual and yet-to-be seen measures to counteract its impact. The European Union and United States, being major beneficiaries and original architects of textile and clothing quotas, have both moved swiftly to counter the impact of surging imports, especially from China. Whereas the EU approach can probably be described as having been based more on bilateral consensus with China than that taken by the US, the outcome of both is relatively similar. Many of the product categories originally protected by quantitative restrictions once again enjoy similar protection. In the case of both the EU and US, safeguard measures have put an end to certain imports from China for the rest of the year, with further restrictions likely over the coming three to four years at least. While the EU has negotiated an agreement with its Chinese counterparts regarding the ‘orderly growth in imports’ over the next three years, with stipulated growth rates, the US safeguard measures were set to expire at the end of 2005, but are already being set up for renewal.

China, more than any other country, has been by far the largest source of the surge in imports, and has thus become the primary focus of new quantitative restrictions. What is interesting to note, though, is the fact that safeguard measures available to countries under general WTO rules have been foregone in favour of the simpler remedies available in China’s WTO Accession Agreement. Although use of this clause is available only for another few years, and is intended as an interim measure to ensure the orderly development of trade, it merely requires a rather non-prescriptive consultation process between the countries concerned without any real pressure for agreement. This pressure would rather originate from within the politico-economical sphere.

The important role that the textile and especially clothing manufacturing sectors play in many developing countries, especially in Africa, has been highlighted. With preferential (essentially quota and import tariff unconstrained) market access to the European and US markets, they have benefited from the quota regime to the point of becoming relatively attractive locations for the industry. Market intervention and regulation in the form of quotas have thus directly aided the global dispersion of this industry (which value-chain theory for this sector predicts would otherwise concentrate in least-cost locations), and in many cases provided countries with the first step away from mono-crop reliance towards a more diversified and even export-led economy.

But a very real danger of the phasing out of quotas (and the ensuring upheaval among affected stakeholders worldwide) is that what was initially intended as an orderly process to substantially liberalise textile and clothing trade and integrate the sector with generally accepted WTO trade principles, is fast becoming the start of something potentially more dangerous and far-reaching. Already there are indications of deep-seated divisions about some of the remedial measures taken subsequent to the ATC's expiry, and with it a growing realisation that these newly imposed textile restrictions could lead to an escalation of trade barriers in other sectors as well. This is true not only for the large developed economies, but also an important consideration for developing countries, especially those that may be eyeing China as a future market for natural resource-based and other exports.

References

EUROSTAT Database. 2005. [Online]. Available: http://export-help.cec.eu.int/thdapp/comext/ComextServlet (September 2005).

GATT. 1986. *The Text of the General Agreement on Tariffs and Trade*. Geneva: GATT.

Gereffi, G. 1994. The Organisation of Buyer-Driven Global Commodity Chains: How US Retailers Shape Overseas Production Networks. *In* Gereffi, G. & Korzeniewicz, (eds.), *Commodity Chains and Global Capitalism.* Westport, CT: Praeger.

Just Style.com. 2005. [Online]. Available: http://www.just-style.com (August/September 2005).

Oxfam. 2004. *Stitched Up: How rich-country protectionism in textiles and clothing trade prevents poverty alleviation*. Briefing Paper.

UN Comtrade. 2005. Comtrade database.[Online]. Available: http://unstats.un.org/unsd/comtrade/ (January 2005)

US International Trade Commission. 2005. USITC Dataweb database. [Online]. Available: http://dataweb.usitc.gov/ (August 2005)

US Department of Commerce. 2005. *International Trade Administration*. [Online]. Available: http://www.otexa.ita.doc.gov/

WTO Website. [Online]. Available: www.wto.org (August 2005)

WTO. 2001. *Comprehensive Report to the Council for Trade in Goods on the Implementation of the Agreement on Textiles and Clothing During the Second Stage of the Integration Process, Textiles Monitoring Body, 31 July 2001.* Geneva: WTO.

Chapter 4

Agriculture and the World Trade Organization – what happened since 1995?

by Ron Sandrey[1]

1. Introduction

In April 1994 contracting parties to the General Agreement on Tariffs and Trade (GATT), including South Africa, officially signed the Marrakesh Declaration, which established the World Trade Organization (WTO) as an institutional framework for overseeing further trade negotiation rounds and adjudicating trade disputes. The declaration also formalised the successful conclusion of the seven-year Uruguay Round (UR) of multilateral trade negotiations, a Round where agricultural products were comprehensively included for the first time. Subsequently, agricultural trade was subject to less discrimination, though it is still regarded as the poor cousin of trade in industrial or manufactured goods with respect to protection levels.

Until the UR, agriculture was often excluded from GATT agreements through waivers, loopholes, exceptions and exemptions from disciplines applying to manufacturing goods. For example, disciplines relating to export subsidies and quantitative restrictions were banned for manufactured goods but not for agricultural goods. For nearly 50 years agriculture was largely exempt from manufactured goods trade rules. While Member countries' prosperity grew on the back of a relatively open trading system for manufactured goods, these same countries erected trade barriers – some insurmountable – to agricultural imports. Hand-in-hand with trade barriers went generous farm support payments provided by government treasuries.

Rather than being driven by straightforward economic principles, as is largely the case with manufactured products, domestic agricultural policies were driven by a perceived need for self-sufficiency in food, wartime food shortages memories, and strong government decision-making representation. This resulted in growing

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unsaleable product surpluses for which governments had to provide further subsidies to dispose of on world markets.

The ideological view that agriculture is somehow different from other sectors continued despite it being comprehensively brought into the multilateral negotiating environment for the first time. Separate agriculture disciplines were agreed under the Agreement on Agriculture (AoA), although the UR did initiate a process to reduce or limit agriculture's exemptions and bring them more fully under GATT/WTO disciplines.

Within the UR the most important elements of the AoA were the following:

(a) with very few exceptions, members agreed to convert all non-tariff barriers into tariffs (commonly known as the process of 'tariffication'), and bind and reduce all tariffs (i.e. no tariff could be increased above the bound tariff rate);

(b) minimum access tariff quotas were to be established for products where no imports were taking place over the 1986-88 base period and were to represent no less than three per cent of corresponding domestic consumption, rising to five per cent over the implementation period. Where imports exceeded the five per cent threshold, Members agreed to established current access tariff quotas which were not to be less than the average annual import quantities for the 1986-88 base period;

(c) export subsidies were capped at average 1986-1990 level and reduced;

(d) constraints were placed on the ability of countries to provide domestic subsidies for their producers;

(e) the rules surrounding agricultural trade were disciplined[2];

(f) developing countries were provided with 'special and differential treatment' in the form of lower reduction commitments and a longer implementation period.

The objective of this paper is to assess how effective the AoA has been since its implementation. The timing was such that the paper was required to be in final form by the end of November 2005, some two weeks before the Hong Kong Ministerial of

[2] For example, the ability to challenge the legality of a country's domestic policies that impact on market access through the dispute settlement process and greater transparency in and a more robust basis for the application of sanitary and phytosanitary (SPS) policies.

the WTO. It is not too harsh a statement to make that the WTO cannot survive another Ministerial failure, and the jury is still out on the Hong Kong Ministerial.

The thesis of this paper is that the AoA in fact set the scene for a radical change in the way agriculture is globally supported and traded. Its success or otherwise will not be measured so much in what has happened in the first decade of the WTO, but rather in the few weeks after this paper has been completed. Thus, the real gain from the AoA was not what it did *per se*, but rather that it set the scene for a comprehensive liberalisation of global agriculture. Will 'Farming Without Subsidies' be a global reality?[3] Are the critics right, and the glass half empty and draining, or are the optimists correct in their assumption that the AoA has set the stage with a half full glass that will lead to comprehensive reform? There is strong evidence pointing to both views, and these will be explored.

The half-empty view is that agricultural subsidies remain at obscene levels in Organization for Economic and Cooperation Development (OECD) countries, and these agricultural sectors remain behind tariff walls that allow a one-way exit of produce through export subsidies to accentuate the harm to efficient producers on world markets while largely keeping out sensitive products other than through symbolic tariff quotas[4]. And where these measures are threatened the resort to non-tariff barriers and the deliberate stalling to introduce changes ordered by the WTO dispute settlement system is routine.

The half-full view is that the AoA mandated the continuation of negotiations on agriculture, and despite setbacks these have continued to the extent that in October 2005 the US proposed a two-stage process on timing on agricultural reforms. In the first five-year period there would be significant reductions in tariffs and trade distorting domestic support and the elimination of export subsidies. This would be followed by an interregnum period of a further five years for review of the effects of the first stage. Then, unless members agreed to change course, the second five-year

[3] The one significant elimination of agricultural subsidies has been the New Zealand experience of the late 1980s, an experience comprehensively detailed in Sandrey & Reynolds (1990). New Zealand continues to be the standout as a small, highly efficient global producer and exporter of temperate agricultural products in an almost totally unsubsidised environment, and as such stands to gain from a similar global system.

[4] While the conversion of many non-tariff barriers into tariffs and tariff quotas was a success, the use of the bound rather than applied tariff rates to base reductions upon was both a curse in that it denied meaningful access in many cases and a blessing in that it reduced future 'weaselling room'. Similarly for the so-called 'blue box' for largely EU domestic supports, good news in that the EU is isolated, but bad in the sense that the EU continued with these large supports.

period would culminate in the total elimination of all tariffs and trade-distorting domestic supports at the end of 15 years. Although it is early negotiating days on this proposal, the EU seems to be accepting the realities of the situation and providing a grudging support provided their concept of decoupled support can be maintained. As with the UR, the recalcitrant Asian economies may be forced to the table with little negotiating power and consequently, influence. Is genuine reform that close, and to what extent was the AoA responsible if the results are positive?

Giving further comfort to the half-full glass perspective is that, although not directly relevant to the AoA, the accession conditions have been rigorous for WTO members who have joined since the UR concluded. For example, prior to its accession to the WTO in 2001, China typically restricted agricultural imports through high tariffs, discriminatory taxes, import quotas, restrictions on trading rights, and other non-tariff barriers (NTBs). Since acceding to the WTO, China has significantly reduced tariffs on many commodities. In terms of NTBs, China is required under its WTO accession agreement to phase out its import quota system, apply international norms to its testing and standards administration, remove local content requirements and make its import licensing and registration schemes transparent. These precedents suggest a mood change that augurs well for the future, and let us not lose sight of the fact that these newly acceded members will want to place significant pressure on others now that they are at the table.

The middle position may well be the reality, however, with an intermediate position that delays comprehensive reforms for another 15 years. For, although non-agricultural market access is much more liberal than agricultural access and, in effect, several GATT/WTO Rounds advanced, there are still significant international disputes over goods, such as steel, clothing and aircraft supports, for example. These equivalents will of course continue in agriculture as the issues become increasingly complex, and Nirvana will not be that close!

Let us now examine in more detail the glass as represented by the general outcomes to the AoA[5].

[5] Much of the factual material for this section was obtained from OECD (2005b) and from the WTO Annual reports.

2. Domestic supports

The Total Aggregate Measure of Support (AMS) reduction commitments of the AoA covered all domestic support provided on either a product-specific or non-product-specific basis that does not qualify for exemption. The commitments called for reductions of 20 per cent in six years (13.3 per cent in 10 years for developing economies, with no reduction required of least developed economies). The so-called 'green box' policies were excluded from the reduction commitments. These include general government services (such as research, disease control, infrastructure and food security stockholding), certain forms of 'decoupled' (from production) income support, structural adjustment assistance, direct payments under environmental programmes and regional assistance programmes. In addition to the 'green box' policies, other policies that need not be included in the Total AMS reduction commitments included direct payments under production-limiting programmes, certain government assistance measures to encourage agricultural and rural development in developing countries, such as investment subsidies and subsidies on inputs provided to resource poor farmers. No reduction commitments had to be made in the case of subsidies regarded as *de minimis*, defined as support not exceeding five per cent (in the case of developed countries) and 10 per cent (in the case of developing countries) of the value of production of individual products or, in the case of non-product-specific support, the value of total agricultural production.

But what is the reality? The Organisation for Economic Cooperation and Development (OECD), the general monitors of agricultural supports, points out that there has been little or no change in the level of agricultural supports in the OECD countries since the late 1990s: from around 37 per cent of farm receipts (the so-called Producer Support Estimates (PSE)) prior to the UR in the reference 1986–88 period to 30 per cent in 2002–04; but this level has been virtually unchanged in the last 10 years. In the most recent 2004 year, support to OECD producers as a whole was estimated at USD 279 billion (EUR 226 billion), a figure that was 30 per cent when expressed as a PSE. Within the OECD there were large PSE variations; below five per cent in New Zealand and Australia; around 20 per cent in Canada, Mexico and the US; 34 per cent in the EU; around 60 per cent in both Korea and Japan; and

an even higher 70 per cent in Iceland, Norway and Switzerland (the home of the WTO).

Measured as a percentage of Real Gross Domestic Product (GDP) there has been a more encouraging overall decline from the 1986–88 figure of 2.3 per cent to one at 1.2 per cent during 2002–04; expressed another way, the average producer price in the OECD during 2002–04 was some 30 per cent higher than the equivalent border price of imports rather than the earlier 60 per cent. Overall, while there has been a movement away from direct production supports to more of the so-called decoupled supports, the former still dominate overall Aggregate Measure of Support (AMS) figures (74 per cent of total supports). Sugar, rice and milk remain the most highly supported commodities, and this fact highlights the dangers of so-called 'cherry picking' whereby the easiest fruits are harvested first leaving the latter ones, such as sugar, rice and milk, until later.

As an aside (to be revisited later): the sugar supports are especially crucial for Africa and pit exporters in different African countries against one another. In December 2002 a WTO Panel ruled that Canada's higher prices for dairy in the domestic market financed exports at a lower price than the average total cost of production. This constituted export subsidisation under Article 9.1(c) of the AoA; and in the EU so-called C sugar receives payments under Article 9.1(c). Thus, Brazil and others initiated a successful action against the EU, and in June 2005 the EU proposed far-reaching reforms to its regime for sugar. It recognises that these reforms will require adjustments in the sugar sectors of the African Caribbean and Pacific (ACP) countries, as sugar exports from these countries have enjoyed preferential and guaranteed access to prices at around three times the world price in the EU market. Regionally, Mauritius and Swaziland will be losers, while South Africa joins Brazil, Thailand and Australia as potential winners as the world sugar prices increase. The EU price of sugar will decline by 39 per cent over two years, but only the EU farmers will be compensated by the EU government to the tune of 60 per cent of the loss incurred. While some compensation (about €40 million for 2006 – with the possibility of further assistance in the future) will be provided to ACP countries, this is little more than a gesture. Thus, agricultural liberalisation is not totally good news for those who have been enjoying economic rents as compensation for distorted regimes

elsewhere. For them, the glass is half empty and rapidly evaporating under the African sun!

The situation for bananas is similar, where the developing countries are being set against one another as a result of the WTO banana dispute. Basically, Latin American producers with a share of about 60 per cent dominate the EU market, while many of the other ACP countries have a restricted quota access of about 20 per cent of the market. Cameroon and Ivory Coast, the two biggest of these exporters, feel thwarted since they have to buy quota licences from Caribbean producers at values that negate the benefits of their access to EU markets.

The situations for both sugar and bananas are evolving, but demonstrate that there are both winners and losers in many trade disputes. Those who previously held privileged access conditions have lost, while efficient producers will gain over time.

3. Export subsidies

For many WTO Members, export subsidies have traditionally been an important policy instrument to facilitate the exportation of increasing levels of production, and, in the EU, export subsidies are still very important policies tools. This has particularly been the case for grains, sugar and dairy products. Export subsidies allow countries to export goods onto the world market at a price lower than that prevailing in their domestic markets. Producers receive the world price plus an amount determined by the government that alters the incentives for domestic producers and encourages higher domestic production than would otherwise be the case. Within a regime of domestic subsidies and higher domestic production, governments are required to increase the level of export subsidy expenditure in order to dispose of the surplus production. As a consequence, world prices are depressed and world trading patterns distorted as high cost producers increase their market share at the expense of low cost producers.

The AoA imposed disciplines on agricultural export subsidies. While export subsidies were not completely outlawed, developed-country members agreed to impose a ceiling on the use of export subsidies at the average 1986–1990 level of the subsidy use and reduce budgetary outlays by 36 per cent and the volume of subsidised export products by 21 per cent over a six-year period through to 2000. This still

leaves considerable scope of subsidy use, and the Doha Development Agenda seeks to eliminate all forms of export subsidies and to discipline all export measures with equivalent effect by a credible end date.

4. Agricultural tariffs and related issues

The situation following the AoA is somewhat complicated. Firstly, the reductions outlined above were made from bound rates and not actual, applied rates. Thus, it was not uncommon for the exporters of agricultural products (in particular to some markets) to show no real gains. Secondly, the process of tariffication resulted in many non-tariff measures (NTMs) being converted to their tariff equivalent. At the beginning of the Uruguay Round, border measures limited to tariffs protected approximately two-thirds of all agricultural tariff lines of member countries, while in the remaining one-third the intervention extended to non-tariff measures. Thirdly, the concept of tariff rate quotas was expanded. Finally, commitments included bindings on duties applied to imported products. Prior to the Uruguay Round, only one-third of agricultural product tariff lines were subject to bindings. Although the increase in the coverage of bindings is particularly great in developing economies (from 17 to virtually 100 per cent of tariff lines), the coverage of bindings has almost doubled in the developed and transition economies as well.

While all sorts of figures can be produced to show the average pre- and post-AoA tariff levels, the situation is not a simple as that. Average trade weighted tariffs are misleading in that they are, by definition, biased towards current trade patterns that are influenced by tariff rates, rates that are often high enough to 'chill' or even prohibit trade. The Australian Bureau of Agricultural and Resource Economics (ABARE) recently examined this with respect to Australian agricultural exports (Jacenko et al., 2005), and their analysis gives a good insight into remaining protection. They examined the global markets for beef, cheese, skim milk powders, butter, sugar, wheat, sheep meats and wool. Their general conclusions are summarised as:

Beef – seven countries accounted for 82 per cent of global consumption. Of these, Russia, Brazil and Argentina are not global markets. For the remaining four, most favoured nation (MFN) applied tariffs are 12 per cent in China, 25 per cent in Mexico,

16 per cent in the US and a trade-stopping 108 per cent in the EU. Other important markets are Korea and Japan, both with applied rates of around 40 per cent.

Cheese – the US and EU together account for 60 per cent of world consumption and both have significant tariff protection: the US 66 per cent and the EU 83 per cent. Canada, with tariff protection of 128 per cent is the next most important global target.

Skim milk powders – the three markets of the EU, US and Japan account for 46 per cent of global consumption. Tariff protection ranges from 11 per cent in the US through 80 per cent in the EU to Japan's 218 per cent.

Butter – four countries account for 52 per cent of consumption, and of these tariffs rates are 40 per cent in India, 90 per cent in the EU and 92 per cent in the US. Three other countries are modest consumers but have high market access potential behind current tariffs: these are Canada, Japan and Switzerland with tariffs of 299 per cent, 360 per cent and 842 per cent respectively.

Sugar – as alluded to above, sugar has a complex trading regime. Six markets account for 49 per cent of global consumption, and of these the important markets/potential markets of the US and EU have MFN applied rates of 314 per cent and of 289 per cent respectively. Of the others, China with a 50 per cent tariff and India with a 60 per cent applied (150 bound) tariff offer potential markets.

Wheat – just five markets account for 59 per cent of global consumption. Of these there is unlikely to be trade expansion into the US (below five per cent tariff), China (one per cent unfilled in-quota tariff) or Russia. This leaves the EU with a complex regime that really boils down to a tariff of 59 per cent, and Japan, a country that accounts for five per cent of global imports over a tariff rate wall of 252 per cent.

Sheep meats – three regions account for 82 per cent of global consumption: the Middle East with five to15 per cent tariffs, China with 12 per cent tariffs and the EU with 83 per cent[6] MFN tariffs. South Africa was considered an important potential market with two per cent of global consumption that is protected by an MFN tariff of 40 per cent.

[6] Note, however, that the EU is the major market for New Zealand lamb at an in-quota tariff of effectively zero.

Wool – China and the EU account for 52 per cent of global wool consumption. The MFN tariff into China is 38 per cent, but most of the imports are through the unfilled tariff rate quota (TRQ) that attracts a one per cent tariff, while the EU bound and applied tariffs are zero.

This snapshot suggests a glass that is both half full and half empty. The half-empty view can be assessed with relevance to the extremely high tariff rates for sugar and dairy products, and the conclusion can be reached that the UR was a failure in opening up those markets. Had rice been included the glass would have had to be viewed even more pessimistically. The half-full advocates can take comfort from the fact that most of these tariff rates are the same for both bound and applied, and as such they now form very visible targets to reformers. For the other products where access is less restricted there is greater cheer, but it must be kept in mind that the UR did little for wool access globally, and while it did cement into place TRQs for beef and sheep meats that was relatively open prior to the UR.

Thus, one could be forgiven for arriving at a general conclusion based upon this tariff evidence that the UR did little directly, but acknowledge that, as was the case with AMS, it did make more visible targets of the protection. Perhaps the overall impact of the UR AoA has been an even split between the half full and half empty views.

- **5. Other commitments**

Other positive outcomes from the UR which are less obvious but equally important are the benefits resulting from more operationally effective trade rules. Examples include the ability to challenge the legality of a country's domestic policies that impact on market access through the dispute settlement process and greater transparency in and a more robust basis for the application of sanitary and phytosanitary (SPS) policies.

The SPS agreement was an important outcome in its own right, as it provided a means to address SPS complaints that could not easily be registered under the previous trade agreements. While the SPS agreement recognises the sovereign right of WTO members to adopt SPS measures to protect the life or health of humans, animals or plants, it requires these measures to be based on international standards or scientific risk assessment. So, where previously members could use SPS

measures as a means of impeding legitimate trade flows, members must now demonstrate the need for such restrictive measures to be imposed and they may be legally challenged by another country. Measures based on international standards are presumed to be in compliance with the agreement, though countries may adopt stricter measures that provide a higher level of health or environmental protection than international standards; but scientific evidence must support the claim that the alternative measures actually do so. However, arguably the most important article in the SPS agreement relates to equivalence of standards. Countries must allow imports from countries with different SPS regulations as long as the exporter can demonstrate that their measures are equivalent to those of the importer. While enhancing international trade, such benefits are extremely difficult to quantify and as such are beyond the scope of this paper.

Finally, it should be noted that the UR negotiations on agriculture focused on the linkages between domestic and international policies to such an extent that, even if not underpinned by specific commitments, as in many cases, they were driving the direction of reform in many countries including the EU and the US. These negotiations also brought agriculture firmly onto the global trade agenda and provided a framework for the continuation of reforms in the sector during the current Doha Round of trade negotiations.

6. The UR result – a case study of the hard numbers

In a comprehensive and detailed examination of the impacts of the UR, New Zealand researchers *inter alia* examined that country's agricultural exports pre- and post- AoA (Sandrey and Smith, 2003). This case study is introduced as it provides an example of a small agricultural exporting country that has benefited from the AoA. It was estimated that as a consequence of the UR agreement to lower tariff barriers, all New Zealand exporters, both agricultural and non-agricultural, could potentially be NZ$3.1 billion better off than they otherwise would have been over the period 19952004 without a successful conclusion to the round. Note that this analysis only reviewed markets in member countries of the WTO at the time of its inception after the UR, and not those in countries that have subsequently joined the WTO, or New Zealand's main trading partner Australia where an FTA with duty free access for all trade exists. It also excluded changes to tariffs in countries such as Chile that, like

New Zealand itself, unilaterally liberalised their tariff schedules much further than they were required to do so under the AoA.

In addition, using the best possible comprehensive sector-specific global computer models, the study estimated that the UR increased New Zealand agricultural export receipts by NZ$6.13 billion over the 1995–2004 period through greater market access using the TRQs in lamb and beef products and WTO members being less able to use trade-distorting export subsidies in the crucial dairy markets of the world. Therefore the overall estimate of UR gains was in excess of NZ$9 billion, most from the agricultural sector. Gains will continue to be generated long after this, as UR commitments cannot be reversed.

While there is not a one-for-one mapping between the agricultural sectors and policies in New Zealand and South Africa, there are enough similarities to draw some conclusions from the New Zealand experience that suggest its relevance. The main one is that after a comprehensive liberalisation a decade before South Africa's, New Zealand's unsubsidised agriculture was in a position to take advantage of the changed market conditions offered by the AoA. It also highlights that the pain from liberalisation occurs before the gain, and this is often one of the factors acting against global liberalisation. We do note, however, that while both countries are temperate climate agricultural exporters, the export product mix in the two countries is not quite similar and the New Zealand gains were largely in the dairy and meat sectors rather than in the common fruit sectors. Finally, there is little or nothing that can be drawn for the developing countries, in Africa specifically, from the experiences of a small, developed, export-oriented, agricultural country on the other side of the globe.

7. The African perspective

In evaluating the UR outcome for Africa after 10 years, the approach has been taken to look at the situation in two regions. The first is South Africa, a country whose agricultural sector is characterised by a mixture of a modern progressive ('white') sector operating alongside a significant subsistence ('black') sector, a dualistic and racially divided sector clearly resulting from decades of discrimination against the black community. Results of the UR are both more relevant to and more easily assessed for the white sector than the black subsistence sector. The other situation

in Africa is essentially a lumping together of the rest of the continent where, notwithstanding some pockets of a progressive sector in many countries agriculture is largely subsistence. As the Uruguay and associated Rounds were largely about market access in a less distorted trading environment the impacts for the rest of Africa from an offensive perspective are likely to have been limited, and from a defensive position as they were largely isolated from adjustment through either the relevance of the UR to their sector or the Special and Differential treatment (S&D) provisions exempting access-related tariff cuts to be made. These are of course sweeping generalisations, but, in addition, closer to South Africa we have the Southern African Customs Union (SACU) countries whose sectors in themselves vary considerably but are locked into South African adjustments via the common SACU tariff, notwithstanding the fact that they have lodged their own bound tariff rates with the WTO.

8. South Africa

Although the policies and the resultant institutional framework that was inherited from the apartheid era still heavily influence South African agriculture, there have been major changes over the last 10 years. These have included land reform programmes; the introduction of minimum wages and other employment conditions for farm workers; the deregulation of the Control Boards; substantial liberalisation of international trade; and the withdrawal of a large proportion of the farmer support services provided to commercial and small-scale farmers alike. There are two consequences of the comprehensive shifts in policy that are important: the change in the agricultural production portfolio of the country, and the shift in trade patterns.

Over the period 1965–67 to 2001–03, animal production (40 per cent) has maintained its relative share of total agricultural production, and given the nature of South Africa's agricultural resources with only some 17 per cent of the available agricultural land suitable for cultivation, this is to be expected. However, the relative share of different kinds of animal products has shifted over this period: the production and consumption of red meat has stagnated, while the production of poultry meat has increased considerably. Horticulture has increased its share of production by 10 percentage points to 27 per cent at the expense of field crops (33 per cent in the latter period from 43 per cent in the earlier one). As the production of virtually all

agricultural commodities has increased over the past couple of decades, this means that the production of horticultural products has, on average, increased at a faster than average rate.

One of the main reasons for the relatively faster growth in the production of horticultural products is the increase in exports of these products. This, in turn, has influenced the agricultural trade balance of the country. A number of important shifts can be identified from trade data:

- While agricultural exports have grown rapidly, they have declined as a share of total exports.
- At the same time the share of total agricultural output that is being exported has increased from a quarter in 1990 to almost a third in the 2000s.
- Exports of processed agricultural products have increased faster than exports of unprocessed agricultural products – the share of processed agricultural exports has increased from around half to around 60 per cent since the 1980s.
- Agricultural imports have grown faster than agricultural exports, more than doubling their share of total imports into the country from 2.6 per cent to 5.4 per cent over the past two decades. During this period, imports increased from 6.2 per cent of total agricultural output to almost a fifth (19.3 per cent) of output.
- As a result, import cover (the ratio of agricultural exports to agricultural imports, a measure of the ability of the agricultural sector to pay for its own imports) has declined drastically from 5.6:1 to 1.7:1, although the latter remains a healthy ratio.
- The main reason for the relatively rapid increase in imports is the emergence of animal feeds, especially poultry feed, as South Africa's main agricultural import item (resulting in Argentina being the single largest source of agricultural imports).

9. Impacts of the UR Agreement on agriculture

There are several different channels through which the AoA may have impacted upon the agricultural sector in South Africa. These include domestic policy (with tariff

policy as sub-set), and offshore market access conditions. With respect to domestic policy, these reforms have gone way beyond any changes that might have been mandated by the UR. While, of course, consistent with the spirit of the AoA, and having largely taken place over a time period that is similar to that under consideration in the 'WTO 10 years on analysis' (as was the case in New Zealand, the case study introduced above), they went beyond anything mandated by the AoA.

Indeed, the official WTO schedule on South Africa[7] reports:
As a result of the substantial inflation rate experienced by South Africa during the period under review, together with the marked reduction in the value of the South African rand over the same period and the widely fluctuating crop harvests as a result of the weather, the AMS has been calculated in real terms, in US dollar terms and in percentage terms. In all three cases the reduction from the base period to 1991 has been significant and well beyond the 20% reduction discipline. South Africa has also unilaterally undergone significant changes in agricultural policy in the spirit of the Uruguay Round as listed in Table 6. South Africa agrees to reduce its AMS by the agreed 20% over 6 years with the understanding that the factors indicated above are taken into consideration.

By 2001 the OECD-calculated PSE for South African agriculture had fallen to 4 per cent, a level the same as Australia's and far below the OECD average of around 30 per cent.[8]

Similarly for tariffs: During the 1990s South Africa fast-tracked the liberalisation of its (and SACUs) tariff schedule; from 1990 to 1999 the maximum rate fell from 1,389 per cent to 55 per cent, while the average (unweighted) rate fell from 27.5 per cent to 7.1 per cent over the same time. Within this band agricultural tariffs were a lesser 4.6 per cent unweighted and an even more insignificant 1.9 per cent weighted (OECD, 2005a). That these cuts are beyond anything mandated by the UR/WTO is confirmed by an analysis of reconciling the UR Schedule against the current South African (SACU) tariff schedule. In the first instance most of the agricultural bound tariffs are significantly below the base rates, and, more importantly, the actual

[7] [Online]. Available: www.wto.org.
[8] Recent changes to the value of the rand seem to have increased that level, however, with the most recent 2003 level at 10 per cent. Around two-thirds of this support is directed as just two products – sugar cane and maize, with both being export commodities.

applied MFN current rates in turn are significantly below the bound rates in most instances. Although an accurate one-for-one mapping is difficult, exceptions where the applied are similar to the bounds appear to be restricted to dairy and related products, eggs, honey, isolated vegetables lines, citrus fruits, liquorices and ginseng, cocoa and products, some bakery products, some hides and skins, and some minor natural fibres.

While South Africa has TRQs for a large range of products that include at least some components of meat, dairy, eggs, vegetables, dried fruits, grapes, tea and coffee, grains, oil seeds, vegetable oils, sugar, food preparations, wine and spirits, soybean meal, tobacco and cotton, an analysis of imports in these TRQs for the most recent 2004 year suggests they are not binding. MFN tariffs on most of the significant lines appear to be at or below the blanket 20 per cent AoA scheduled maximum rate for TRQs, and consequently many are filled several times over.

10. The Agreement on Agriculture impact on South African exports

Based upon this analysis, it is difficult to see where the AoA may have had any impact upon South African domestic agricultural policies. Did it have any influence upon exports, as was demonstrated to have been the case for its fellow Cairns Group member New Zealand? Ideally, as comprehensive an analysis as was applied to New Zealand's exports would provide the definitive answer to this, but such an analysis is extremely time-consuming. We have instead examined some indicators.

During 2004 exports of South African agricultural products (as defined by the WTO) totalled some US$3,577 million, and represented 7.8 per cent of total exports. While the US$ figure is subject to currency fluctuations, the percentage share figure is not; this 2004 figure was the lowest since a value of 7.5 per cent registered in 2000 (all others values over the last nine years since 1996 have consistently ranged between 8.8 per cent in 2001 to the 9.8 per cent high of 9.8 per cent. Since the dominant exports from South Africa are products from the mineral sector, products where the UR had virtually no impact, a sweeping generalisation could be made that the AoA may have had limited impact upon the export profile.

These global exports were dominated in 2004 by exports of fresh fruit (32.8%), beverages (20.6%), processed fruit and vegetables (8.5%) and sugar (6.9%). By

markets, these were the EU (46.8%), Japan (4.9%), the US (4.6%), and Mozambique (4.2%) in 2004. The relative shares for 1996 were 35.5, 8.7, 3.8 and 4.7 per cent for these markets respectively. Thus, the EU, while remaining the main market, has increased its dominance to nearly one half. While some exports may, in the future, face lower tariffs at the EU borders as a result of the Trade, Development and Cooperation Agreement (TDCA) trade agreement between the EU and South Africa, limited impact would have been apparent by 2004, as many of the negotiated access concessions would not have phased in by that time as the Generalised System of Preferences (GSP) access was superior to the TDCA until around this period (Kalaba et al., 2005).

South African exports of fresh fruit face a complex regime into the EU, where a seasonal tariff regime is coupled with TRQs, although the maximum tariffs for grapes, oranges and apples of 14, 16 and 9 per cent is not that high by EU standards, and these reduce further when seasonal variations and concessions are considered to 3, 6 and 2 per cent respectively. Other markets are also mainly low-tariff markets. Impacts from the AoA are hard to access, but these duties are lower than the EU bound rates and therefore not subjected to AoA tariff reductions in general.

Wine is a fast developing export from the Republic, with around 81 per cent of the exports currently directed to the EU where, under a bilateral agreement, there is a binding TRQ that allows access with zero duties. Out-of-quota exports enter at an average of around 6 per cent duty. The next most important destinations are the US (duty free) and Canada (2%). Thus, wines are not subjected to meaningful duties, and since the AoA did little or nothing to reduce these duties there were no gains from that agreement to South Africa.

Sugar is more complex. Although the sector is heavily protected domestically at domestic prices that are currently nearly double world prices[9], South Africa is an important global exporter.[10] During 2004 these exports went to a variety of destinations. African markets included Mozambique (17% of the total), Kenya (7%), Madagascar (5%) and even Mauritius (4%). The AoA would have done nothing to

[9] This has changed over the last couple of years, as in 1999–2000 the PSE was a much lower 15%, although imports remain protected by TRQs.
[10] Ranking 7th during the 2000–02 period with a 2.9% share, behind Brazil at 29%, EU, Thailand, Australia, Cuba and India but ahead of Mauritius in 11th place with 1%.

open these markets. Other markets included Japan (13%), Korea (10%), the US (4%) and the EU (2%). For the latter market South Africa has no access under the quota, and faces tariffs of 93 per cent for refined sugar. Japan's tariff is zero, while Korea maintains a minimal three per cent duty.

In summary, the AoA *per se* did little or nothing to assist the South African sugar sector, although the dispute settlement regime case as discussed above may have set in place a movement towards the freer global trade regime that should benefit the Republic notwithstanding its domestic protection. The OECD concurs with this judgment, and considers that the AoA had little substantive impact on world sugar markets, other than for export subsidies. At the conclusion of the Uruguay Round Agreement on Agriculture (URAA) implementation period in 2000 for OECD countries the world sugar trade continued to be distorted by average bound tariffs, special safeguard measures and TRQs tariff-quotas that are amongst the highest of all agricultural products. Although export subsidy use was disciplined by the AoA, market access for sugar into developed markets was essentially unchanged by the AoA (OECD, 2001).

Overall, there does not seem to be a compelling case to argue that the AoA cemented in significant economic gains as seemed to be the case in New Zealand. There are, of course, avenues that have not been explored, such as any gains from the reductions in export subsidies, but given the agricultural product mix it is not intuitively obvious where these gains may have come from.

11. The rest of Africa

Table 1 provides some insights into the importance of agricultural trade for SADC countries, and the SADC countries are used to proxy the implications of the AoA for the rest of Africa. The table, expressed in US dollars and for the 1997 and 2002 years, shows the main exports by HS2 chapters and provides an analysis of the percentage share held by South Africa to place the SADC members in perspective with South Africa as discussed above. Note that Fish (HS 03) has been included, and although not an agricultural product it is a natural resource product that has similar market access issues as the agricultural products. Also note that trade data

for individual members of SADC (excepting South Africa) is difficult to obtain and often unreliable. Thus, Table 1 and subsequent analysis must be treated with some caution. Finally, it has not been possible to obtain trade data for either Angola or the Democratic Republic of Congo.

Table 1: SADC Agriculture Exports, US$mill, 1997 & 2002

			% SADC Agr Exp		% from South Africa	
	1997	**2002**	**1997**	**2002**	**1997**	**2002**
Sugar	$680m	$704m	17%	14%	43%	34%
Fruit	649	667	16	14	89	88
Beverages	357	518	9	11	99.5	88
Fish	268	484	7	10	77	60
Tobacco	177	399	4	8	46	22
Cotton	259	312	6	6	17	13
Proc vege	300	268	7	6	82	32
Hides	247	214	6	4	96	81
Cereals	292	206	7	4	97	79
Coffee	173	175	4	4	18	19
Wool	224	174	6	4	96	99
Others	625	965	16	20	86	60

Source: World Trade Atlas (South Africa) and TIPS (SADC)

To gain more of a perspective on the aggregate trade data shown in Table 1, Table 2 details some of the main features that make up the aggregate data. Again, note the caution *re* the accuracy of the data, and that given the individual data has been expressed in local currency this table does not give a perspective on the relative values of these exports. The bottom row of Table 2 shows the average component in the export trade represented by agricultural (and fisheries) products from SADC members. These vary from 5 per cent from Namibia through to 77 per cent in the case of Malawi. The individual cells show where exports from a SADC country are a significant percentage of the total exports from that country (for example, tobacco is 49.5 per cent of the exports from Malawi).

Table 2: Relative Importance of Agr Exports to SADC countries, most recent year data, % of Total exports.

	Lesot	Malaw	Maurit	Mozm	Namib	Swazi	Tanz	Zam	Zim
Sugar		23.2	17.4	1.2		7.9**	0.8	3.5	1.8
Fruit							4.1		
Beverages	5.7*		0.5		0.6	1.0			0.5
Fish			2.2	7.3	2.9		9.8		
Tobacco		49.5		1.3			4.5	1.9	10.2
Cotton	0.5*	1.2	2.0	2.4			4.6	5.1	5.1
Cereals							1.9	0.7	
Coffee							7.5	1.1	0.6
Total Agr	9.5	77.2	29.3	25.7	5.0	13.5	44.5	16.8	18.9

* For Lesotho, beverages include piped water, and cotton is textiles.

** For Swaziland, the major export was drink concentrates (in HS 33) for Coca-Cola, a non-agricultural product but one based on sugar.

Set against this background, what then have been the implications of the UR/WTO AoA for these countries? We have discussed fresh fruit and beverages with respect to South Africa above, and concluded that the AoA did little for these products. Similarly, wool was discussed in general with respect to the ABARE research, and it was shown that there were few barriers to trade in this commodity (not shown is the New Zealand research which concluded that the AoA did little or nothing either, as the barriers were already very low or zero). This leaves sugar, tobacco, cotton, coffee/tea and fish as products of interest.

Tariffs for fish (defined as HS 03 only) remain complex for these products into the main market of the EU in particular (67%, with another 6% to both South Africa and the US and 5.4% to Japan) and difficulties are being experienced in negotiation on preferential access for fish into that market; globally, subsidies to fisheries products remain a major issue despite the general WTO agreement on industrial subsidies. Thus, although the UR did little for fishery access, the Doha Development Round and a movement on EU rules of origin and subsidies in particular, may do more.

Sugar has been discussed above, with the general picture emerging that the AoA did little directly for sugar, but indirectly contributing to both setting up the framework for

a substantial liberalisation of production and trade in the future and augmenting this through the dispute settlement mechanism. The disruptive polices of the EU, the US and Japan cause most of the problems by heavily subsidising their producers. In 2000 the world reference price for sugar was around US$ 220 per tonne, but the US, EU and Japanese producer prices were around $410, $510 and $800 per tonne respectively. These levels of protection are made possible by domestic support in all three areas, limited quota access and very high out-of-quota tariffs to maintain these regimes. Accentuating the problems for competitive producers are the export subsidies that the EU uses to sell surpluses onto remaining free-world markets.

The Australian Centre for International Economics (CIE) estimates the value of these economic rents to have been almost one billion US dollars annually: $300-million from the US annually and $560 million from the EU. While there are no gains to Southern African countries into the US, Mauritius (nearly $200-million), Swaziland ($75-million), and Zimbabwe ($25 million) are three of the six main beneficiaries from access into the EU market (Centre for International Economics, 2002). Simulations of the liberalisation of production and trade show the predictable results of reduced production and higher consumption in the protected markets as prices are reduced, balanced by increased global prices, production and trade from the largely developing countries in response, although the extent of these changes varies. A study by the OECD confirmed this, and estimated that South Africa production would increase by around 40 per cent with exports doubling while ACP countries as a group reduced production by around 25 per cent and halved exports in response to world price increases of around 20 per cent (Trade Directorate, OECD, 2004). Consequently, African preference and non-preference exporter countries are pitted against one another, with those losing preference rents feeling aggrieved. The WTO challenge to the EU sugar regime as a result of the AoA dispute settlement process and not the AoA *per se* has set this battle in motion.

Table 2 shows that sugar is crucial to Malawi, Mauritius and Swaziland (along with its processed drink concentrates[11]). Not shown is that of the SADC 2001 exports, 37.4 per cent were from South Africa, 30.9 per cent from Mauritius, and 10.5 per cent

[11] Analysis of the non-SACU global exports from the BLNS countries combined shows that these soft drink concentrates (HS 330210) were the major single export during 2004. While HS 3301 is an agricultural product, HS 3302 is not. The main destinations were, in order, New Zealand, Australia and Korea.

from Swaziland (with Zimbabwe, Malawi and Zambia contributing from 4.7% to 7.6% each). The major markets in 2001 were the EU (39.2%), Africa (31.8%, with around half of this intra-SACU trade), Asia (21.2%) and the US (5.3%).

Coffee is a classic example of an agricultural product whose long-term market prices have fallen dramatically over the last two decades in spite of increasing demand. This has created the so-called 'coffee paradox', whereby a 'coffee boom' in consuming countries has existed alongside a 'coffee crisis' in producing countries. This is because the coffee sold in the international market and the coffee sold as a final product to the consumer are becoming increasingly differentiated products, with the final value added by selling symbolic and service quality attributes rather than coffee *per se* (Daviron & Ponte, 2005). Neither these woes nor any possible solution can be linked to the AoA, as tariffs are generally low (duties into the US were zero even before the AoA, and those into the EU are low). Table 2 shows that coffee (including tea) is an important export for Malawi and Tanzania, while not shown is that Tanzania exported 50.5 per cent of the total (including processed coffee and tea), Malawi 22.2 per cent and South Africa 16.5 per cent. The major market is the EU (53.8%) followed by a diverse selection that includes Africa (Kenya 9.6%, South Africa[12] 7.8% and Mozambique 3.3%), Japan (6.7%) and the US (2.5%).

Around six million tonnes of tobacco are produced globally each year in 120 countries, with 80 per cent of this coming from developing countries. Brazil, China, India, Indonesia, the US and Zimbabwe, the top six global producers, produce 70 per cent of the total crop. Malawi (25.2%) and South Africa (13.4%) are ranked second and third behind Zimbabwe (56.7%) for SADC exporters. Almost all developed countries levy very high taxes on tobacco products for health reasons, but as this is generally in the form of excise duties, which apply equally to foreign and domestic products, they are WTO compliant although they are often at levels that exceed the value of the product itself by a wide margin. There are some AoA tariff quotas applying to tobacco products on imports into Australia, Bulgaria, Costa Rica, Guatemala, Hungary, Malaysia, Poland, Romania, El Salvador, Thailand, the US and South Africa itself. The EU is again the major market, followed by China (10%) and

[12] This, coupled with the intra-SACU exports to South Africa, may reflect further processing of the raw product before re-exporting.

SADC itself (9.8%). After these comes a disperse destination listing, including Japan, the US and Egypt.

Cotton emerged as a major flashpoint at the WTO trade summit in Cancun, Mexico, as four West African countries namely Benin, Burkina Faso, Chad and Mali called for an end to cotton subsidies in rich countries. They also called for compensation to cover economic losses caused by subsidies. In 2001–2002 US cotton had received farm subsidies of $3.9-billion, which exceeded the entire gross domestic product of Burkina Faso or the entire US aid budget for Africa. This challenge dramatically highlighted both the problems that African farmers in particular face in a distorted agricultural market, and how the balance of power in the WTO is swinging away from rich countries to a more representative view of the entire WTO membership. It also highlights that the AoA did precious little for African cotton producers, except, as argued in this paper, set the scene for dramatic change. Meanwhile, world cotton prices have fallen by half since the mid-1990s, and adjusted for inflation, they are now lower than at any time since the Great Depression of the 1930s; and the recent WTO rulings have stated that many of the agricultural support measures provided to US and EU farmers in the cotton and sugar sub-sectors were against WTO regulations, encouraged overproduction and artificially lowered international prices with harmful effects on developing country producers.

Within SADC, while cotton is less important it still accounts for around five per cent of the agricultural exports from some countries. During 2001 the main exporters by value were Zimbabwe (38.6% of the total from SADC), Mauritius (19.1%), South Africa (13.8%), Zambia (13.5%) and Tanzania (12.4%). Again, note that these figures may contain some processed cotton yarn. The main markets were Africa itself (including SADC at 30.3%, and within this South Africa at 18.9%), the EU (28.6% and duty-free), and Thailand (8.1% and also duty free).

12. Overall conclusions and the way forward for Africa

Critics of the WTO can rightly claim, as this paper has shown, that the AoA did very little for African agriculture. The main items of export interest were either unaffected, or, as was more commonly the case for the sensitive sectors, the developed countries largely avoided having to make meaningful policy changes for these

products. This has led to a disillusionment bordering on resentment within many African circles about the WTO in general, and especially so when actual or potential economic rents face reductions from preference erosion. The glass is half empty and draining away!

This paper argues that those critics, while at face value having a valid point of view, miss the bigger picture. That picture is that the AoA set up the mechanism for comprehensive reform of global agricultural production and trade, and there is a very real (but not guaranteed) prospect of that happening under the auspices of the Doha Development Round of the WTO. This is because (a) agriculture was brought substantially into the GATT for the first time and mechanisms were set in place to address the problems, and (b) the use of the WTO dispute settlement process, while it may have brought mixed blessings to some countries in Africa in commodities such as bananas and sugar, has complemented the original AoA framework in highlighting many issues. The real problem in many ways is that half-baked reforms fail to produce benefits, yet they inflict much of the pain. The journey must be completed in order for these gains to materialise, and the AoA was a genuine start for agriculture upon that journey following false ones in the earlier GATT Rounds that concentrated upon manufactured products. Thus, the glass is half full.

13. The way forward

The message that one plus one is greater than two must be emphasised with respect to economic and trade liberalisation. It is certainly true for African trade policies and the role of Africa in the Doha Development Round (DDA) of the WTO. Two points are clear from this. The first is that the DDA is important for Africa. The second is that Africa is important for the DDA. This shows how far the WTO has moved since the UR AoA, an outcome that largely bypassed Africa.

A strong and consistent message from quantitative analysis of the economic benefits of multilateral trade reform is that developing countries gain from such liberalisation, and, more importantly, that these gains are increased when developing countries become active participants in such reforms. Certainly, the actual numbers may be challenged, but not the directions and relative magnitudes of these numbers. The

developed countries recognise that Special and Differential (S&D) treatment is essential to ensure a fair outcome for all – but S&D treatment for whom?

It is not a blanket to throw over oneself to justify doing nothing, but a mechanism to recognise that differences exist between the WTO members, and that many countries need time and assistance to adjust to reforms. It is a provision accorded to the developing members, but at the same time these members must recognise that it is a transition mechanism. A way has to be found for a self-correcting approach to recognition on a country-by-country basis that there are differences between the developing members that are as large as or larger than those that exist between the developed and developing members of the WTO. Part of the answer may be to build into future S&D provisions, criteria that would automatically determine eligibility. So, 10 years later, were the S&D provisions of the AoA a success? They absolved Africa from making any real changes, but was this in Africa's best interests?

This inevitably led to the vexatious issue of preferences. Yes, they are important to Africa, as the region has benefited and continues to benefit from preferential access into the EU and the US in particular. But analysis highlights two points. The first is that, for whatever reason, full advantage has not been taken of these preferences (these reasons include supply-side constraints or non-tariff measures inhibiting access). The second point is that the proliferation of free trade agreements (FTAs) globally is eroding these preferences. The positive message is that the region must move from claiming preferences as an inalienable right to demanding greater market access and less domestic protection from the OECD members through the Doha process, and the AoA set the basis for this. Cotton and sugar are cases in point, but they must not be isolated for special treatment at the expense of other products.

Meanwhile, the real costs to Africa of infrastructure constraints are clear. When viewed in an effective rate of protection framework, these costs act as a major constraint to exports. This emphasises the importance of non-tariff measures in particular, and while many of these measures may be at foreign borders, domestic problems often add significantly to exporter costs.

In the final analysis, for a variety of reasons, Africa has fallen behind in welfare improvements. It is true that the AoA largely bypassed the continent, but conversely,

Africa must actively and positively engage in the global process and face domestic reforms. But at the same time, the developed OECD markets must be further opened to provide a catalyst for export-led growth.

Meanwhile, as a small developing food-importing country within Africa, Lesotho, for example, remains a strong supporter of the WTO Doha agenda on agriculture. It is generally in support of the progressive positions being taken for the elimination of all forms of export subsidies and tighter criteria on food aid provided they leave room for Lesotho and other developing countries to continue to use flexible conditions in times of genuine cases of emergency food aid. It also welcomes the proposals for steep tariff cuts but reinforces the need to exempt Least Developed Countries (LDCs) from these cuts. It is, however, concerned that the level of special products as proposed by the EU leaves too much space for exemptions from meaningful cuts in too many products of interest to developing countries. It sees achieving the highest level of support for the concept of duty-free and quota-free market access among developing countries as fundamental if improvements are to be achieved for LDCs. This access should be granted and implemented immediately, on a secure, long-term and predictable basis with no restrictive measures introduced. These positions emphasise that there is support for the WTO process in Africa, and add to the hope that the AoA set the framework for meaningful reforms from the Doha Development Round.

14. Post-Hong Kong endnote

The rhetoric and anger have subsided; the Captains and the Kings have departed. What is the assessment of the WTO's December 2005 Hong Kong Ministerial? The half-full-glass view is that the process is still on track, and the WTO lives to fight another day – an outcome that was not actually guaranteed pre-Hong Hong. These meetings were therefore not the famous train-wreck of Cancun. The disquietening news is that little was actually achieved beyond this, and this will give support to the half-empty-glass view.

Interpreting the official Ministerial declaration[13] is an art, but it is being argued that Hong Kong has somewhat succeeded in two specific issues. Firstly, developed

[13][Online]. Available: http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm

countries were to eliminate cotton export subsidies in 2006, although this may not happen if the overall agricultural negotiations are not concluded by the end of 2006 and, more crucially, the real problem of US (in particular) production subsidies is not being addressed ahead of an overall agreement. Secondly, a decision has been made to complete the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by end of 2013, although again modalities are still to be negotiated. Other declarations really amounted to very little that is 'bankable', and there are many outstanding issues yet to be resolved.

A feature of Hong Kong was the way in which trade modellers gained a broader acceptance, as, somewhat perversely, those opposed to reforms are now citing the more recent analytical research as really doing nothing to further the cause of those promoting research! A good place to review this change in research gains is the paper by Frank Ackerman entitled 'The Shrinking Gains from Trade: A Critical Assessment of Doha Round Projections' (Ackerman, 2005). This work details how the gains are becoming both smaller and skewed towards the developed countries rather than promoting poverty alleviation in the developing world. In another work widely cited at Hong Kong the highly respected World Bank team of Kym Anderson, and Tom Hertel (Anderson & Martin 2005), are revising their benefits downwards to a miserly $3.13 per head in the developing world (in contrast to the $79.04 per head in the developed world). Note that these gains are not repeatable gains, but rather a once-only step upwards. Furthermore, for the southern African region this actually overstates the gains in some countries, as the loss of tariff revenue is not fully factored in.

Why are the gains shrinking? Part of this is that some of the assumptions are being revisited (employment, for example), while the newer version of the Global Trade Analysis Project (GTAP) model enables analysts to use better trade and tariff data and incorporate both the EU expansion and China's WTO accession into their now-updated base work. These combinations are making a huge difference. Some of the more optimistic models (as discussed by Ackerman) employ what is known as dynamic and economies-of-scale assumptions that extend the scope and range of these gains; and these assumptions are rightly viewed with some scepticism. More

importantly, perhaps from a developing country perspective, is that the latest models are able to incorporate both loss of tariff preference and loss of tariff revenues into their basic framework, and for many countries this is crucial. Added to this is the realisation that 'free trade' is an overly optimistic and somewhat mercurial concept, and therefore modellers may be better served by assuming a more realistic outcome to assist policy makers.

References

Ackerman, F. 2005. *The shrinking Gains fro Trade: A Critical Assessment of Doha Round Projections.* Global Development and Environment Institute Working Paper No. 05-01, Tufts University, October 2005.

Anderson, K. & Martin, W. (Eds.). 2005, *Agricultural Trade reform & the Doha Development Agenda.*

Centre for International Economics. 2002. *Targets for OECD sugar market liberalisation*. Canberra and Sydney, October 2002.

Daviron, B. & Ponte, S. 2005. *The coffee paradox: Global markets, commodity trade and the elusive promise of development*. [Online]. Available: www.tralac.org.

Hertel, T. & Winters, A. (Eds). 2005. *Putting Development Back into the Doha Agenda*. [Online]. Available: http://www.mfat.govt.nz/foreign/eco/uruguayround/uruguayindex.html.

Jacenko, A., Podbury, T., Shaw, I., Nair, R. & Gunasekera, D. 2005. Agricultural trade: improving market access through the WTO. *AustralianCommodities,* 12(3), September Quarter 2005.

Kalaba, M., Sandrey, R. & Van Seventer, D.E. 2005. *Analysis of Trade Between South African and the EU and a preliminary attempt to examine the impact of the EU – SA FTA on trade*. TIPS Internal paper, 2005.

OECD. 2005. *Agricultural Policies in OECD Countries: Monitoring and Evaluation 2005.* From the WTO Market Access for Agricultural Goods. [Online]. Available: http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto01/wto1_45.htm.

OECD. 2001. *Market Effects of Crop Support Measures*. Paris: OECD.

OECD. 2005. *Review of Agricultural Policies in South Africa*. 2005 Draft version.

Sandrey, R. & Reynolds, R. (Eds.). 1990. *Farming Without Subsidies*. MAF Policy Services, 1990.

Sandrey, R. & Smith, H. 2003. *An Assessment of the Gains to New Zealand from the Uruguay Round of Trade Negotiations*. Prepared by the Ministry of Agriculture and Forestry and the Ministry of Foreign Affairs and Trade, June 2003. [Online]. Available: http://www.mfat.govt.nz/foreign/eco/uruguayround/uruguayindex.html.

Trade Directorate, OECD. 2004. *An Analysis of Sugar Policy Reform and Trade Liberalisation*. Paris: OECD.

WTO Annual reports: [online]. Available: http://www.wto.org.

Chapter 5

African Member States and the Negotiations on Dispute Settlement Reform in the World Trade Organization

by Clement Ng'ong'ola[1]

1. Introduction and background

Paragraph 30 of the 2001 Doha Ministerial Declaration authorised negotiations on the WTO's dispute settlement process in the following manner (WTO, 2001):

> We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding (DSU). The negotiations should be based on work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter.

It would appear from this that the negotiations on DSU reform were originally intended as resumption or continuation of ongoing work,[2] and it was expected that they would be concluded fairly quickly. The outcome was not made contingent on progress and agreement on other negotiating issues on the Doha Work programme, under the single undertaking principle. The DSU negotiations were also organised differently. They were conducted in Geneva, in a special session of the Dispute Settlement Body (DSB), a body that nevertheless reported to a Trade Negotiations Committee (TNC) set up for the Doha Work Programme, answerable or reporting to the General Council. It would also appear that the rhythm of Doha Work Programme somehow influenced the rhythm of the negotiations on DSU reform. Deadlines in the DSU negotiations came and went together with other deadlines for the Doha Work Programme. After the May 2003 deadline, the General Council in July 2003 extended the timeline to May 2004. Therefore at the Cancun Ministerial in September 2003, Ministers could only note the progress that had been made so far, and direct the

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[2] Review of the DSU was initially authorised by a Decision of 15 December 1993, which set a deadline of 4 years from the entry into force of the WTO Agreement. The review commenced in 1997. In December 1998 the deadline was extended from 1 January 1999 to 31 July 1999. See minutes of the DSB meeting held on 8 December 1998, WT/DSB/M52, 3 February 1999.

negotiations to continue with the aim of concluding not later than May 2004 (WTO 2003b). After this deadline had also passed, the so-called July Package authorised continuation of the negotiations, but conspicuously refrained from setting another deadline (WTO 2004). At the 6th Hong Kong Ministerial in December 2005, Ministers again noted the progress so far made, and this time urged continuation of the negotiations 'towards a rapid conclusion' (WTO 2005). A conclusion is not yet in sight.

The period from the commencement of the process—April 2002—to the failed Cancun Ministerial—September 2003—can be regarded as the first phase of the negotiations. The Special Session of the DSB received and considered motivated proposals and suggested textual reformulations from Members on all but three of the 27 Articles of the DSU (WTO, DSB, 2003d).[3] Members could not agree to limit the scope of the negotiations to procedural aspects identified in earlier negotiations as requiring clarification and improvement (WTO, DSB, 2003e). Some of the proposals suggested fundamental, unheralded reforms, which, to other Members appeared unnecessary, given the relatively short, but generally successful period that the DSU had been in operation. The original May 2003 deadline expired, and the Cancun Ministerial also passed with the Chair of the special session struggling to compile and to garner consensus over a consolidated text of proposed amendments. From the Cancun Ministerial to the end of the second deadline (May 2004), in addition to consideration of existing proposals and textual reformulations, the DSB received and included as part of the negotiating agenda some fresh proposals and textual reformulations. After May 2004, the focus was on refinement of proposals and textual reformulations on issues identified during the earlier phases, on which it was initially thought some convergence of views was likely (WTO, DSB, 2005b). The issues initially included remand, sequencing and post-retaliation, but they now also include third party rights, flexibility and member control of dispute settlement processes, panel composition, time savings, transparency and, of course, special and differential treatment of developing countries. A convergence of views on all these issues is not likely soon. The negotiations during the current phase are also following what is described as a bottom–up approach. The process is led and driven by members,

[3] The provisions of the DSU not included in this compilation and thus not directly covered by the reform proposals are Article 2, 20 and 26.

meeting mostly in informal sessions, with the hope of developing a convergence of proposals that would then be formally presented in the special session of the DSB. It cannot be discounted that there will be further delays and dissension in the special session when proposals formulated in informal meetings are formally tabled. The DSU negotiations therefore have the potential of being concluded rapidly, as the revised mandate now have requirements, or is spinning on, even beyond the conclusion of Doha Negotiations.

As on several other issues on the Doha Work Programme of particular concern to them, African Member States have made spirited contributions in the DSU negotiations. It is now widely accepted that an effective and efficient dispute settlement mechanism is especially important for weak and small states lacking the wherewithal to ensure protection and vindication of their rights through the projection of economic or political might (Hoekman and Kostecki, 2001) Almost all the African member states qualify as such weak or small states requiring such protection under the DSU. Yet African members are not among the frequent or regular users of the DSU mechanism. Developing countries in Asia and Latin America, in contrast, are among some of the regular and adept users of the mechanism, and have featured prominently, as main parties or third parties, in most of the high profile precedent setting disputes resolved to date.[4] African countries have featured mainly as third parties, and essentially to defend or prevent the corrosion of preferential trading rights.[5] The main challenge for African Member States in the negotiations is to propose or support reforms or clarifications with the prospect of improving 'offensive' African participation in WTO dispute settlement. This paper interrogates, from this perspective, some of the contributions and proposals made in the earlier phases of

[4] See, for example, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS/2/AB/R, 29 April 1996, involving Brazil and Venezuela as complainants; *EC – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, involving Ecuador, Guatemala, Honduras and Mexico, and the United States, as complainants; *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, involving India, Malaysia, Pakistan and Thailand as complainants; and *EC – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, 7 April 2004, involving India as the complainant.

[5] WTO statistics in September 2002 indicated the most frequent users of the system at the appellate stage among developing countries were: Brazil (7 Appeals); India (7 appeals); Korea (4 appeals); Mexico (3 appeals); Argentina, Chile, Guatemala, Malaysia, Pakistan and Thailand, (2 appeals each). Egypt and South Africa are the African countries that have participated as main parties (respondents). The African countries that have participated as third participants in appellate review proceedings, include: Cameroon, Ghana, Ivory Coast, Nigeria, Senegal, Zimbabwe, Mauritius, Benin, Chad, Kenya, Malawi, Swaziland and Tanzania. The participation by Benin and Chad in *US – Subsidies on Up*land , WT/DS/265/AB/R, 28 April 2005, could be described as offensive, in that they supported the case made by the complainant, Brazil.

the negotiations by Groups of African Members States.[6] It also suggests positions which African Members should adopt on the issues or areas on which convergence is likely to emerge in the closing phases of the negotiations.

2. Salient and distinctive features of WTO dispute settlement.

An assessment of the DSU negotiations must, necessarily, be preceded by a synopsis of the distinctive features and the main stages of the WTO dispute settlement process. Most of the distinctive features relevant to this discussion can be discerned from Articles 1 to 3 of the DSU, on coverage and application, administration, and general provisions. It is apparent from these provisions that the DSU establishes an 'inter-governmental', mandatory and 'quasi-judicial' process. It is an improvement and an elaboration of dispute settlement principles and procedures applied under the General Agreement on Tariffs and Trade (GATT) of 1947. The core underlying objective of the process is to protect and preserve the balance of carefully negotiated rights and obligations of Members, preferably through negotiated as opposed to litigated or adjudicated solutions.

2.1 An inter-governmental, mandatory and quasi-judicial process

WTO dispute settlement can be described as 'inter-governmental' partly because the DSU, according to Article 1.1, can only be invoked by WTO Members in disputes arising from or relating to the 'covered agreements. These are the Agreement Establishing the WTO and related texts and instruments referred to in its annexes, which WTO Members are either compelled or given a choice to adopt and apply as a pre-condition for WTO Membership. Only the Members of the WTO are party to the covered agreements and are the primary bearers of the rights and obligations in those agreements.

Although the rules and disciplines in the covered agreements obviously affect non-state actors, they cannot access the dispute settlement mechanism directly. They

[6] The proposals interrogated in this work were submitted by the African Group, a coalition of mostly African least developed members (the LDC Group), and a group of developing countries that included two African states, Tanzania and Zimbabwe. See: WTO, DSB Special Session, Proposal by the African Group, TN/DS/W/15, 25 September 2002, and Text for the African Group Proposals, TN/DS/W/42, 24 January 2003; WTO, DSB, Special Session, Proposal by the LDC Group, TN/DS/W/17, 9 October 2002, and Text for LDC Proposal on Dispute Settlement, TN/DS/W/37, 22 January 2003; and WTO, DSB Special Session, Proposals on the DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W18, 7 October 2002, and TN/DS/W/19, 9 October 2002.

must go through Member States. Each WTO Member thus necessarily acts as a filter of disputes involving its 'traders' and other parties. It follows that frequency of resort to the DSU may depend on the type of relationship obtaining in each Member State between Government and traders or parties affected by violations of the covered agreements. The extent to which such traders and other interested non-governmental actors should be allowed to intercede or to contribute more directly in the settlement of particular disputes is one of the controversial issues in the DSU negotiations.

For WTO Members, the DSU process can also be described as 'compulsory' or 'mandatory', partly because Article 23 of the DSU suggests that it is the only, or the first, mechanism to which WTO Members must have recourse when they seek redress for infringements of their rights under the covered agreements. The process is also compulsory because the party against which a complaint is lodged is not required to give consent to the commencement of proceedings. It must by virtue of WTO membership engage in the process and attempt to respond to the complaint against it. The DSU can in this respect be compared or contrasted with other mechanisms for settlement of disputes in public international law, which can only be invoked if the defending party agrees to submit to the jurisdiction of the mechanism.[7]

The WTO dispute settlement process can be described as 'quasi-judicial' partly because of the political influence likely to be exerted over the process where disputes are channelled through governments of the Member States. But this characterisation primarily stems from the arrangements provided for the administration of the process. Article 2 of the DSU establishes the DSB and gives it the authority to supervise and oversee the various stages of the process, from the establishment of panels, adoption of panel and Appellate Body decisions, surveillance of the implementation of adopted decisions, to authorisation of the imposition of retaliatory measures. The General Council of the WTO, composed of representatives of all Members States, in fact convenes as appropriate to discharge the functions of the DSB. In this way, WTO Members, through their representatives in Geneva, would appear to wield enormous powers over the disposal of disputes, which probably politicians or

[7] See, for example, Article 36(2) of the Statute of the International Court of Justice.

legislators in most domestic legal systems governed by liberal democratic constitutions would not be allowed to have.

The ability of WTO Members, through their representatives in Geneva, to influence the outcome of a dispute is however mitigated or controlled by some ingenious rules on decision taking in the DSB. As might be well known, political bodies in the WTO generally adhere to the practice of taking critical decisions by consensus, or by weighted majority voting if consensus cannot be established.[8] In the DSB, the 'negative or reverse consensus' rule is prescribed for the taking of decisions relating to the establishment of panels, adoption of panel and Appellate Body reports, and authorisation of retaliatory measures. This rule requires that proposals tabled before the DSB on these issues must be accepted and adopted, 'unless the DSB decides by consensus not to do so.'[9] It is difficult to secure consensus to reject proposals on such issues, because the party that proffered the proposal or succeeded in the dispute settlement process is not likely to go along. Thus, key decisions in WTO dispute settlement are routinely or automatically adopted in the DSB, notwithstanding that many Members would have voiced their displeasure with the outcome in their deliberations.

2.2 Principles of GATT 1947

In Article 3.1 of the DSU, WTO Members 'affirm their adherence to the principles for the management of disputes applied under Articles XXII and XXIII of GATT 1947', as elaborated and modified by the DSU. Articles XXII and XXIII of GATT 1947 basically provided for the settlement of disputes through consultations, in the first instance, and through institutional determination if consultations failed to yield a satisfactory adjustment of the matter within a reasonable time. These provisions also envisaged that a dispute could arise and be entertained if a violation of GATT obligations by one party caused 'the nullification or impairment' of another party's benefits, or if there was 'nullification or impairment' of benefits not necessarily attributable to violation of GATT obligations. The GATT system, in other words, envisaged that a dispute could arise from a 'violation complaint' as well from as a 'non-violation complaint'. It is somewhat odd that a party could be called upon to answer a complaint where its

[8] Article IX:1 of the WTO Agreement.
[9] Articles 6.1, 16.4, 17.4 and 22.6 of the DSU.

conduct had not amounted to breach or violation of its treaty obligations. This oddity, the quaint terminology of 'nullification and impairment' of benefits, and the accent placed on consultations or negotiations, as opposed to institutional resolution of a dispute, are by virtue of Article 3.1 of the DSU notable elements of WTO dispute settlement.

2.3 Preservation of negotiated rights and obligations

From a number of the 'General Provisions' in Article 3, it is apparent that the core objective of WTO dispute settlement is the preservation of the carefully negotiated rights and obligations of Members reflected in the covered agreements. The process 'cannot add to or diminish the rights and obligations provided in the covered agreements'. Disputes must be settled promptly, in accordance with the rights and obligations in the covered agreements; and 'all solutions' must be consistent with the covered agreements and 'shall not nullify or impair benefits accruing to any Member under those agreements'.

The most remarkable of the general provisions on this theme is Article 3.9. It states that the DSU provisions 'are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement'. Article IX:2 of the WTO Agreement confirms that the Ministerial Conference and the General Council 'shall have the exclusive authority to adopt interpretations' of the WTO Agreement and the covered agreements. It would thus appear that political organs in the WTO have the power to provide legal interpretations that are more authoritative than those of judicial or dispute settlement organs.

2.4 Preference for negotiated solutions

Some of the other 'General Provisions in Article 3 reiterate the preference in WTO dispute settlement for negotiated as opposed to adjudicated solutions, which was also a hallmark of GATT dispute settlement. Paragraph 7, the most notable provision in this regard, stipulates, first, that prior to initiating proceedings each Member must exercise its own judgement as to whether such action would be fruitful. If there must be action, the aim should be to secure a positive solution, preferably 'a mutually agreed solution consistent with the covered agreements'. In the absence of a

mutually agreed solution the first objective should be withdrawal of measures violating the covered agreements. The remedy of compensation should be sought or awarded only if is not practicable to withdraw an offending measure immediately, and only as a temporary remedy, pending ultimate withdrawal of the offending measure. If compensation does not induce compliance with the covered agreements, the remedy of last resort shall be retaliation, through the suspension of the application of concessions or other obligations by the succeeding party. The DSU is different from many other domestic and international dispute settlement arrangements in that it does not provide for reparations for losses occasioned by violating measures, through monetary compensation or damages. Paragraph 10 of Article 3 finally suggests that use of the dispute settlement procedures should not be intended or considered as contentious acts. Members must engage in the procedures in good faith, and complaints and counter-complaints in regard to distinct matters should not be linked.

2.5 Stages in the WTO Dispute Settlement Process

Some of the salient and distinctive features highlighted above entail several distinct phases that WTO disputes have to pursue. Three main phases are discernible. The first phase involves the search for a negotiated solution, through consultations or recourse to good offices, conciliation or mediation. The second phase involves adjudication or formal determination of violation of obligations or nullification or impairment of benefits. This is conducted by a panel in the first instance, and by an Appellate Body on appeal. The third phase is concerned with implementation of the decision of the adjudicating body. This involves adoption of the decision by the DSB, determining the implementation period, and surveillance of the implementation by the DSB. The process may also involve, as noted above, negotiation of compensation, if implementation is delayed, and, as a remedy of last resort, retaliation by the complaining party. This may require further recourse to the following modes of dispute settlement: arbitration, for purposes of determining the implementation period; reference to a panel to assess measures taken in compliance with the decision; and arbitration for the purpose of determining appropriate levels of retaliation to be authorised.

This complex process takes cognisance of the fact that this is likely to be a delicate matter for the concerned Member, requiring it to take legislative or executive action on issues on which national sovereignty may be regarded as inviolable in its domestic political environment. This is also reflected in the timelines suggested for the implementation phase of the DSU process. Prompt disposal of disputes is one of the objectives or general principles of the DSU, but the timelines suggested for each stage of the process must also be realistic. It is not feasible to hurriedly dispose of and settle disputes in this complex area of international economic relations.

3. Negotiating issues and African contributions

The DSU negotiations commenced with a detailed submission by the European Communities (EC) (WTO, DSB. 2002a). Many of the other submissions during the first phase of the deliberations were elaborations, reactions and counter-proposals to the clarifications and improvements suggested by the EC. The negotiating issues emerging from the various submissions and proposals can be related to some of the salient features and main phases of WTO dispute settlement highlighted above.

3.1 Consultations

As indicated above, WTO disputes settlement must commence with the holding of consultations between concerned Members. There must be an attempt at consultations before further action is taken under the DSU. It is notable that only an attempt at consultations is required. It is not required that consultations must be adequate, or of the type capable of producing a positive result. It is also notable that consultations are a private and confidential matter, and without prejudice to the rights of any Member in any further proceedings. Consultations do not produce a legally binding or enforceable decision. The DSB, although notified of the process, is also not involved.

The negotiating issues on which notable contributions have been made by African Members include the place where consultations should be conducted, time frames, and participation by interested third parties.

The assumption, it would appear, has always been that consultations should be held in Geneva, the seat of the WTO and its dispute settlement organs. The Least

Developed Country (LDC) Group has proposed in the negotiations that consultations could be held in the capital of the LDC Member against which a complaint has been lodged. Indeed, since this is private matter in which the DSB is not intimately involved, a better clarification would be that consultations could be held wherever it might be convenient for all the parties involved.

Consultations must be attempted and concluded within a maximum period of 60 days after the receipt of the original request. Proposals to reduce this period to 30 days would appear to be problematic for developing and LDC Members, including African countries, seeking flexible and extended time frames for this and other stages of the DSU process. As will be confirmed below, an extended dispute settlement process ultimately may not be in the interests of any constituency of the WTO, and African Members should accept a revised shorter time frame for consultations

Consultations, as a private matter, primarily involve the complaining party and the addressee of the request. The right of third parties to join in the negotiations is restricted. They must have 'a substantial trade interest', and the addressee must agree that 'the claim of substantial interest is well founded'. Indeed, the complaining party can pre-empt third party participation by lodging the request for consultations in a particular manner.[10] A third party precluded from participating in consultations may then lodge its own request against the defending party. African and LDC groups have endorsed proposals to remove restrictions on third-party participation in consultations and at other subsequent stages of WTO dispute settlement. Although this is likely to complicate the negotiations, and may require intrusion into and greater control of the process by the DSB, African countries may have more to gain from these changes. These are proposals likely to enhance their capacity and ability to use and to manipulate dispute settlement processes.

3.2 Good offices, conciliation and mediation

As an alternative to the holding of consultations, the dispute may be referred to good offices, mediation and conciliation, which may be provided by the Director-General of the WTO. This form of dispute settlement is referred to in three separate instances.

[10] Article 4.11 suggests that third party participation, subject to satisfaction of the 'substantial trade interest' requirement, is permissible if the request for consultations is framed under Article XXII:1 of GATT 1994, Article XXII:1 of GATS, or corresponding provisions in other covered agreements; but not if the request is lodged under Article XXIII:1 of GATT 1994, Article XXIII:1 of GATS or corresponding provisions in other covered agreements.

First, Article 5 of the DSU suggests that any category of Members may 'voluntarily' agree to refer a dispute to this form of dispute settlement. This process can be sought, or terminated, at any time. This is also a confidential process, and without prejudice to the rights of either party in further proceedings under the DSU.

According to Article 3.12, a dispute in which the complaint has been lodged by a developing country Member against a developed country Member may, at the instance of the developing country, be resolved under the procedure described in a GATT Decision of 5 April 1966 (BISD 14S/18). The first step in this procedure is good offices, conciliation and mediation to be offered by the Director General. It would appear that the procedure in this instance is not entirely voluntary. The developed country Member may not object or refuse to go through the process. If, however, a negotiated solution does not emerge from the process within two months, either party may request the Director-General to report to the DSB, and the DSB 'shall forthwith' establish a panel to examine the matter. The panel in turn will be required to report within a period of 60 days, subject to such time extensions as the parties may agree to. As will be noted below, the DSB does not normally appoint a panel upon receipt of a request, and a panel under the normal procedure has a period of six to nine months to conclude its work. It would thus appear that Article 3.12 offers a developing country a 'fast-track procedure' for proceeding from negotiations to the adjudication of a dispute.

The third reference to good offices, mediation and conciliation is in Article 24.2 of the DSU. The procedure may in this instance be requested by an LDC Member involved in a case where no satisfactory solution has emerged from the consultations. No time frames are suggested for the reference of the dispute to the procedure, or to the subsequent panel process if no solution emerges from the process.

It would appear that very little use has been made of these provisions and the good offices, conciliation and mediation procedures in WTO dispute settlement.[11] A possible explanation may be that by the time the DSU is invoked most parties probably would have exhausted the informal, non-binding, diplomatic avenues

[11] Article 5 was invoked, apparently for the first time, in a complaint by the Philippines and Thailand against the European Community's preferential tariff treatment of canned tuna originating in ACP States. See WTO, General Council, WT/GC/66, 16 October 2002, and WT/GC/66/Add.1, 16 October 2002. The mediation report by Deputy-Director General Rufus Yerxa was treated as confidential.

available to them for the settlement of the dispute and may now be seeking a binding adjudicated solution. Yet, the LDC Group has proposed in the DSU negotiations that reference to the good offices procedure under Article 24.2 should not be 'upon request' by the LDC Group. It should be mandatory. This may be counterproductive. It is also not likely to assist LDCs to improve their understanding of the other DSU procedures and to participate more frequently in the adjudicatory stages of dispute settlement.

3.3 Panel proceedings

Aspects of the panel process that have elicited notable and controversial submissions in the DSU negotiations include the establishment and terms of reference for panels, selection of panellists, transparency and confidentiality in the conduct of panel proceedings, and the right of panels to seek information and technical advice from any person or group.

3.3.1 Establishment and terms of reference

After an attempt at consultations, a request for the establishment of a panel to formally resolve the dispute can hardly be turned down. The DSB must establish the panel at the second meeting at which the request appears on its agenda, unless, as noted above, it decides otherwise through the reverse consensus principle. The standard terms of reference for a panel are 'to examine the matter' in the light of relevant provisions of the covered agreements, and 'to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in [the] agreements'.[12]

The establishment of a panel at the first meeting at which the request appears on the agenda of the DSB is a possible clarification of the DSU that should be acceptable to many Members, and developing and LDC Members probably do not need a dispensation from such a provision.

As regards the terms of reference, both the African and LDC Groups have proposed to make it mandatory for panels to consider and to make specific findings on the development implications of the issues raised in disputes involving developing and

[12] Article 7.1 of the DSU.

LDC Members, and to 'specifically consider any adverse impact that findings may have on the social and economic welfare' of the developing or LDC parties. The African Group submission is coupled with heavy criticism of the dispute settlement process, for 'abstracting itself from the developmental fundamentals', and for failing to contribute satisfactorily 'towards the tangible attainment of the development objectives of the WTO Agreement' (WTO, DSB, 2002c: par. 2). It is proposed that the DSU should explicitly state, (in Article 7) that it is 'an important mechanism for achieving the development objectives of the WTO Agreement'; and the General Council should conduct a review of the DSU every five years to ensure that consideration is being given to the development objectives in WTO dispute settlement.

Whether or not the strong criticism is merited, neither panels nor the other DSU organs should be required or expected to perform tasks beyond the remit of dispute settlement, which they may be the least qualified to discharge. Panels should consider and comment on development implications that are woven into 'the claims' and legal arguments that are part of their mandate, but they should not be required to indulge in speculation on non-legal matters not properly brought before them. The challenge is for parties representing developing countries or LDCs in WTO disputes to ensure that development concerns are encoded in a language that would compel dispute settlement mechanisms to comment and make specific findings on such issues.

3.3.2 Selection of panellists

A panel is normally composed of three persons, but the parties to the dispute can agree to a composition of five. Names of panellists for each case are proposed by the WTO Secretariat from an indicative list maintained by the WTO and updated regularly with inputs from Member States. If the parties fail to agree on the identity of the panellists within 20 days after acceptance of the request for a panel, the Director-General, acting in consultation with chairpersons of the DSB and relevant Councils or Committee, determines the composition.

Panellists are expected to be 'well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel';

served as their country's representative to the GATT or WTO; served in the WTO Secretariat; taught or published on international trade law or policy; or served as a senior trade policy official of a Member (Article 8.1). They are supposed to serve in their individual capacities, not as representatives of Member States or any organisation. They are also not salaried employees of the WTO. The WTO covers their expenses, 'including travel and subsistence allowance' (Article 8.11), but this is reputed to be an inadequate recompense for the services they render.

To ensure avoidance of conflict of duty and interest, unless the parties otherwise agree, citizens of Members whose governments are parties to the dispute are disqualified from serving as panellists (Article 8.3). It is at the same time required that panellists should be selected with a view to ensuring 'a sufficiently diverse background and a wide spectrum of experience' (Article 8.2). It is also stipulated that in a dispute between a developing and a developed country at least one panellist shall be from a developing country, if the developing country so requests (Article 8.10).

Proposals first motivated by the EC to revise this system have generated some of the most intensive discussions on DSU reform within and outside the DSU negotiations. The EC basically suggested the establishment of a standing list or roster of panellist, from which panels would be constituted broadly in the manner currently done for the Appellate Body. Some of the motivations for the proposal are that this will eliminate conflicts and delays in the panel selection process. This is also likely to lead to the development of a more professional, experienced and readily available cadre of panellists, better able to discharge their complex duties. It would appear that there is no large pool of qualified and experienced panellists, in or around Geneva, ready and willing to take on the task of settling a dispute on current terms and conditions. This is compounded by repeated exclusion of citizens of EC Member States and the United States, the most frequent litigants under the DSU, on account of potential conflict of duty and interest.

The African and LDC Groups and some of the developing countries were not initially impressed by these arguments. The African Group submission categorically stated that there is no case for a standing body of panellists. It suggested that the quality of panel reports could be improved without necessarily changing the tenure of the

panellists. The submission also noted with concern the unbalanced geographical representation of Africa on panels and in the Appellate Body, but offered no suggestions on how to redress the problem. The LDC Group submission proposed that a developing country or an LDC party to a dispute involving a developed country should be entitled to request that two of the panellists should be from a developing country or the LDC as the case may be.

The case for better representation of LDCs and sub-Saharan African countries on the indicative list or proposed roster of panellists would probably be difficult to dismiss. But if panels should, as they probably must, be transformed into more professional outfits on account of the undeniable complexity of WTO disputes, the nationality of the panellists selected for particular disputes should not be that important. In a rarefied legal environment, furthermore, litigants should be dissuaded from insisting on who the adjudicators for their disputes should be.

3.3.3 Transparency and confidentiality in the conduct of proceedings

Panel proceedings are conducted in accordance with the Working Procedures developed by the DSB, (included as Appendix 3 of the DSU). The emphasis in these procedures is on flexibility, timeous disposal of disputes, transparency and confidentiality, but not so much on technical rules relating to the admission and assessment of evidence. As a general rule, the period from the composition of the panel to the issue of the final report should not exceed six months. It should not exceed nine months if the panel has requested an extended time frame.

In the interests of transparency, the Working Procedures require that presentations, rebuttals and statements to the panel shall be made in the presence of the parties; and written submissions, responses to questions and panel reports should be made available to the parties. At the same time, panels meet in closed session. Even the parties will be present only when invited. The deliberations and documents circulated during the process are also confidential. Panel reports must be drafted without the parties, and opinions expressed by individual panellists in panel reports must be anonymous. The main parties to the dispute, however, are allowed sight of and can comment on the draft or interim report containing summaries of the facts and arguments. A party to the dispute is also not precluded by the confidentiality

requirements from disclosing statements of its own position to the public, or from providing a non-confidential summary of its confidential submissions.

Although the requirements for third-party participation are slightly more relaxed at the panel stage, third parties do not enjoy the same rights as the main parties. Third parties have rights to be heard, to make written submissions, and to receive the submissions of the other parties only in reference to the first meeting of the panel, but not subsequent meetings. They are not privy to the interim report, and they may not lodge an appeal against the panel's decision. The requirements for third-party participation are more relaxed in the sense that they need only have a 'substantial interest' in the matter (Article 10(2)), not a 'substantial trade interest' as is required at the consultations stage, and their involvement does not require the approval of the defending party. It would also appear that participation as a third party in consultations is not a prerequisite for participation in the same capacity at the panel stage.

In the DSU negotiations, proposals to permit third parties to attend and participate in all meetings, if they so request, and to receive of all non-confidential documentation, will improve internal transparency in panel and appellate review proceedings. Further relaxation of the requirements for third party participation might also encourage greater involvement of African and LDC Member States in DSU proceedings. The African Group has suggested in this regard that 'substantial interest' for developing and LDC Members should be interpreted as including 'any amount of international trade; trade impact on major domestic macro-economic indicators such as employment, national income, and foreign exchange reserves; the gaining of expertise in the procedural, substantive and systemic issues relating to the Understanding; and protecting long-term development interest that any measures inconsistent with the covered agreements and any findings , recommendations and rulings could effect' (WTO, DSB. 2003b). A better submission would have been that each WTO Member should be allowed to exercise its own judgement as to whether participation as third party would be fruitful. This, as noted above, is the only guideline on initiating action as a main party under the DSU.

3.3.4 The right to seek information and technical advice.

A controversial transparency-related issue in panel proceedings is the right of a panel 'to seek information and technical advice from any individual or body which it deems appropriate', or to 'consult experts to obtain their opinion on certain aspects of the matter' (Article 13 and Appendix 4). The right of a panel 'to seek information' has been interpreted in WTO jurisprudence as empowering a panel not only to literally 'seek' or request information or advice, but 'to receive' unsolicited submissions, such as the so-called *Amicus Curiae* briefs.[13] It has also been held that a panel has the discretion to accept or not to accept or utilise any information or advice, whether requested or not. A proposal by the EC to regularise the position and practice on receipt of unsolicited information in the manner suggested by the Appellate Body has met stern opposition from the African Group and a group of developing countries led, on this issue, by India. They have countered with proposals seeking to clarify that the right to seek information in WTO dispute settlement shall not be construed as authorising receipt of unsolicited briefs. Apart from the fact that the Appellate Body might have erred in its interpretation of 'the right to seek', it has been contended that the DSU is a mechanism for WTO Members, and acceptance and use of unsolicited submissions from non-Members might upset the balance of rights between the parties to a dispute. It has been contended that only submissions routed through Members party to a dispute should be received and utilised.

The stance taken by the African Group on this issue unfortunately creates the impression that the desire is to shield panels and the Appellate Body from unwanted or unfavourable submissions and arguments. Given the complexities of the issues raised in the covered agreements, and the 'multilateral' importance of DSU rulings, there should be 'friends of the court' who are not necessarily 'friends of the parties' in WTO dispute settlement. The debate should not be about exclusion of unsolicited briefs, but about the circumstances and procedures for entertaining them. Indeed, this would not be a matter for political debate, negotiation and determination in a normal judicial system. It would be left to the adjudicators or the administrators of the system to develop appropriate working rules and procedures.

[13] WTO, *US-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Appellate Body Report, 12 October 1998, par. 103–110.

4. Appellate Review

The hearing of appeals against decisions of panels is another distinctive feature that sets the DSU apart from its GATT antecedents. The hearing of appeals is entrusted to an Appellate Body, established by the DSB in terms of Article 17.1 of the DSU. This is a standing body consisting of a total of seven persons. Three of these persons are known as a division and are selected to serve in any one case in accordance with internal rules set and applied by the body itself. Appellate Body members are appointed for a four-year term, and may be reappointed once. Appointees must be 'persons of recognised authority, with demonstrable expertise in law, international trade, and the subject matter of the covered agreements generally' (Article 17.3). They should be 'unaffiliated with any government', but the total composition of the Body must be 'broadly representative of membership in the WTO'. Citizens of Member States are not, by that fact alone, ineligible to serve in disputes involving their countries, but all Appellate Body members must observe rules of ethics and avoid cases creating a direct or an indirect conflict of interests. Appellate Body members must also be available to serve at all times and at short notice.

The mandate of the Appellate Body is to consider appeals 'limited to issues of law covered in the panel report and legal interpretations developed by the panel', and to 'uphold, modify or reverse the legal findings and conclusions of the panel' as appropriate (Articles 17.6, 17.12 and 17.13). The Appellate Body is not empowered to revisit the factual findings, nor is it clearly empowered to remand or send back a case to a panel for clarification or modification any factual findings.

The mandate of the Appellate Body is discharged in compliance with Working Procedures for Appellate Review, devised and revised from time to time by the Appellate Body, acting in consultation with the DSB and the Director-General. As at the panel stage, strict time limits must be observed in the processing of an appeal. The overall requirement is that the task must be completed and the final report circulated within a period of 60 to 90 days from the date the notice of appeal was lodged. The rules and procedures also impose substantially the same requirements as under panel proceedings on meetings and communications with the parties, and on confidentiality of the proceedings and information circulated for the proceedings. It is notable, however, that the sequence of activities during appellate review does

not include the circulation of an interim report for inputs by the parties. The process, on the other hand, accommodates a period for an exchange of views among all Appellate Body members prior to the finalisation of its report by the division responsible for the case. This is an element of the principle of 'collegiality' in the Appellate Body. Collegiality also entails that each member of the Appellate Body is entitled to receive all documents filed in an appeal, and all members convene on a regular basis to discuss matters of policy, practice and procedures. These provisions seek to ensure that Appellate Body members stay abreast of dispute settlement and other relevant activities in the WTO; to ensure consistency and coherence in decision-making; and to create opportunities for members to draw on individual and collective experiences of each other.

Some of the less troublesome proposals in the DSU negotiations on appellate review are the resizing of the Appellate Body to ensure better representation of WTO membership; revising the term of office for appointees; giving the Appellate Body remand powers; and extending the time frame for the process from a maximum of 90 days to between 90 and 120 days. The more controversial issues are transparency related, such as the right of the Appellate Body and the other adjudicatory organs to receive unsolicited submissions; opening the proceedings to public observation; and giving panellists and Appellate Body members the latitude to issue separate, dissenting opinions.

The position taken by African Members on unsolicited submissions has already been commented upon. The demandeurs of such reforms, including, more notably, the US, seem to be advocating for greater internal as well as external transparency in the conduct of WTO dispute settlement. The opening-up of panel, Appellate Body and other proceedings to public scrutiny, except when confidential information is under consideration, is part of this external transparency campaign. The main contentions are that DSB rulings and recommendations affect a much wider community than those directly involved in the dispute; that publicity and transparency would contribute to better understanding of the WTO by the public and civil society; and that proceedings of other international dispute settlement mechanisms dealing with equally important and sensitive issues, are also open to the public (WTO, DSB, 2002b and WTO, 2003c).

The African response, predictably, has been negative. The African Group submission contends that external transparency is not a priority in the context of the objectives of the Doha development agenda, and that it is not appropriate at this point in time to open DSU proceedings to the public. The connection between the Doha Agenda and transparency in DSU proceedings is not demonstrated, and the appropriate conditions or possible time frames for contemplating this development have not been suggested. Could this be yet another indication of the reluctance of African Members to countenance reforms that might entail further 'judicialisation' of DSU processes?

The position taken by African Members on conduct of DSU proceedings in public would appear to be inconsistent with the main argument they have advanced in support of allowing individual panellists and Appellate Body members to issue separate dissenting opinions, and determining the outcome of a dispute by majority decision. It is claimed that judicial practice in the International Court of Justice and national court systems has demonstrated that dissenting opinions may bring to the fore usually unheard of concerns which may in the long run shape the law. It is thus effectively suggested that the DSU process, in this instance, could also be 'judicialised', but not to the extent of permitting public hearings or receipt of unsolicited briefs as is practised in the International Court of Justice or in national legal systems which follow Anglo-American common law legal traditions. It should be noted that it would be odd, and probably unwise, to graft such judicial practices onto a dispute settlement system that most Members, including the demandeurs of these reforms, seek to retain as 'quasi-judicial' and manned by part-time personnel who may not be sufficiently trained or experienced in techniques of judicial reasoning and interpretation. It is also easy to exaggerate possibilities of majority and dissenting opinions under a dispute settlement system that at the appellate level places a premium on collegiality of all adjudicators.

5. Adoption of Panel and Appellate Body Reports

Panel and Appellate Body Reports must be adopted by the DSB for the rulings and recommendations in them to become binding decisions, and to be unconditionally accepted by the parties. Panel reports must be adopted within 60 days after the circulation of the final report, but Members must have a period of at least 20 days in

which to consider a report after its circulation. Appellate Body reports must be adopted within 30 days after the circulation of the report (Articles 16.1, 16.4 and 17.14). The overall time frames are that, as a general rule, the period from the establishment of a panel to the date the DSB considers the report should not exceed 9 months where there was no appeal, or 12 months where the dispute went through the appellate review process (Article 20).

All Members of the WTO, including the parties to the dispute, are entitled to participate fully in DSB deliberations on adoption of a report. They are entitled to voice and to have recorded their objections to a report, if any. At the end of the deliberations, however, the negative or reverse consensus rule operates to ensure the adoption of the report, the vehemence of some of the objections notwithstanding. This is what makes it a legal fiction to regard the DSB as the body that resolves a dispute.

Some of the Members have complained in DSU negotiations that panels and the Appellate Body at times err and produce decisions that are counterproductive or go beyond what may strictly be necessary for the prompt settlement of a dispute, but the negative consensus rule pre-empts control or correction of such errors by DSB (WTO, DSB, 2002h). One solution proposed by the US is the introduction of an interim review stage in appellate proceedings, at which the parties would be entitled to indicate erroneous findings, which the Appellate Body would be obliged to exclude from its final report. Panels would be similarly constrained by appropriate amendments to the interim review stage of the panel process. It has also been suggested that the DSB should be empowered to decide (by positive consensus), not to adopt a finding in a report or the basic rationale behind the finding, and a party to the dispute would then be under no obligation to accept the repudiated finding. The African Group has suggested amending the DSU so that panels and the Appellate Body could be required in the course of proceedings to refer questions relating to gaps in or conflicts between the covered agreements to the General Council for authoritative interpretation. The African Group has also proposed that the DSB and the General Council should periodically debate and interrogate the jurisprudence emanating from dispute settlement so as to correct erroneous interpretations and to restate the law accordingly.

The addition of an interim review stage in appellate proceedings is not in itself objectionable, but legal purists would find it galling that parties to a dispute should be allowed to control what should and should not be in the final report of an independent adjudicator. It is equally objectionable that parties to a dispute should be allowed to indicate portions of a decision which they will be prepared to accept and to abide by. This is also uncomfortably close to suggesting that the WTO should revert to the old GATT procedure under which dissatisfied parties could deprive relevant decision-making organs of the consensus required for the adoption of a decision.

The submissions by the African Group on this issue are more palatable, since the General Council and the Ministerial Conference, in any event, have the 'exclusive authority' to adopt interpretations of the covered agreements.[14] But the inherent weakness of this arrangement should now be apparent from the difficult and tortuous manner in which issues of legal reform, including DSU reform, have been handled by political organs of the WTO, such as the DSB, the General Council and Ministerial Conference. A transparent, independent, more professional dispute settlement Appellate Body may occasionally err and come up with surprising jurisprudence, but it is arguably the better alternative.

6. Implementation issues

6.1 Establishing a reasonable period for implementation

Article 21.3 of the DSU indicates that 'if it is impracticable to comply immediately' with an adopted ruling or recommendation, the Member concerned shall be given a reasonable period of time in which to do so. It is one of the distinctive features of the DSU that the party required to comply with decision has considerable say in this matter. It may propose the period for approval by the DSB. The parties to the dispute can also strike an agreement over the matter within 45 days after the adoption of the report. In the absence of such an agreement, the period shall be determined by arbitration within 90 days after the adoption of the report. It is suggested that the arbitration must be conducted, and the reasonable period of time

[14] Article IX:2 of the WTO Agreement.

determined, within a period of 15 to 18 months from the date of the establishment of the original panel in the case. It is also suggested, 'as a guideline for the arbitrator', that the period of time should not exceed 15 months from the date of adoption of the report, but the practice developed by arbitrators is to look for the shortest period required for the implementation of the rulings and recommendations under the affected country's legal system.

Some of the not so controversial submissions in the DSU negotiations are that arbitration under Article 21.3 should be sought within 30 days from the date of adoption of DSB recommendations, and the award must be issued within 45 days of the appointment of the Arbitrator. On behalf of developing countries and LDCs, clarifications have also been sought to make it more imperative for Members to give particular attention to the interests of developing countries in the assessment of a reasonable period. It has also been suggested that the requirement for prompt compliance with rulings and recommendations should not be insisted upon in complaints against developing countries and LDCs. Even more controversial, and probably unacceptable, is a proposal made by India, on behalf of group of developing countries, suggesting that a reasonable period of time for developing countries should be stretched to not less than 15 months or to at least two years where a change of statutory provisions or long held practice or policy is required. A proposal by the African Group suggesting mandatory arbitration (under Article 25 of the DSU) for the purpose of drawing up an adjustment programme for the gradual implementation of rulings and recommendations by a developing country might also be unacceptable if, like the Indian proposal, it is intended for the benefit of all developing countries.

6.2 Assessment of compliance measures

Article 21.5 of the DSU is the provision which prescribes 'recourse to these dispute settlement procedures' where there is disagreement as to the existence or consistency with a covered agreement of 'measures taken to comply with' DSB rulings and recommendations. It also stipulates that the dispute shall wherever possible be referred to the original panel constituted for the complaint, and the panel shall endeavour to deliberate and issue its report within 90 days of the referral of the

matter to it, or account to the DSB for any delays encountered and any additional time required.

Some of the ambiguities in this provision, requiring clarification in the DSU negotiations, are whether resort to 'these dispute settlement procedures' refers to the panel process as well as other procedures under the DSU, such as consultations and appellate review; and the relationship between the time frame for this process and for that prescribed for arbitration in respect of retaliatory measures sought in terms of Article 22.6. Under the latter process, an award must be issued within 60 days after the expiry of the reasonable period computed in terms of Article 21.3, and no appeal against the award is allowed. Therefore this is potentially a faster process to conclude. The question that arises is whether a successful complainant may insist on determination by arbitration of the level of retaliation to be authorised under Article 22.6, even if the process of assessing the consistency of measures adopted in compliance with the rulings and recommendations under Article 21.5 has not been completed. This is the so-called sequencing problem. What should come first, compliance proceedings or assessment of the levels of retaliation?

Some but not all the proposals in the DSU negotiation suggest that compliance proceedings should start with consultations. All the proposals suggest that there should be appellate review in compliance proceedings. Most of the proposals also suggest that arbitration on the levels of retaliation should not start until after the commencement or conclusion of compliance proceedings. This is the manner in which the sequencing problem has been addressed by agreement between the parties in some disputes. It is notable that no significant contributions have been made by the African and LDC Groups on these issues.

6.3 Compensation

If DSB rulings and recommendations cannot be implemented within the reasonable period of time determined in terms of Article 21.3, Article 22.2 of the DSU provides for the negotiation of satisfactory compensation to be paid by the party required to comply with the rulings and recommendations. A remarkable feature of compensation under the DSU is that it is a 'voluntary' or negotiated remedy, but if it is not agreed upon within 20 days after the expiry of a reasonable time, the other party

can seek authorisation to retaliate in terms of Article 22.3. It is also a temporary remedy, not intended to substitute for, but to induce, compliance with the rulings and recommendations. It is not intended as reparation for losses suffered as a result of the violations of the covered agreements.

Although Article 22 is silent on the matter, it has hitherto been assumed that 'mutually acceptable compensation' will normally take the form of trade enhancing concessions. Article 22 more clearly indicates that the retaliation that must follow failure to agree on compensation shall be in the form of suspension of concessions or other obligations. Compensation in the form of trade concessions is difficult to negotiate, and probably not worthwhile for countries lacking the capacity or ability to exploit the concessions. It must be tempting for most Members to let matters slide to the point of seeking authorisation for retaliation, hence the problem of the sequencing of compliance proceedings and arbitration on levels of retaliation. Appropriate levels of compensation may only be known during arbitration to determine levels of retaliation in terms of Article 22.6. By this time the parties should already have agreed or failed to agree on compensation.

Powerful arguments have been advanced in DSU negotiations on behalf of developing countries and LDCs on the need to clarify the form and rationale for compensation under the DSU. It has been contended, for example, that by the time compensation is awarded or sanctions authorised, or indeed compliance with WTO obligations enforced, which currently could take more than three years (WTO, DSB, 2002g), a developing or LDC Member could have suffered the type of losses that cannot be repaired by compensation by way of enhanced market access. It has been suggested that the DSU should provide for the award of monetary compensation, calculated to reflect the level of nullification or impairment, from the introduction to the withdrawal of the measures causing the nullification or impairment. In the African and LDC Group submissions, this proposal is restricted to disputes involving measures taken by a developed country against a developing or LDC Member. This is one aspect that could deprive the proposal of wider or universal support in the DSU negotiations. The other concern is that this type of reform could be interpreted as fundamental, going beyond the clarifications and improvements suggested by the Doha negotiating mandate.

6.4 Suspension of concessions or other obligations

As noted above, the party that invoked the dispute settlement procedures may request the DSB to authorise the suspension of concessions (retaliation), the remedy of last resort under the DSU if no agreement is reached on compensation within 20 days after the expiry of the reasonable period of time. The DSB, according to Article 22.6, shall grant the authorisation, applying the negative consensus rule, within 30 days of the expiry of the reasonable period of time. However, as also indicated earlier, disputes as regards levels of retaliation or the application of the principles and procedures for determining the areas in which to retaliate must be referred to arbitration. The arbitration must be concluded within 60 days after the expiry of the reasonable period, and the award must be accepted by the parties as final. There can be no appeal against the award or a second arbitration on the matter.

The principles and procedures for determining the levels of retaliation and sectors in which to retaliate are elaborately described in Article 22.3. The first principle, restated briefly, is that retaliation must be sought in the same sector(s) in which a violation was found. If this is 'not practicable or effective', a party may seek to retaliate in other sectors under the same agreement. If this too is neither practicable nor effective, and if 'the circumstances are serious enough', retaliation may be sought under another covered agreement. In the application of these principles, account must also be taken of the levels of trade in the sector in which violation or nullification of benefits was found, the broader economic elements related to the nullification or impairment, as well as the broader economic consequences of the retaliation. A request for cross-sector or cross-agreement retaliation must also be properly motivated.

The DSU negotiations may eventually lead to clarifications on issues such as the time frames and procedures for securing authorisation to retaliate and determining levels of retaliation; modification of the levels of retaliation[15]; and the procedures for withdrawal of the authority to retaliate. But the more intractable issue, on which consensus may not emerge, is how to make retaliation a practicable or an effective remedy for a country with a smaller economy that has to confront its larger trading

[15] This includes the 'carousel' problem under which a Member authorised to retaliate unilaterally modifies the list of concessions in respect of which the authority was granted.

partner. As the arbitrators in Ecuador's request for cross-agreement retaliation against the EC in the *Bananas* dispute noted, any form of retaliation where the complaining party is highly dependent on imports or trade from the other party may have more harmful effects for the complaining party than its larger trading partner.[16]

At least three sets of proposals have been canvassed in the DSU negotiations on this problem. First, the African and LDC Groups have suggested the remedy of 'collective retaliation', or suspension of concessions by all Members, in disputes initiated by a developing or LDC party against a developed country. The second proposal, by Mexico, is to provide for transfer or 'negotiation' of the right to retaliate, from the complaining party to another Member with the ability to suspend concessions without causing more harm to its economy. The third set of proposals recommend awarding litigation costs to the successful party in circumstances to be determined by a panel or Appellate Body. A variation of this recommendation, suggested by way of Special and Differential (S&D) treatment, is to provide for the award of reasonable costs and other litigation expenses of a developing country Member, if a developed country Member is found to be in violation of its obligations, or if the developed country Member, having initiated the litigation, fails to prove its claim against a developing country Member.

As with monetary compensation, the award of litigation costs to all deserving parties, not just developing and LDC Members, is the type of remedy that can positively contribute to the smooth and efficient functioning of the DSU Mechanism. Members may in the long run, if not in the current negotiations, be persuaded to incorporate these remedies in DSU procedures. It is difficult, on the other hand, not to be sceptical and unenthusiastic about collective retaliation and the notion of discounting an award. Collective retaliation can be described as a blunt instrument, aimed at terrorising a wrongdoer into compliance with the covered agreements through collective or universal breach or wrongdoing. This, of course, would confound the core tenets of the DSU and the rules-based multilateral trade system. The proposal on negotiation of awards is similarly flawed, but to a lesser degree of severity. It

[16] *EC - Regime for Importation, Sale and Distribution of Bananas, Arbitration under Article 22.6, (Ecuador)*, 1999, par. 73. The arbitrators found that Ecuador had shown that it was not practicable or effective for it to retaliate in the same goods or services sectors in which violations had been established. A request to suspend concessions or other obligations under the TRIPs Agreement was authorised, but Ecuador apparently refrained from enforcing the award.

suggests that a WTO Member could be allowed to buy the right to wage a proxy trade war and violate its own obligations against a party that may not have committed a wrong against it. We do not need to speculate now on whether there could ever be demand or a market for 'retaliatory awards' in the international trading system. There can hardly be any consensus on the need for such radical reforms to the DSU mechanism not so long after its introduction.

7. Special and Differential Treatment of Developing and LDC Members

As parts of the foregoing discussion would have indicated, the DSU provides for S&D treatment of developing and LDC Members at various stages of the dispute settlement process. Some of the provisions describe more specific procedural and other dispensations; and some are hortatory in nature, calling special or particular attention to be given to the problems and interests of developing and LDC Members. Most of the provisions refer to developing country Members as the beneficiaries of such treatment. Only one provision, Article 24, describes special procedures for LDC Members.

Some of the procedural and other dispensations for developing country Members described or alluded to above include the reference of disputes to the 'fast-track' GATT 1966 process under Article 3.12; the right of a developing country to request that one of the panellists at the panel stage should be from a developing country; and the possibility of extended time frames for consultations and for preparation and presentation of arguments at the panel stage. The more hortatory requirements for special or particular consideration to be given to the interests of developing countries are indicated in reference to consultations, the preparation of panel reports, and ensuring prompt compliance with rulings and recommendations.

Article 27 of the DSU on the special responsibilities of the WTO Secretariat can also be regarded as prescribing a special form of treatment for developing country Members. In addition to the provision of legal, technical and administrative support to panels, the Secretariat is required to assist Members in respect of dispute settlement at their request, and may provide additional legal advice and make available a qualified legal expert from the WTO technical cooperation services to any

developing country Member which so requests. But such assistance shall be provided 'in a manner ensuring the continued impartiality of the Secretariat'.

As for the special treatment of LDC Members, the first paragraph of Article 24 is also hortatory in nature. It calls for 'particular consideration' to be given to 'the special situation' of LDC Members at all stages of the dispute settlement process. It also calls for the exercise of 'due restraint' by Members in raising matters against LDC Members and in seeking compensation from or authorisation to retaliate against LDC Members. Article 24.2, as noted above, gives LDC Members involved in disputes the right to request good offices conciliation and mediation by the Director-General or Chairman of the DSB before a request for a panel is lodged. .

In the DSU negotiations, the African and LDC Groups have proposed replacing the word 'should' with 'shall' in some of clauses calling for special or particular attention to be given to the problems and interests of developing countries. This, however, may not achieve much. The relevant clauses are likely to remain as peremptory or as hortatory as they presently are. The LDC Group has also suggested inserting a reference to LDC Members in all the clauses that refer to developing countries as beneficiaries of S&D treatment. This is intended to ensure that there should be no doubt as to the entitlement of LDC Members to the treatment specified for developing countries.

It should be apparent that the submissions by the African and LDC Groups to the DSU negotiations are generally about enhancement of S&D treatment for developing and LDC Members. Among the submissions and proposals not yet accounted for are those relating to the responsibilities of the Secretariat. It has been suggested that the support and assistance rendered to parties under Article 27 of the DSU should be extended to third parties. It has also been suggested that the Secretariat should maintain a geographically balanced roster of legal experts from which developing and LDC Members may select the experts to provide the required assistance, and the selected experts should be required to fully discharge the functions of counsel, notwithstanding the requirement that assistance must be provided in a manner ensuring the impartiality of the Secretariat. The African Group has also proposed the establishment of a WTO fund on dispute settlement, to be financed from the regular WTO budget and extra-budgetary resources. The main problem with these

proposals is that the type of assistance and support suggested is likely to place the WTO Secretariat in an invidious position, since it is also responsible for the provision of technical, legal and administrative support to panels. It would be better if technical and financial support for LDCs and some of the African developing countries were organised under arrangements separate and distinct from the Secretariat.

The other overarching flaw of the submissions on S&D treatment is that no attempt is made to distinguish between developing countries in Africa and elsewhere that might or might not be deserving of such treatment. The African Group submission attempts to speak for all developing countries, including those that already might be adept at using the DSU mechanism, such as India, Brazil, Argentina, and Korea. This has provided a ready excuse for the rejection of even some of the well-motivated proposals by the other groups and parties to the negotiations.

8. Concluding observations

As noted above, after the July 2004 package, the DSU negotiations, notwithstanding the absence of any deadline, have focused on a package of issues, identified primarily for their systemic importance'. The DSB has suggested that these must be issues that 'would bring real improvements to members'. They must also be issues that could not be easily negotiated on an *ad hoc* basis, between parties to a particular dispute; and they must 'be "doable" in the short term' (WTO. 2005a: 2 par.1–2). Three issues initially identified under these guidelines are sequencing, remand and post-retaliation. These are largely technical and procedural issues on which African developing and LDC Members did not make significant inputs in the earlier phases of the negotiations. The clarifications under consideration do not suggest that this constituency of the WTO is likely to be adversely affected. Also identified as issues on which the negotiations could focus are 'transparency, third party rights, compliance and developing country issues'. From the analysis conducted in this brief, it is only on third-party rights that African negotiators should strive to ensure that the outcome reflects their original proposals. Relaxation of restrictions on third-party participation and improvement rights of third parties under the DSU are some of the DSU reforms that can ensure better understanding of and increased participation by African developing and LDC members in DSU processes.

African positions and proposals on the other identified systemic negotiating issues can and should be moderated in the process 'give-and-take' of the negotiations. On 'internal transparency', for example, the issuing of separate and dissenting opinions is not likely to add much value to DSU processes. On external transparency, controlled opening-up of DSU proceedings, and reception and utilisation of *amicus curiae* briefs should not be completely ruled out. It might be in the interest of all members to 'further judicialise' DSU proceedings in this manner. On S&D treatment, or developing-country issues, there will probably be no progress in the negotiations unless developing countries are prepared to concede differentiation between those that require S&D treatment, including most African countries, and those that do not. In the area of dispute settlement it should not be too difficult to negotiate acceptable criteria for such differentiation. African Members States must also be clear and conscious about the type of S&D treatment sought in this area. It is perfectly in order to seek capacity-building support from the WTO, but perhaps not financial assistance and support in the conduct of particular disputes. That such financial support and assistance should ideally be sought from agencies not linked to the WTO Secretariat is strong. Caution must also be exercised with respect to the type of S&D treatment that leads to the attenuation of basic rights and responsibilities for developing and LDC members. There should not be two tiers of WTO dispute settlement, a weak system for developing and LDC members, and the normal more rigorous process and system for the rest of the membership. On the procedure for the selection of panellists, another systemic issue that might be added to the negotiating agenda, in the closing phases of the negotiations, the EC, the main demandeurs of the clarifications, have made a compelling case, which developing countries have struggled to impugn. It is suggested that African and LDC members should concede, probably in exchange for whatever concessions can be wrought on difficult compliance issues.

Although it is not advisable to indulge in crystal-ball gazing in respect of outcomes of multilateral trade negotiations, it would appear from the progress made thus far in the DSU negotiations that African and LDC groups are likely to be disappointed with the outcome. Many of their proposals and contributions are likely to be swept under the proverbial carpet. The negotiations are also not likely to impact on levels of African participation in DSU process. It must be appreciated and accepted that there is a

limit to which 'clarifications and improvements to the DSU' can resolve problems relating to low and largely defensive usage of the DSU by some WTO members. In addition to structural weaknesses of the DSU, this a problem that might require addressing issues related to Africa's small share of world trade; the composition and direction of Africa's trade; difficulties of engaging aid and trade preference benefactors in contentious dispute settlement; and well-known intellectual and financial resource constraints. This suggests that we should not be too despondent about the results of the DSU negotiations not properly reflecting African contributions and proposals, some of which were arguably not carefully conceived and formulated in the first place.

References

Hoekman, B.M. and Kostecki, M.M. 2001. *The Political Economy of the World Trading System*. Oxford: Oxford University Press.

WTO Documents

WTO. 1998. *US-Import Prohibition of Certain Shrimp and Shrimp Products*. WT/DS58/AB/R, Appellate Body Report, 12 October 1998.

WTO. 2001. *Ministerial Declaration*. Ministerial Conference, Doha, 9–14 November 2001.

WTO, DSB. 2002a. *Special Session, Contribution of the EC and its Member States*. TN/DS/W1, 13 March 2002.

WTO, DSB. 2002b. *Special Session, Contribution of the US to the Improvement of the DSU Related to Transparency*. TN/DS/W/13, 23 August 2002.

WTO, DSB. 2002c. *Special Session, Proposal by the African Group*. TN/DS/W/15, 25 September 2002.

WTO, DSB. 2002d. *Special Session, Proposals on the DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe*. TN/DS/W18, 7 October 2002, and TN/DS/W/19, 9 October 2002.

WTO, DSB. 2002e. *Special Session, Proposal by the LDC Group.* TN/DS/W/17, 9 October 2002.

WTO, General Council. 2002f. WT/GC/66, 16 October 2002, and WT/GC/66/Add.1, 16 October 2002.

WTO, DSB. 2002g. *Special Session, Proposal by Mexico*. TN/DS/W23, 4 November 2002.

WTO, DSB. 2002h. *Special Session, Contribution by Chile and the US*. TN/DS/W/28, 23 December 2002.

WTO. 2003a. *Text for LDC Proposal on Dispute Settlement*. TN/DS/W/37, 22 January 2003.

WTO. 2003b. *Cancun 5th Ministerial Text*,. September 2003, par. 2.11.

WTO, DSB. 2003b. *Special Session, Text for the African Group Proposals.* TN/DS/W/ 24 January 2003.

WTO. 2003c. *Further Contribution of the US to the Improvement of the DSU Related to Transparency.* TN/DS/W/46, 11 February 2003.

.WTO, DSB. 2003d. *Special Session, Compilation of Draft Text Proposals as of 14 March 2003.* JOB(03)/10/Rev.3, 17 March 2003.

WTO, DSB. 2003e. *Special Session, Report by Ambassador Petér Balás to the TNC*. TN/DS/9, 6 June 2003.

WTO. 2004. *Decision of the General Council*. WT/L/579, 2 August 2004.

WTO, DSB. 2005a. *Special Session, Report by Ambassador David Spencer to the TNC.* TN/DS/12, 21 July 2005.

WTO. 2005b. *Special Session of the DSB, Minutes of the Meeting Held on 22 October 2005*. TN/DS/M/20, 26 May 2005, p. 2, par. 1 and 2.

WTO. 2005c. *6th Ministerial Conference, Ministerial Declaration, Hong Kong*. 18 December 2005, par. 3.34.

WTO. 2006. *Decision of the General Council.* 27-28 July 2006. WT/GC/M/103.

WTO. 2007. *Decision of the General Council*. 7 February 2007. WT/GC/M/107.

Cases cited

US – Standards for Reformulated and Conventional Gasoline, WT/DS/2/AB/R, 29 April 1996, involving Brazil and Venezuela as complainants.

EC – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, 9 September 1997.

US – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998, involving India, Malaysia, Pakistan and Thailand as complainants.

EC - Regime for Importation, Sale and Distribution of Bananas, Arbitration under Article 22.6, (Ecuador), 1999, par. 73.

EC – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, 7 April 2004.

US – Subsidies on Upland, WT/DS/265/AB/R, 28 April 2005.

Chapter 6

The General Agreement on Trade in Services Negotiations and the Southern African Customs Union – A Preliminary Exploration of Emerging Issues

by
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1. Introduction

Any analysis of the Southern African Customs Union (SACU) region invariably becomes complicated owing to the overwhelming scale of the South African economy relative to the rest of the SACU countries. What this implies is that these economies have very different needs, and often conflicting concerns as a result of the SACU arrangement. Nevertheless, we will find that in looking at trade in services, there are some striking similarities between South Africa and the smaller SACU countries in their priorities with regard to a negotiating strategy.

It is important to bear in mind that Botswana, Lesotho and Swaziland are all landlocked with small populations. What is interesting, however, is that being landlocked is more of a disadvantage for trade in manufacturing than for trade in services. This paper looks at selected aspects of services trade negotiating issues for SACU countries. It is important at the outset to emphasise that this paper is actually a reflection of the information, data and analysis on SACU countries that are available. While the literature is very limited, more information is available on telecoms and finance than on the other sectors. More reference is made to these sectors purely to illustrate the extent to which sector-specific issues, with all the complexities of regulations and specific function and role in the economy, will ultimately drive a services-negotiating strategy.

In general, a more meaningful and comprehensive analysis on services in SACU is needed, country-by-country, and sector-by-sector. Owing to serious data limitations,

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this paper is often uneven in its coverage of sectors (or themes related to sectors) and countries in the union. Moreover, in view of the paucity of research on SACU countries in services trade, the paper relies heavily on the limited research and is often overdependent on one or two articles in certain areas. In view of data limitations, the paper focuses rather more on South Africa, in some respects, than it does on other SACU countries. However, there is an additional key reason why a focus on South Africa in particular is important: owing to the problem of size, the prospects for greater competition in SACU are limited if this is not realised in South Africa. The main contribution of this paper is to introduce general issues that may be of relevance to an overall negotiating strategy.

Like most other countries, vehicles for services liberalisation in SACU consist of three elements: unilateral, regional (bilateral) and multilateral. Various SACU countries have implemented some form of unilateral or autonomous reform of services sectors that may have automatically improved market access. Similarly, all SACU countries are members of the WTO and have participated with different levels of intensity in the General Agreement on Trade in Services (GATS) negotiations. In addition to the multilateral process, SACU countries are involved in negotiating a Free Trade Agreement (FTA) with the US that goes well beyond simple goods liberalisation. In some respects SACU's multilateral services negotiating strategy is likely to be significantly influenced by the services agreement negotiated in the SACU-US FTA. The details of the services FTA are very vague at this stage so the paper focuses largely on the GATS.

2. Overview of Services Trade

In all SACU countries, the services sector is a major contributor to GDP, employment and trade. In Botswana and Namibia, GDP from services as a percentage of total GDP according to the most recent estimates are around 50%. In South Africa, these figures are slightly higher at about 60%. The growth in services trade has generally been impressive in the last few years in most SACU countries. For example, from 1990 to 1999, services in Botswana experienced an average annual growth rate of 6.3%, which exceeded the average annual GDP growth of 4.3%. Similarly, in Lesotho the average annual growth rate of services was 5.4%, while GDP growth averaged at 4.4%. In Namibia, services have grown at the same rate as GDP, while in Swaziland

services grew marginally more slowly than GDP, with services growing at 3.4% per annum on average and average GDP growth at 3.8% per annum (Ndulo, Hansohm and Hodge, 2005:3-4). In South Africa, the average annual growth rate in services from the period 1990 to 2002 was at about 4% compared to less than 2% in manufacturing. Statistics on services employment are not readily available, but services contribute significantly to employment and are particularly important to small business and informal employment.

Services trade varies significantly by Mode of Supply. For example, Mode 2 has important implications for SACU countries from the point of view that reliance on consumption abroad is important for tourism revenue. Indeed, other restrictions through Mode 1, 3 and 4 depend largely on the extent to which services have an effect on other parts of the SACU economy. South Africa also relies very heavily on consumption abroad as international tourism becomes increasingly significant to the economy. The major difference, however, between South Africa and the rest of SACU is that the former exports many other forms of services specifically to the latter and other African countries. Of the SACU countries, the export of services by Mode 2 is relatively more important for Botswana and Namibia. Namibia showed a share of exports by consumption abroad at 9.5% in 1998 while Botswana showed 3.6%. Lesotho's export (by Mode 2) share of GDP was 2.8% that year (Ndulo, Hansohm and Hodge, 2005:10-11).

Services trade in Lesotho made up 40% of GDP in 1997. In the other SACU countries, the share of services trade as a percentage of GDP is lower, but still significant, at 45.4% in Swaziland, 40.5% in Namibia and 38.5% in Botswana. Services trade as a proportion of GDP is much lower in South Africa, at 13.3% in 1997. The majority of the SACU countries such as Botswana, Namibia, South Africa and Swaziland are net services importers, while Lesotho showed a net services trade deficit in 1997 (Ndulo, Hansohm and Hodge, 2005: 5-7).

An important issue to bear in mind is that the need for GATS-related reform in SACU countries depends on the countries themselves as they benefit directly from this reform process, without any specific trade-offs that sometimes exist in goods reform. The classical case is the removal of barriers to Mode 3 to provide an enabling environment conducive to FDI. This, for example, has entailed double taxation

agreements with various developed countries. Similarly, SACU countries have immediate domestic interests in removing barriers to Mode 1 supply in some cases without thinking of the trade-offs that the GATS may pose. Movement of natural persons is an important form of services trade in SACU. Imports of specialists and professionals abroad can assist capacity building. Many firms in SACU countries import skilled workers from abroad but unfortunately, there is a lack of quantitative data on imports and exports of Mode 4 of supply (Ndulo, Hansohm and Hodge, 2005:16-17). Naturally, an important issue, such as the training of nationals, needs to be borne in mind.

3. GATS commitment and the Services Negotiating Architecture

Multilateral services reform gained momentum at the conclusion of the Uruguay Round of WTO negotiations in 1994 when WTO members committed to successive rounds of negotiations to progressively liberalise trade in services, starting no later than 2000. The GATS negotiating architecture has provided a useful classification to services trade classified according to Modes of Supply. These are as follows:

- Mode 1 – cross-border supply
- Mode 2 – movement of consumer to the country of supplier
- Mode 3 – commercial presence
- Mode 4 – temporary movement of persons

The coverage of services in the GATS is also quite interesting. In most countries, these sectors provide an essential contribution to the greater part of the economy. For example, all these services account for close to 70% of the South African economy.

Table 1: Services Covered by the GATS

1) Business and professional services
    - Accountancy services
    - Advertising services
    - Architectural and engineering services

- Computer and related services
- Legal services

2) Communication services
   - Audiovisual services
   - Postal and courier, express mail services
   - Telecommunications

3) Construction and related services

4) Distribution services

5) Educational services

6) Energy services

7) Environmental services

8) Financial services

9) Health and social services

10) Tourism services

11) Transport services
    - Air transport
    - Maritime transport
    - Services auxiliary to all modes of transport

The different service sectors can be classified for the purpose of understanding their economic importance to the SACU economies and for assisting us in examining the welfare implications more systematically and finally better informing a trade negotiating strategy. These are the four basic categories:

- Producer Sectors (transport, financial)
- Consumer Sectors (tourism)

- Social Sectors (education, health)
- Utilities (energy, telecoms)

The effects of these classifications play themselves out in different ways: For example, energy, transport and communications affect the overall cost structure of the economy as a whole, leading to pure economic waste. Restrictions in health, for example, may affect overall health services by giving monopoly rights to the private provision of health resulting in a large gap in prices between public and private provision of health services. Lack of competition in financial services, for example, could result in a distortion of allocation of capital or investment in the economy that could also have adverse implications for welfare. The overall inefficiency in services may result in slow growth and low productivity in the economy. Empirical evidence shows that the link between services and growth is greater than that between goods and growth. Some sectors have more direct knock-on growth effects than others (see Cassim, 2005, for more detail).

An analysis of the impact of restrictions in different Modes is quite important to SACU countries, as the welfare benefits of reforms could have several effects. For example, SACU countries may currently have a high cost structure in several services sectors owing to their monopoly or duopoly status. Another problem, typically, is the cost of foregone investment. By preventing both foreign and domestic firms from investing because of lack of competition, the high prices may potentially be choking the rest of the economy for both producers and consumers. In this sense, GATS market access and national treatment can be very important levers for further reform. Similarly, Mode 1 restrictions could artificially increase the costs of services that otherwise would be very accessible. These are very important considerations in informing a GATS negotiating strategy. While we do not assess welfare effects in this paper, it is important to stress that often the lack of developing country commitment (as we will see below) is partly explained by the absence of analysis in various sectors and the meaning of further reform for the economy.

The GATS process encourages countries to make commitments both horizontally and by sector. A horizontal commitment applies to trade in all scheduled services generally, while a sector commitment applies to trade in a specific sector. Very few SACU countries have made any serious commitments to the GATS. There are

various reasons for this, which we will explore later. In terms of the WTO process each member is required to present in a schedule the specific commitments on market access and national treatment it undertakes in services. Given below is a breakdown of SACU and some SADC countries in terms of the number of services sectors committed by country. As we can see, with the exception of South Africa and Lesotho, SACU countries have committed less than 21 of their services sectors.

Table 2: Number of Committed Services Sectors by SACU and SADC Countries by July 2000

NUMBER OF COMMITTED SECTORS	COUNTRY
Less than 21	
	SACU Countries Botswana, Swaziland, Namibia
	Selected SADC Countries – Mozambique, Zambia
21 to 60	Selected SADC Counties – Malawi, Mauritius, Zimbabwe
Less than 61	SACU – South Africa and Lesotho

Adapted from Adlung et al. (2002:263)

Various factors explain the low level of commitment of SACU countries. Often this is less of a reflection of a lack of commitment to reform but rather a capacity problem. Firstly, there is very low capacity, even in a country like South Africa, to champion and manage, both technically and politically, a services reform strategy. For example, the South African Department of Trade and Industry (DTI) trade negotiations team is particularly thinly resourced with very few senior individuals working on the trade negotiations desk (see Steuart and Cassim, 2005). This situation is even more hopeless for the small SACU neighbours. Secondly, the complexity of services require interministerial cooperation which in itself requires initiation mechanisms, clarity of mandates and others that often underlie the inertia in many SACU countries to make GATS commitments, which is in many ways viewed by some as a process that could have unintended consequences in the eyes of many policy-makers. Finally, the complexity of reform in sectors that were previously considered non-

tradables compounds the problem. Often, cost benefit analyses of services sector reforms do not exist to the same extent in developing countries as in many developed economies, as well as in some more advanced developing or middle income countries such as Brazil and Malaysia.

Notwithstanding the difficulties outlined, there are instances where the case for reform is more clear-cut requiring less analytical input and more harnessing of political will to reform and create positive externalities for the economy as a whole. While SACU countries have not committed significantly – some commitments have been made, as we will see.

South Africa and Lesotho have made commitments to the GATS in terms of both banking and insurance, though not for other financial services. Neither Botswana nor Namibia has made GATS commitments for financial services (Hawkins, 2003:51-52). Botswana, specifically, has made horizontal commitments with respect to cross-border supply and consumption abroad. Moreover, it has made horizontal commitments on Mode 3 supply in terms of both market access and national treatment. Lesotho and Namibia have made horizontal commitments on commercial presence in terms of market access only. Swaziland has not made commitments on Mode 3 (Ndulo, Hansohm and Hodge, 2005:18-19).

Botswana and Lesotho have made commitments regarding market access restrictions of Mode 4, which are limited to highly skilled persons and employees of companies operating in the country with stipulations to ensure development of local labour. Namibia has these same limitations but does not stipulate development of local persons. Swaziland has not yet made commitments on market access or national treatment on Mode 4 of supply. In terms of national treatment of Mode 4, Lesotho has no limitations and Botswana does not discriminate for those given market access and stipulates that professionals need to be domestically registered. Namibia and Swaziland have not yet made horizontal commitments on national treatment on Mode 4 of supply (Ndulo, Hansohm and Hodge, 2005:29-30).

Lesotho has no restrictions under Modes 1 and 2 (cross-border supply and consumption abroad). In order to establish commercial presence (Mode 3), foreign service providers are required to satisfy a minimum capital outlay of US$200,000 and

a foreign equity requirement of US$50,000. Mode 4 is permitted automatically for up to four senior expatriates and specialised skill labour subject to the laws of Lesotho. In terms of national treatment for all Modes of Supply, there are no limitations in Lesotho (Governments of SACU member countries, 2003:26-27).

Namibia's commitments under the GATS are minimal. The country has not made any horizontal commitments on market access or national treatment. Namibia was not a participant in the Fourth Protocol on basic telecommunications or the Fifth Protocol on financial services (Government of Namibia, 2003:202).

Swaziland's GATS commitments indicate that the government intention is to maintain liberal Mode 1 service provision and encourage Mode 3. Measures that affect cross border supply are generally left unbound, while market access for Modes 2 and 3 is not restricted. Swaziland has bound measures affecting Mode 4 (Government of the Kingdom of Swaziland, 2003:341).

While South Africa made commitments in the Uruguay Round, for finance, telecommunications, construction and engineering, it did not make commitments in education, energy and health, for example. South Africa did, however, make commitments of some form (partial or full) in about 80% of the main GATS services categories. However, of the nine service categories in which commitments were made, several sub-sectors were also left unbound, for example postal services, audiovisual services and a few others. In terms of the Doha Round, South Africa has still not submitted its initial offer to the WTO. Cassim and Steuart (2005) argue that this was a missed opportunity where South Africa could fairly easily have made an initial offer in a range of 'non-sensitive service sectors – sectors in which South Africa either did not schedule commitments at all or did not fully liberalise at the end of the Uruguay Round. These include legal and auditing services, research and development services, advertising services, packaging services, printing and publishing services, other business services not elsewhere classified, and recreational, cultural and sporting services (other than audiovisual services).

4. Sectoral analysis and the GATS: the case of finance and telecoms

A major challenge of the GATS negotiations for SACU countries is to translate them to the sectoral country level. Indeed, any negotiating strategy needs to be informed

by a sequencing of steps. First, what is it all about or why do it? It is important to emphasise that SACU countries' commitment should not simply be considered a process of compliance by virtue of WTO membership. It is critical, firstly, for negotiators to appreciate the extent to which negotiations have national positive welfare effects. Secondly, as a precursor to developing a negotiating position on a sectoral basis, it is important to understand the structure of a sector, its key features and role in the economy and the extent to which GATS-related disciplines could positively influence both the trajectory of the specific sector and the economy as a whole.

Some of the aspects that are explored here are primarily in the area of finance and telecoms. It is perhaps no coincidence that these are the best researched sectors in SACU, relative to other services sectors, but that they are also two of the most critical sectors in terms of their undue weight in the economy. A major challenge presented by services regulation in all the different sectors is, in a sense, to sift out the important regulation that pertains to the restrictions on market access or differences in national treatment. The section below simply identifies some regulations and restrictions as well as the level of commitment of various SACU countries, to give a sense of the detail required to understand the implications of GATS induced reform in the sector.

4.1 Banking, insurance and other financial services

In view of competition and the structure of the financial sector in SACU, the overriding concern, with the exception of South Africa, is the problem of lack of scale. Moreover, many of the small SACU countries import their financial services specifically from South Africa. A SACU country (other than South Africa) that has a sizeable financial services sector is Botswana, which is nevertheless insignificant in comparison to South Africa. Moreover, South African banks have major interest and shares in several banks in the smaller SACU countries.

South Africa's financial sector is fairly developed by middle-income country standards. The sector has been undergoing some process of gradual autonomous liberalisation. Considerable regulatory changes have taken place in the sector, particularly in opening it to foreign investment. Despite the opening up of the financial

sector, some markets remain uncontested. There are high levels of concentration in the banking sector – the four largest banks in South Africa (Standard Bank, ABSA, First National Bank and Nedbank) hold over 80% of the market share. There is some evidence to suggest that the high level of concentration does have an impact on performance and pricing behaviour. For example, banking costs are considered high in South Africa. This may be related to market structure issues. In general, the lack of competition in the banking sector, as well as the increasing cost of capital (both as a result of monetary policy and bank risk), is an important challenge facing the economy. Smaller SACU countries for obvious reasons suffer less contestation in banking and finance even though they have almost a similar number of banks as other countries. For example, Lesotho and Swaziland have four banks each linked to South African banks.

An important question is the extent to which the nature and form of financial intermediation are linked to the GATS negotiations. For example, SACU countries are characterised, with minor difference in levels, by high spreads between lending and deposit rates (see Hawkins, 2003). This is inadequate for any economy but the question faced is to what extent the GATS framework can be leveraged to address this problem. Before attempting to answer this question, it may be useful to look at the current state of GATS commitments and regulation in this sector.

The GATS framework for assessing market access and national treatment is a useful tool/mechanism and starting point to review the role that financial services play in the respective economies and in the costs of restrictive measures. In addressing problems in the financial sector, there are essentially two areas that have to be looked at. The first is the extent to which the nature of financial regulation has had perverse effects by nurturing inefficient costly financial sectors. The second is whether the sector itself takes on near monopoly characteristics irrespective of regulation.

There are various restrictions that exist in the financial sector, for example restrictions to setting up banks, mostly for prudential reasons, but also in cases where prudential requirements may simply act as a smokescreen to protect the interests of other firms. For example, all banks have to comply with minimum capital adequacy ratios but countries could set unrealistic targets. This is an example of the

kinds of questions policy-makers should be asking, while assessing the extent to which further reform, either domestically or through GATS, may be necessary to achieve certain objectives in the financial sector.

4.2 GATS commitments in finance

As was mentioned earlier, the only countries that really made commitments in this area are South Africa and Lesotho. Lesotho has made commitments in terms of both market access and national treatment for Insurance and banking services. Mode 1 of supply of financial services is unbound in terms of both national treatment and market access. Insurance services are bound with no restrictions for Mode 2 of supply, while banking services are bound with no restrictions for this Mode of supply. In terms of market access for commercial presence, Lesotho's financial services are bound with restrictions. National treatment of Mode 3 for financial services is bound with no restrictions. Mode 4 for financial services is unbound except for the horizontal commitments made (Ndulo, Hansohm and Hodge, 2005:39).

Although Botswana has made no commitments in terms of Modes 1 and 2 for banking, Botswana has no restrictions on capital flows, the number of foreign banks, borrowing or deposits. Therefore, based on the lack of restrictions in terms of market access and national treatment, Botswana appears to have a liberal trade policy. Ironically, while Lesotho has committed to some extent in financial services, it has restrictions on capital flows and the number of foreign banks, while borrowing and deposits are subject to exchange control. Namibia restricts capital flows but not the number of foreign banks. In addition, approval is required for borrowing and deposits are subject to exchange control (Hawkins, 2003:52-53).

While Lesotho, Namibia and Botswana have made no commitments in terms of legal form, equity restrictions, and types of transactions or the number of operations under Mode 3, both Botswana and Namibia allow commercial presence in the form of subsidiaries and representative offices, share of equity is unrestricted, insurance and securities transactions are restricted, but the number of operations is unrestricted. Lesotho allows all legal forms under Mode 3, share of equity is unrestricted, transactions in insurance and leasing are restricted, but the number of operations is unrestricted. This indicates that even though the countries have not made GATS

commitments under Mode 3, the regimes are generally fairly liberal and the countries can make more generous commitments (Hawkins, 2003:54-56).

The majority of restrictions to the provision of financial services contained in South Africa's Uruguay Round commitments relate to commercial presence (Mode 3). In general, there are many ways in which governments in individual countries can create a framework to ensure that their financial services sectors are competitive. There is a range of regulations that contribute to high banking costs. The critical issue is to assess the extent to which further commitments can effectively result in reduced costs.

4.3 Telecommunications services

Telecommunications services are notoriously unreliable and costly in SACU countries. General commitments in telecommunications cover facilities-based and public-switched telecommunication services, mobile cellular telephone services, satellite-based services, and value-added services. In all countries there is generally one nationally owned fix-line operator with some private equity stake in some cases. Naturally, countries are at different stages of their reform process. For example, a second fixed line operator will be operational in South Africa in 2006. Indeed, a second operator may not just be viable in the small SACU countries.

The process of opening up of the South African telecommunications sector post-1994 has been slow. Regulatory reforms since 1994 have resulted in the licensing of three mobile telephony providers, the corporatisation and partial equity sale in the fixed-line monopoly (Telkom), and the opening of the VANS sector. Telkom's current monopoly affects local access, public pay-phones, national long-distance and international telecommunications. The pace of reform in telecoms is partly determined by the nature of regulation and the role of independent regulators in determining the extent and level of competition and pricing. All SACU countries have independent telecoms regulators – their legal form and structures may differ respectively but are essentially constituted as independent, at least by law.

Other than fixed-line telephony, all SACU countries have mobile operators. Botswana and Namibia, for example, have two mobile telecommunications operators each. South Africa has three mobile telecommunications operators. Foreign ownership of

mobile telecommunications firms in Botswana, Namibia and South Africa is limited to a 49% share of equity. Lesotho has one mobile telecommunications operator. There are no restrictions on foreign ownership in Lesotho, although the number of operators is limited. The lack of ownership restrictions in Lesotho may be an indication that this country is unable to impose restrictions due to a lack of depth in domestic capital markets (Hodge, 2002:23-24).

SACU countries are generally quite restrictive in their telecoms. Underlying this is the dominance of a single fixed-line operator that has a major influence on the overall costs structure of the communications sector as a whole, bearing in mind that internet services providers rely heavily on fixed-line for bandwidth, and so forth. While South Africa committed to an extension of monopoly rights for its only fixed-line operator, Telkom, to 2003, only more recently is the evidence of a second operator coming into existence. In the case of Botswana, foreign and local private ownership in the sector is prohibited (Monnane, 2003:2-4).

A great deal of restrictions does exist in SACU countries ranging from prohibition of voice over internet, prohibitions on the number of operators, and so forth. Once again, like financial services, there are many domestic reform issues that need addressing as the costs structure of these services generally also jeopardises other sectors, such as manufacturing and agriculture, which may gain from better market access.

4.4 GATS commitments in telecommunications

Generally, most SACU countries have not made any GATS commitments in telecoms, with the exception of Lesotho and South Africa. Lesotho has made commitments regarding both market access and national treatment. Cross-border supply of telecommunications is bound with no restrictions, while consumption abroad is unbound. Mode 3 is bound with no restrictions. For both Lesotho and South Africa, Mode 4 is unbound except for commitments made in the horizontal section for limitations on market access and limitations on national treatment. South Africa has made commitments in basic telecommunications. In terms of limitations on market access, Modes 1, 2 and 3 are bound with restrictions. Modes 1, 2 and 3 are bound with no restrictions in South Africa (Ndulo, Hansohm and Hodge, 2005:57).

South Africa's telecommunications cover was quite comprehensive but not by any means far-reaching in terms of level of liberalisation. South Africa committed in the Uruguay Round to a duopoly in fixed-line operators. A SNO was scheduled to enter the market in 2003, but by late 2004 the licence granted by the Minister of Communications was still not operational, for reasons that are beyond our scope here.

Furthermore, foreign investment in suppliers of facilities-based and public switched telecommunications services and mobile cellular telephone services is limited to a cumulative maximum of 30%. South Africa's commitment, also, excludes a commitment to interconnection rates that are the same as those provided by the major supplier to itself and permits the authorities to determine different rates for different areas or different services. South Africa's offer also does not commit to making publicly available the period normally required to make a decision concerning an application for a licence.

As far as value-added network services are concerned, South Africa's existing commitments state a general restriction on the bypass of South African facilities for routing of domestic and international traffic. Further, VANS providers can only supply international services with the consent of Telkom.

Currently, value-added network services suppliers must make use of the facilities of the three international network operators and the two national operators concerning the provision of VANS with respect to Mode 1 and Mode 3 respectively. Furthermore, VANS suppliers may not provide voice services over their networks. The primary limitations therefore are with respect to the inability to own or resell network capacity and to provide VOIP services.

In terms of future challenges, other SACU countries should commit to the WTO – at least pre-commit to a reform process in the way that South Africa has, based on the potential offer presented in the previous section. At least for a start, the rest of the SACU countries should bind the sector to the status quo. South Africa bound itself in the Uruguay Round to introduce competition at some future date. While the rest of SACU needs to commit, a major challenge for South Africa is firstly to implement its commitments, and secondly to improve on its current commitments.

5. Beyond finance and telecoms

As mentioned, there are many other sectors that are part of the WTO process and are likely to come up for negotiations. SACU countries have an important opportunity to firstly bind sectors that are already highly liberal with no market access and national treatment restrictions. In addition, other sectors should be examined very seriously, specifically to use GATS as an opportunity to lock in a reform process. For example, there are numerous barriers to trade in air transport services that exist within SACU countries. For example, Namibia has two large commercial ports, namely Walvis Bay and Luderitz. A barrier to trade in maritime services in Namibia is that the port operator, Namport, holds a monopoly over the provision, facilitation and endorsement of port-related services (Ndulo, Hansohm and Hodge, 2005:67-70). As a result, requests have been made to Namibia to make commitments regarding maritime services, as discussed in the next section.

Another interesting area is Architectural, Construction and Engineering Services. Only South Africa and Lesotho have undertaken commitments on cross-border supply of architectural services. Although this does not mean that it is necessarily prohibited or impossible to supply architectural services cross-border to SACU and other African countries, it shows that there is much room for improving commitments regarding the removal of formal barriers. Supply via consumption abroad (Mode 2) and commercial presence (Mode 3) suffers largely the same fate, albeit with additional commitments by Swaziland and Botswana. As expected, the greatest limitations are placed on supply via Mode 4 (presence of natural persons) (Teljeur and Stern, 2002: 38).

South Africa made extensive Uruguay Round commitments in architectural, construction and engineering services. The only restriction contained in South Africa's commitments in these services applies to the provision of architectural services: specifically, for building plans of 500m² and over, the services of a locally registered architect must be used. In all other sectors, there are no limitations to market access and national treatment except for the cross-border provision of construction and related engineering services, which remain unbound for reasons of technical infeasibility. (South Africa did not make any commitments in Other Construction and Related Engineering Services.)

In general, there has been great reluctance by most countries to commit in more sensitive sectors such as health and education. An important issue for SACU countries is to prioritise sectors and limit their GATS involvement to some key economic sectors, in view of resource constraints. As we will see in the next section, various requests have been made by various trading partners towards SACU countries that involve a range of other sectors.

6. GATS requests and offers

As mentioned earlier, the process of reform in the GATS depends on requests from partner countries to open up. SACU countries received various requests in the last two years. We have been able to obtain several requests from various countries towards South Africa and some requests from the European Community (EC) towards Botswana, Lesotho and Swaziland.

Table 9 below aggregates some of the requests in financial services from various countries including EC, US and a few others. A full analysis of these requests is beyond our scope here, but at this stage a suggestion is simply made that countries need to harness analytical capacity to critically review what these mean for their respective domestic economies. As we can see, in financial services the major concern is South Africa's restrictions in Mode 3 where a great deal of economic opportunities may exist for international banks. Mode 1 restrictions need to be examined carefully too. Some of the most important requests in financial services can be classified into more or less three areas. The first set of requests is concerned with the collusive behaviour of 19 local banks respecting access to automatic clearing-houses. A second set of requests relates to freer movement of experts in the financial services industry. The third set of requests is of a prudential nature, such as allowing foreign bank branches to use the parent capital.

Table 9: Requests on financial services (excluding insurance and insurance related services)

South Africa to:

- Make full commitments in Modes 1 and 2 for the provision and transfer of financial information and financial data processing, and for advisory and other auxiliary financial services.
- Make full commitments in Modes 2 and 3 in pension fund management and all sub-sectors
- Remove discriminatory capital requirements under national treatment (Mode 3).
- Allow foreign banks' branches to use parent's capital to meet prudential requirements (Mode 3).
- Make full commitments in Mode 3 in all sub-sectors, especially where limitations might constrain choice of preferred form of commercial presence or level of equity participation.
- Take into account the guarantee extended by the branch's head office or by another foreign bank for additional lending volume (Mode 3).
- Remove restrictions on dealings in foreign exchange.
- Clarify why the limitation that restricts foreign banks to holding 49% of the equity of any seat on the JSE has not been scheduled.

Botswana, Namibia and Swaziland to:

- Follow the classification given in the Annex on Financial Services.
- Make commitments (Mode 3) to accept deposits, lending, financial leasing, transmission services and guarantees.
- Make commitments in Mode 1 for provision of provision and transfer of financial information, and auxiliary financial services.

In addition, Swaziland to:

- Clarify the measures and the extent to which preferential access (under the MFN exemption) to capital and money markets is granted to the members of SACU's CMA.

With respect to financial services, other than insurance services, the EC has requested Botswana, Namibia and Swaziland to follow the classification given in the

Appendix 1 on Financial Services and make commitments regarding Modes 1 and 3. Swaziland has also been requested to clarify the preferential access that is granted to SACU's CMA members.

Table 10 below shows requests in almost all modes, demonstrating that restrictions exist widely. A key challenge for future research is to establish the extent to which restriction is simply underpinned by a prudential requirement, or is restrictive and by its very nature creates excessive rents for particular interest groups.

Table 10: Requests on insurance and insurance-related activities

South Africa to:

- Make full commitments in Mode 1 in reinsurance, MAT insurance (including intermediation), and services auxiliary to insurance.
- Make full commitments in Mode 2 in life insurance, non-life insurance, MAT insurance, reinsurance, insurance intermediation, and services auxiliary to insurance.
- Make full commitments in Mode 3, including the removal of restrictions on a supplier's ability to establish preferred form of commercial presence (subsidiary, branch or joint venture) and at the level of equity participation preferred by the service supplier.
- Remove the approval requirement for acquiring shares in existing companies (Mode 3).
- Remove the residency requirement for the majority of directors (Mode 3).
- Cartel of local banks controlling the automatic clearinghouses complicates entry by new participants.
- Foreign bank branches are not allowed to use their parents' capital to meet prudential requirements.
- Concerning regulation on bank branch capital, the fact that the branch's head office or another foreign bank guarantees additional lending volume is not taken into account.
- Prohibition on foreign banks from using global capital as open exchange position (net open foreign currency position limited to 15% of branch capital and reserves).

EU Requests to Botswana, Namibia and Swaziland to:

- Commit direct life and non-life insurance (Mode3).
- Make commitments in Mode 1 for reinsurance and retrocession.

In the case of telecoms, we have several requests – most of these make absolute sense in view of the restrictions that exist in the sector. In the telecommunications sector, commercial presence is often more open than cross-border supply.

Table 11: EC Request to South Africa on telecommunication services

Value-added services

South Africa to:

- Remove restrictions on the bypass of South African facilities for routing of domestic and international traffic.
- Introduce a regulator that is independent of all operators, allow an unlimited number of operators and, if licences are necessary, a licensing regime that abides by the principle of the Reference Paper.
- Remove the regulation according to which VANS providers can only provide international services with the consent of Telkom SA.
- Make full commitments in market access for all value-added services (Mode 2).

Basic Services

South Africa to:

- Remove restrictions on the ability of service providers to supply services on a facilities basis only.
- Remove restrictions on the number of service operators in basic telecom services (including cellular telephony).
- Remove limitations to foreign investment.
- Remove the restriction permitting foreign investment in suppliers up to a cumulative maximum of 30% (Mode 3).
- Remove references to the possible need for different interconnection rates with major suppliers.
- Remove restrictions on the bypass of South African facilities for routing of domestic and international traffic.
- Remove references in the schedule to Telkom's status as a de facto regulator, and to the fact that VANS firms can provide services only with the consent of Telkom, as well as references to the ad hoc nature of dealing with international VANS providers.

Botswana, Namibia, Lesotho and Swaziland have been requested by the EC to make commitments relating to the Reference Paper of the Basic Telecommunications negotiations in addition to making commitments to open sub-sectors to full competition and foreign investment. The request has been made with a special reference to data transmission telecommunications services (Table 12).

Table 12: EC Requests to Botswana, Lesotho, Namibia and Swaziland on telecommunications services Botswana, Lesotho, Namibia and Swaziland to:

- Make commitments to open the sector to full competition and foreign investment, especially in data transmission related services.
- Make commitments to the reference paper of the Basic Telecommunications negotiations.

Various requests have been made in other sectors such as energy, education, health and professional and architectural services. For example, there is a request for South Africa to make full commitments in higher education and training services, adult education, and other education services in all Modes as well as to remove burdensome requirements, including non-transparent needs tests. In professional services, there are requests to remove the requirement to use the services of a locally registered architect for building plans greater than 500m².

In construction and related engineering services, South Africa was requested to make full commitments in Mode 4 with respect to the following professionals: architects, engineers, and related professionals; general managers in construction; extraction and building trade workers; construction labourers; and manufacturing labourers. Another important area where South Africa has received several requests is in respect to energy. Specific requests, among others, have been to make full commitments in Mode 3 in related scientific and technical consulting services, and construction and related engineering, as well as to make full commitments in Mode 3 in the operation of transportation/transmission and distribution facilities, and the transportation of petroleum and gas.

Botswana, Namibia and Swaziland have all been requested by the EC to make horizontal GATS commitments to remove restrictions that relate to ‘business visitors’,

who are defined as foreign service suppliers seeking temporary entry to hold meetings, conclude contracts or set up commercial presence. Very few requests, other than those relating to telecommunications, have been made to Lesotho, given the extent of commitments already made. As such, requests to Lesotho have only been made to relating to environmental and computer and related services. The EC has requested Botswana to make commitments regarding business services, construction and engineering services, environmental services and tourism services, in addition to the requests relating to horizontal commitments and financial and telecommunications services. Namibia has been requested to make specific commitments relating to legal, engineering, environmental, construction, engineering, computer and business services, in addition to numerous horizontal commitments. The majority of these requests to Namibia and Botswana are to make commitments under Mode 3 (commercial presence). Swaziland has been requested to make commitments relating to business services and computer and related services, in addition to horizontal commitments (see Appendix 1).

Namibia has been requested to make extensive commitments regarding maritime transport. The EC has requested that Namibia make commitments in Modes 1, 2 and 3 for international freight and passenger transport, also to make commitments for access and use of port and multimodal facilities. Requests have been made that Namibia commit to allow international maritime transport services to move and reposition their equipment on their own vessels between the two Namibian ports, as well as operate vessels from any country for pre- and onward carriage of international transport between the ports of Namibia (See Appendix 1). In many ways the implications of South Africa's response to these areas depend largely on South Africa's response, as SACU countries rely heavily on services from SA. This would require close cooperation among these countries in carving out services negotiating strategies.

7. Some reflections on the implications of a SACU Services Negotiating Strategy

Owing to the overwhelming constraints in services exports for most SACU countries, there is nothing to gain from greater openness in global regulation or services exports for SACU countries if one is thinking in mercantilist terms. So it is important

to state very unambiguously that there are no obvious offensive interests, at least in the short term, for SACU countries other than South Africa's interest in Africa, and in a few sectors in other parts of the world. But the important issue is that services reforms are effectively a behind-the-border type of issue and perhaps there is need to change the mindset of policy-makers when dealing specifically with this sector. Most of the welfare gains will be derived from domestic reform and not from a multilateral process.

There are two important questions to ask here. First, what is the value of SACU countries to binding their commitments in services, even if not liberalising further through a process of domestic reforms? Secondly, is there a case for more far-reaching reform than that which is driven through the GATS? This has to be reviewed on an individual-country basis but the basic argument is that committing to a global trading system can have a useful signalling effect about commitment to reform. But, this signalling would be meaningless if there is no willingness to embark on a serious domestic reform agenda.

It is absolutely clear that market access gains are not obvious for most SACU countries, with some exceptions in the case of South Africa. So, by and large, SACU interests in services are merely limited to whether policy-makers want to use it as an opportunity to enhance their own reform process if there is some domestic inertia. Indeed, another important strategy is the extent to which SACU can play off its GATS-induced reform for better access in other areas such as agriculture or manufacturing.

It was noted that SACU countries did not offer anything meaningful in the GATS, while South Africa and Lesotho provided more commitments relative to others. It is, however, important not to overemphasise the impact that GATS commitments can have on SACU countries in particular. At this stage, the commitment to bind services reforms may or may not have an obvious benefit and there may be other priorities specifically for the BLNS countries (Botswana, Lesotho, Namibia and Swaziland). However, it is clear that reforms in services are necessary in all SACU countries. The GATS process could simply be a useful adjunct to domestic reform. This is how they should really be viewed.

Indeed, the dynamics between South Africa and the rest of SACU differ. In many respects, the lack of competition in many services in South Africa has spillover effects on BLNS countries. So, in some respect, the latter should have a strong interest in further competition in South African services. An important issue for these countries is the extent to which they can rely on more competitive import of services, in particular, through Mode 1, for example. In other words, it is not clear why banking costs or the costs of telecoms in the smaller countries need to be dependent on South African prices. Naturally, there are obvious reasons for this – many markets are minute and it may not make sense to service one of the BLNS countries.

A key policy issue is the extent to which SACU countries are able to reduce costs of services to assist their domestic industries in becoming more competitive, even if South African services were not competitive. This requires a detailed review of regulations and an understanding of different SACU economies in order to comprehend whether costs of services are a function of regulatory barriers to entry, lack of a critical domestic market or something else. Without intensive fieldwork in respective BLNS economies, it is difficult to assess the extent to which changes in regulations could result in investment in services sectors. The problem is compounded by the fact that BLNS countries are not as integrated as are individual countries with South Africa. In general, there is no reason why BLNS countries should not enjoy more competitive services at least in some sectors even by switching to other third suppliers. This may not be the case in transport or certain financial services, but generally this should be seriously investigated at the individual SACU country level.

8. Conclusion

In understanding services reform there are essentially two analytical challenges we face. The first is to assess the role of services in the economy and the second is the link between services and the GATS negotiations. Services are highly diversified and heterogeneous. This paper has primarily focused on the GATS negotiations and the role of SACU economies. Emphasis was placed on the extent to which SACU countries have participated or committed (or pre-committed to GATS reforms). Some aspects of the SACU economies were explored, specifically in finance and telecoms, in an attempt to juxtapose the structure of these sectors in the national economy, and

to compare the nature of regulation and market structure with a variety of GATS negotiating issues, specifically by mode of supply. A review of requests from other countries to SACU countries followed. These requests provide a convenient point of departure for further research in this area, unpacking what exactly they would mean for SACU countries if they were to accede to them. Finally, the paper speculated about the role and function of services and their worth in the negotiations process.

The impact of services reform varies from creating more efficiency in the economy, inequality (more or less) through changes in prices of services, and employment loss, to other factors such as environmental impacts. Access to services is another important factor that needs some consideration. Health and education, for example, are considered basic public goods, particularly for the poor, who cannot afford private medical or educational facilities. The liberalisation of these social sectors is not as straightforward as other more commercialised sectors. Moreover, the other side of GATS reform is the potential for a member to significantly increase its services exports through further reductions in barriers in partner countries. This can have a significant impact on the domestic economy, and implications for sustainable development must be considered here too. Naturally this applies to a limited extent to South Africa and is less relevant to the BLNS countries, at least, in the short- to medium-term.

Owing to their vast differences, some sectors have a more direct impact on economic growth, while others have a more direct impact on welfare, poverty and the environment. For example, there is no obvious link between business or professional services and the environment. There is, however, a strong link between tourism and the environment. Financial services, on the other hand, can have a significant effect on South Africa's long-term growth prospects.

SACU countries, it was argued, should first commit in sectors that are liberal and open anyway, such as tourism and business services, perhaps. The second step would be to use the GATS as an opportunity to harness political support to phase out restrictions that have adverse effects on economic growth. However, in liberalising services, it is important to ensure that the policies aimed at creating market access and nondiscrimination, in order to induce more efficiency and competition in the

economy, are not at the cost of massive unemployment or price inflation in services and utilities.

The other important aspect of the impact of services liberalisation is the benefit to SACU from market access in the global economy. There have been no real requests from SACU countries towards potential markets, with a few exceptions from South Africa. The paper has not focused much on this, purely in recognition of the fact that the major constraint to SACU is not inability to export services, but to reform services in their own economies. There are, however, several sectors where South Africa's export potential is high, such as financial services, construction services, and business services. The recognition of this is ultimately quite important for a cost and benefit analysis of GATS reform.

Appendix 1: GATS 2000 Requests from the EC and its Member States

EC Requests to Botswana

Horizontal Commitments

Botswana to:

- Specify criteria to be fulfilled to obtain approval from Bank of Botswana with regard to fees due to non-resident service suppliers (Modes 1&2).
- Specify criteria to be fulfilled to obtain licence for juridical persons (Mode3)
- Remove the requirement whereby locals are given priority over foreign investors to purchase shares in resident companies (Mode 3).
- Remove labour market testing for intra-corporate transfers of managers, executives and specialists, in addition to persons with a degree or equivalent qualification transferring for training or experience (Mode 4).
- Remove restrictions relating to Business Visitors (foreign services suppliers seeking temporary entry to hold meetings, conclude contracts, or set up commercial presence).

Business Services

Computer and Related Services

Botswana to:

- Make full commitments under Modes 1,2 and 3.

Other Business Related Services

Botswana to:

- Make full commitments under Modes 1,2 and 3 for ‘Management Consulting Services’ and ‘Services Relating to Management Consulting’.

Telecommunications Services

Botswana to:

- Make commitments to open the sector to full competition and foreign investment, especially in data transmission related services.
- Make commitments to the reference paper of the Basic Telecommunications negotiations.

Construction and Related Engineering Services

Botswana to:

- Make full commitments under Mode 3.

Environmental Services

Botswana to:

- Consider making commitments in terms of market access and national treatment of 'Water for Human Use and Waste Water Management', 'Solid/Hazardous Waste Management', 'Protection of Ambient Air and Climate' and 'Remediation and Cleanup of Soil and Water' (Mode 3).

Financial Services

Botswana to:

- Follow the classification given in the Annex on Financial Services.

Insurance

Botswana to:

- Commit direct life and non-life insurance (Mode 3).
- Make commitments in Mode 1 for reinsurance and retrocession.

Banking and Other Financial Services

Botswana to:

- Make commitments (Mode 3) to accept deposits, lending, financial leasing, transmission services and guarantees.
- Make commitments in Mode 1 for provision of provision and transfer of financial information; and auxiliary financial services.

Tourism and Travel Related Services

Botswana to:

- For Hotels and Restaurants including Catering' make commitments in Mode 3 to clarify the requirements that a foreign service provider is required to meet and the extent to which the requirements amount to a limitation in national treatment.

EC and its Member State's Requests to Namibia

Horizontal Commitments

Namibia to:

- List the provisions of Namibian law that would amount to a restriction in terms of Article AVI GATS in order to increase transparency (Mode 3).
- Define terms used, 'management and expert jobs' (Mode 4).
- Specify in schedule prior employment requirement (Mode 4).
- Specify maximum length of stay for intra-corporate transferees (Mode 4).

- Give clarification of degree of affiliation between companies that is required in order for transfer to qualify under provisions on intra-corporate transferees (Mode 4).
- Clarify the practical meaning of the requirement that foreign nationals must be 'agreed upon by contracting parties and approved by Government' (Mode 4).
- Make a commitment to exempt intra-corporate transferees from 'Economic Needs Tests' (Mode 4).
- Make a commitment to remove restrictions on entry and grant a maximum stay of 90 days in a year for 'Business Visitors' entering the country to hold meetings, negotiate the sale of services, conclude contracts to sell services or set up commercial presence (Mode 4).

Legal Services

Namibia to:

- Make a commitment to allow consultancy on public international law and law of jurisdiction in situations in which the service provider or its employees are qualified lawyers.
- Make full commitments under Mode 3.

Engineering Services

Namibia to:

- Make a commitment to allow Mode 3 through different types of entities or at a minimum through joint ventures with local enterprises.

Computer and related services

Namibia to:

- Make full commitments under Modes 1, 2 and 3.

Other business services (management consulting services and services relating to management consulting)

Namibia to:

- Make full commitments under Modes 1, 2 and 3.

Telecommunications

Namibia to:

- Make commitments to open sub-sectors to full competition and foreign investment, especially in data transmission related services.
- Make additional commitments to the Reference Paper of the Basic Telecommunications negotiations.

Construction and related engineering services

Namibia to:

- Make full commitments under Mode 3.

Environmental services

Water for human use and wastewater management, solid/hazardous waste management, protection of ambient air and climate and remediation and cleanup of soil and water.

Namibia to:

- Consider making commitments for Mode 3.

Financial services

Namibia to:

- Follow the classification provided in the Annex on Financial Services.

Insurance

Namibia to:

- Make commitments for direct life and non-life insurance in Mode 3.
- Make commitments for reinsurance and retrocession in Mode 1.

Banking and other financial services

- Make commitments on acceptance of deposits, lending, financial leasing, all payment and money transmission services, and guarantees in Mode 3.
- Make commitments in Mode 1 regarding the provision and transfer of financial information and other auxiliary financial services.

Transport Services

Maritime Transport

Namibia to:

- Make commitments in Modes 1, 2 and 3 for International Freight and Passenger Transport.
- Make additional commitments to provide services at ports on a nondiscriminatory basis.
- Make commitments for access and use of port facilities.
- Make commitments to allow access to and use of multimodal facilities.
- Make commitments to allow international maritime transport suppliers to move and reposition own equipment on own vessels between ports in Namibia.

- Make commitments to allow international maritime transport suppliers to operate vessels of any flag for pre- and onward carriage of international cargo between ports of Namibia.

Services Auxiliary to all Modes of Transport

Namibia to:

- Make full commitments in Modes 2 and 3 for Storage and Warehouse Services.
- Make full commitments in Modes 1, 2 and 3 for Freight Transport Agency/Freight Forwarding Services and Pre-Shipment Inspection.

EC and its Member State's requests to Lesotho

Computer and related services

Lesotho to:

- Make full commitments in Modes 1, 2 and 3.

Telecommunications

Lesotho to:

- Make commitments to open sub-sectors to full competition and foreign investment, especially in data transmission related services.
- Make additional commitments to the Reference Paper of the Basic Telecommunications negotiations.

Environmental Services

Water for human use

Lesotho to:

- Consider making commitments for Mode 3.

Wastewater management, solid/hazardous waste management, protection of ambient air and climate & remediation and cleanup of soil and water

Lesotho to:

- Consider extending commitments beyond consultancy services (Modes 3 and 4).

EC and its Member State's requests to Swaziland

Horizontal commitments

Swaziland to:

- Make a commitment to exempt intra-corporate transferees from 'Economic Needs Tests' (Mode 4).
- Make the same commitment to exempt graduates or persons with equivalent technical qualifications to transfer for training or experience (Mode 4).

- Make a commitment to remove restrictions on entry and grant a maximum stay of 90 days in a year for 'Business Visitors' entering the country to hold meetings, negotiate the sale of services, to conclude contracts to sell services or set up commercial presence (Mode 4).

Computer and related services

Swaziland to:

- Make full commitments in Modes 1, 2 and 3.

Other business services

Management consulting service

Swaziland to:

- Make full commitments to market access for Mode 1.

Services relating to management consulting

Swaziland to:

- Make full commitments to market access and national treatment for Mode 1.

Telecommunications

Swaziland to:

- Make commitments to open sub-sectors to full competition and foreign investment, especially in data transmission related services.
- Make additional commitments to the Reference Paper of the Basic Telecommunications negotiations.

Financial Services

Swaziland to:

- Follow the classification given in the Annex on Financial Services.
- Clarify the measures and the extent to which preferential access (under the MFN exemption) to capital and money markets is granted to the members of SACU's CMA.

Insurance

Swaziland to:

- Make commitments for direct life and non-life insurance in Mode 3.
- Make commitments for reinsurance and retrocession in Mode 1.

Banking and other financial services

Swaziland to:

- Make commitments on acceptance of deposits, lending, financial leasing, all payment and money transmission services, and guarantees in Mode 3.
- Make commitments in Mode 1 regarding the provision and transfer of financial information and other auxiliary financial services.

References

Adlung, R. et al. 2002. The GATS: Key Features and Sectors. *In* Hoekman, B, Mattoo, A. and English, P. (eds.). 2002. *Development, Trade, and the WTO. A Handbook.* Washington: The World Bank.

Cassim, R. 2005. *Growth and Welfare in Services, forthcoming Development Southern Africa*.

Gabaraane, M. 2003. *Botswana Financial Services*. SATRN Working Paper No. 2, Botswana Institute for Development Policy Analysis (BIDPA), January.

Government of Botswana. 1998. *Trade Policy Review*. WTO WT/TPR/G/35.

Government of Botswana. 2003. *Trade Policy Review*. WTO WT/TPR/S/114/BWA Annex 1.

Government of Kingdom of Lesotho. 1998. *Trade Policy Review*. WTO WT/TPR/G/36.

Government of Kingdom of Lesotho. 2003. *Trade Policy Review*. WTO WT/TPR/S/114/LSO Annex 2.

Government of Kingdom of Swaziland. 2003. *Trade Policy Review*. WTO WT/TPR/S/114/SWZ Annex 5.

Government of Namibia. 1998. Trade Policy Review. WTO WT/TPR/G/37.

Government of Namibia. 2003. *Trade Policy Review*. WTO WT/TPR/S/114/NAM Annex 3.

Governments of SACU member countries. 2003. *Trade Policy Review: Southern African Customs Union*. WTO WT/TPR/G/114 March.

Government of Kingdom of Swaziland. 2003. *Trade Policy Review*. WTO WT/TPR/S/114/SWZ Annex 5.

Hawkins, P. 2003. *Policy and Performance of the Financial Services Industries in Southern Africa.* Paper prepared for the South African Trade Research Network Feasibility, October.

Hodge, J. 2002. *WTO Negotiations in Telecommunications: How Should SADC Countries Respond?* SATRN Working Paper No. 1, Economics Department, University of Cape Town, November.

Kaboyakgosi, G. 2003. *Air and Road Transport in Botswana*. SATRN Working Paper No. 5, Botswana Institute for Development Policy Analysis (BIDPA), April.

Kaboyakgosi, G. and Sengwaketse, M. 2003. *Construction and Related Services in Botswana*. SATRN Working Paper No. 4, Botswana Institute for Development Policy Analysis (BIDPA), April.

Monnane, M. 2003. *Botswana Telecommunications Services*. SATRN Working Paper No. 3, Botswana Institute for Development Policy Analysis (BIDPA), January.

Ndulo, M., Hansohm, D. and Hodge, J. 2005. *State of Trade in Services and Service Trade Reform in Southern Africa*. NEPRU Research Report No.31, May.

SA Airlink website: www.saairlink.co.za/airlink_swazi2.htm (Acessed 23 August 2005}.

Steuart, I. and Cassim, R. 2005. *Opportunities and Risks of Liberalising Trade in Services: Case Study on South Africa*. Johannesburg. ICTSD. [Online]. Available: http://www.ictsd.org/issarea/services/.

Swaziland Stock Exchange website: www.ssx.org.sz (Accessed 23 August 2005).

Teljeur, E. and Stern M. 2003, *Understanding the South African Construction Services Industry: Towards Understanding a GATS negotiating Strategy*. Paper Presented at the TIPS forum, 2002, Glenburn Lodge, Johannesburg.

The Namibian Economic Policy Research Unit (NEPRU). 2005. *Competition in Namibia's Banking Industry.* NEPRU Policy Brief, Issue 10, June.

Chapter 7

The challenges facing least developed countries in the GATS negotiations: a case study of Lesotho

by Calvin Manduna[1]

1. Introduction

Least developed countries (LDCs) face of myriad of challenges in negotiating effectively both at the World Trade Organization (WTO) and in various other fora.[2] These challenges stem from a variety of issues, such as lack of resources, technical capacity or a perceived lack of interest in the subject matter under negotiation. These challenges particularly affect LDCs when negotiating trade in services.

Over the last two decades, services have become increasingly tradable and dynamic and several categories of services have been among the fastest growing economic activities in the world economy.[3] Based on the four types of services transactions subject to multilateral disciplines (i.e. modes 1–4), total measurable trade in services was about US$2.1 trillion by the end of 2004 (Sauve, 2005). Developing countries' services exports made up for almost 25% of this total, amounting to about US$377 billion by the end of 2003. The share of services in developing countries' total exports has risen from less than 10% in 1980 to nearly 21% today. Such trends in aggregate data have led some commentators to conclude that the gap between developed and developing countries in the share of services in total trade has been reducing (Sauve, 2005:1).

However, an analysis of individual developing countries and LDCs, especially those from Africa, suggests otherwise. Indeed, the persistent small share of services trade for many African countries, coupled with the non-visibility of many services trade activities and exports in their domestic economies and the difficulties involved in measuring such trade in services (Riddle, 2002), has led some African countries to conclude that there is not much for them to gain in the WTO services negotiations.[4] As a result, services are not given the prominence enjoyed by other sectors, such as

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[2] For examples of some of the problems facing LDCs and developing countries in trade negotiations, see Abugattas Majluf (2005). See also Manduna (2005).
[3] See UNCTAD (2005) and UNCTAD (2003).
[4] Indeed, the Doha Development Agenda (DDA) is sometimes seen as a 'mercantilistic bargain between developing country exports of agricultural products and developed country services exports' (Sauve, 2005: 1).

agricultural or non-agricultural market access. This can be discerned from the resources and time that many LDCs allocate to sectoral assessments on services and the little support given to service negotiations. Although this result may not have been a conscious decision by officials, this has been the experience of many LDCs, such as Lesotho. At the same time, it is important to keep in mind that multilateral negotiations on services only began during the Uruguay Round. Therefore services negotiations remain a fairly new area when compared to goods. Likewise, it is only in recent years that Regional Trade Agreements (RTAs) have come to include provisions on liberalising services. Services were traditionally not areas that were uppermost, if at all, on the agenda of policy makers in many LDCs, with the exception of tourism. Moreover, services unlike industrial goods or agricultural products are not the responsibility of a single Ministry, but require the involvement of several line Ministries, including health, transport, communications, energy, education and so on. So far, many LDCs are yet to overcome the challenge of coordinating effectively across various ministries in the services negotiations. It is therefore, not surprising that LDCs and many developing countries have mostly focused on industrial goods and agriculture in the negotiations and in their domestic policy.

This chapter provides a brief sketch of the experience of Lesotho during the Uruguay Round and in the current WTO negotiations on services, and seeks to illustrate some of the challenges which Lesotho needs to overcome during these negotiations. At the same time, Lesotho also faces the prospect of bilateral negotiations on services together with the other Southern African Customs Union (SACU)[5] Members. Free Trade Agreement (FTA) talks are currently underway between SACU and the European Communities (EC) under the Economic Partnership Agreements (EPAs)[6], while previous FTA negotiations between SACU and the United States[7] have been

[5] SACU is the world's oldest customs union dating back to 1910. Its Member States are Botswana, Lesotho, Namibia, South Africa, and Swaziland. A subsequent SACU Agreement in 1969 was renegotiated in 2000 (entering into force in July 2004) in order to democratise SACU (following the advent of democracy in South Africa in 1994), provide for administrative institutional reform and address the emerging needs of the SACU Member States more effectively. See further http://www.tralac.org/pdf/New_SACU_Institutions-Prospects_for_Regional_Integration.doc and http://www.dfa.gov.za/foreign/Multilateral/africa/sacu.htm

[6] Several ACP regions have commenced EPA negotiations on services. Liberalisation of services should be in accordance with the requirements of the GATS, in particular, GATS Article V, which calls for agreements on services to have substantial sectoral coverage. It remains to be seen how the different region determine what qualifies as substantial sectoral coverage and how the cater for special and differential treatment for the ACP parties.

[7] The US – SACU FTA negotiations began in June 2003, with the aim of creating the first US free trade area with an Africa bloc. For the US, an FTA with SACU would provide access to the important South African market and go some way to offset the South Africa – EC Trade Development Cooperation Agreement (TDCA) which entered

scaled back to focus on trade and investment cooperation after more ambitious FTA talks collapsed in 2006. Possible future FTAs might involve China[8] and India.[9] What is clear is that Lesotho faces a considerable challenge in mobilising the required human and financial resources, preparing for the various negotiations on services and also managing and coordinating various ministries which should be involved in the services negotiations. The challenges highlighted here are not unique to Lesotho, but are being grappled with by other LDCs and some developing countries. Ultimately, this chapter highlights the urgent need for targeted technical assistance for LDCs in various services-related activities, such as sectoral assessments, raising the profile and competitiveness of services suppliers, improving data collection capacity, improving the understanding of the GATS amongst officials and developing a private sector strategy to promote services trade, exports and competitiveness. The aforementioned assistance to LDCs should be viewed in the context of operationalizing the GATS Articles IV and XIX, the Modalities for the Special Treatment for LDCs in the Negotiations on Trade in Services[10] and the Guidelines and Procedures for the Negotiations on Trade in Services.[11] To date, progress toward giving effect to these provisions has been disappointing.

2. Some characteristics of Lesotho's economy and trade[12]

The following section provides an overview of Lesotho's economy and its trade profile. This will help us to better understand services trade in the context of

into force in January 2000. From the SACU perspective, an FTA with the US would expand and entrench the preferential treatment SACU Members receive under the African Growth and Opportunity Act (AGOA). Hopefully this will stimulate FDI flows into SACU. The SACU – US FTA negotiations faced a year-long deadlock since 2004 due to differences over the scope of the FTA and the subject matter of the negotiations. In particular, SACU was prepared to discuss market access, but wanted to exclude investment, intellectual property, labour issues and government procurement (with South Africa concerned about the impact on its Black Economic Empowerment programmes). The US rejected this approach, arguing that it had a Congressional mandate to negotiate on all subjects. The two sides met in Geneva in July 2005 and the talks were expected to resume later in September, with hopes to conclude the negotiations by September 2006. However, disagreement over the focus areas, special and differential treatment and possible development provisions led to collapse in the FTA talks in November, 2006. See http://www.ictsd.org/weekly/04-10-06/inbrief.htm, See also http://www.bilaterals.org/article.php3?id_article=6536 http://www.afsc.org/trade-matters/trade-agreements/SACU.htm and http://www.bilaterals.org/article.php3?id_article=2526

[8] See further SAIIA (2004). and http://www.saiia.org.za/modules.php?op=modload&name=News&file=article&sid=516.

[9] See further Siddiqui (2004).

[10] WTO Document TN/S/13 (5 September, 2003).

[11] WTO Document S/L/93 (29 March 2001).

[12] This section is based on data from the Central Bank of Lesotho (2004); The Economist Intelligence Unit (2005); WTO Trade Policy Review: Lesotho 1998 & 2003; WTO Documents WT/TPR/S/36 & WT/TPR/S/114/LSO. See also Sandrey et al. (2005).

Lesotho's economy, and highlights Lesotho's dependence on a narrow range of specialised exports, and the importance of unlocking the potential for economic diversification presented by services trade.

Lesotho is a small, mountainous, landlocked country (entirely surrounded by South Africa) with no substantial natural resources other than water, which it exports to South Africa. It is both an LDC and the poorest member of SACU, and is heavily dependent economically on South Africa. Classified as a low-income and food deficit country by the World Food Programme, only 9% of the land surface qualifies as arable land. The country has been subject to serious drought and over-grazing in recent years. Some 80% of the country's population of 1.8 million is rural. Although the majority of rural households rely on subsistence agriculture, it only accounts for a small share of household incomes. Most rural households rely for income on wage remittances from migrant labour in South Africa (mostly in mines and agriculture). According to Lesotho's Bureau of Statistics, agriculture employs some 69% of the labour force—largely at a subsistence level. Although agriculture has consistently been a major employer in the economy, the sector's performance has waned in recent years (with its share of real domestic output falling from 20.7% in 1993 to 17% in 2003) due to the deterioration of soil quality, erosion and unfavourable weather conditions. As a result, the available arable land has declined from about 13% in the 1960s to about 10% today. Commercial agriculture also experienced a decline, with exports of mostly wool and mohair accounting for 6.1% in 1993, but falling to 3.3% in 2003 (Sandrey et al., 2005: 13).

Lesotho's economic performance in recent years has been uneven. The contribution to the Gross Domestic Product (GDP) of other primary sector activities, such as mining and quarrying, is at best still marginal (see Table 1 below).[13] Unemployment has been a persistent problem for the Government and is currently estimated at just

[13] According to the WTO Trade Policy Review for Lesotho for 1998, in 1996, agriculture and forestry represented some 12% of GDP at factor cost, down from 16% in 1990; mining and quarrying were an obscure 0.01% of GDP and manufacturing accounted for 16.5% of GDP. In 2003, the tertiary sector (consisting of service sectors such as wholesale and retail trades, transport and communications and public services); primary sector (predominantly agriculture) and the secondary sector (including, manufacturing and construction) accounted for 41%, 17.1% and 41.9% of real domestic output respectively (Sandrey et al., 2005: 12). Services therefore represent a significant contributor to economic output and in particular, the growth in construction activity was spurred by the Lesotho Highlands Water Project and the large reconstruction expenditures of government following the destructive political riots of 1998.

over 30%.[14] Lesotho's problems have been exacerbated by the high incidence of HIV/AIDS, which has hollowed out the structure of the population and reduced life expectancy to just 35 years for men and 38 years for women.[15] This has had a considerable negative impact on the country's economic performance and social structure. Lesotho's economic performance over the last three decades has been also been constrained by three factors: (i) intermittent domestic and regional political instability (the latter due to destabilisation by apartheid South Africa); (ii) structural constraints, such as poor agricultural performance compounded by environmental concerns, poor farming systems and low productivity, and (iii) poor economic and financial management.

The structure of Lesotho's economy remains very unbalanced, with the country becoming increasingly reliant on a narrow range of activities, notably, remittances from migrant workers (mostly in South Africa), exports of water and power to South Africa, the SACU revenue pool, and the manufacture of garments. A major challenge for the government is to formulate policies aimed at diversification and creating a more balanced economy.[16]

Remittances

Remittances of migrant workers account for over 30% of the gross national product (GNP) (almost 45% of GDP) and, in 1996, accounted for more than double the value of Lesotho's export earnings. Over the last decade the number of migrant workers has declined by almost half[17] largely due to a number of factors, such as the increased mechanisation of mines (particularly coal mines); the closure of some marginal gold mines due to escalating costs; the relatively high mine wages that now

[14] The primary sector continues to be the major employer, however, the secondary and tertiary sectors contribute more to GDP. Despite recent declines, the South African mining sector still absorbs a significant share of excess labour from Lesotho. Net income from migrant labour accounted for 42% and 18% of national income in 1992 and 2002 respectively (Sandrey et al., 2005: 15). The number of migrant workers still exceeds those employed in the domestic manufacturing sector by far (61 415 compared to 29 903 respectively for 2003). The Government is also a significant employer in the formal sector. Apart from manufacturing and construction, most private sector employment is concentrated in unskilled and semi-skilled categories such as domestic work. Construction (as well as wholesaling and retailing) is the major employer in the services sector accounting for 54% of labour (although this has declined somewhat following the winding down of the Lesotho Highlands Water Project, LHWP construction); while clothing/textiles and footwear accounted for the largest share of the labour force in the manufacturing sector averaging 73% and 14%, respectively, between 1997 and 2003.

[15] See http://www.unicef.org/infobycountry/lesotho_statistics.html See also Lesotho Country Profile at http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1063291.stm.

[16] For an analysis of products that have the potential to diversify Lesotho's export base see Sandrey et al. (2005).

[17] The number of migrant mine workers fell from a peak of 126 733 in 1989 to 57 989 in 2004. See Central Bank of Lesotho (2004).

attract South Africans in larger numbers than before; and lay-offs of Basotho workers in the South African mining industry due to the appreciation of the rand. In spite of this, miners' remittances have generally remained on an upward trend over the last decade;[18] however, the traditional high share of remittances as a percentage of exports has steadily declined in the last decade (WTO, TPR 1998:3). This may not in itself be a bad thing, as it suggests that other exports, in particular garments, are adding value to the 'export basket'. In addition, the consistency of such revenue always remains precarious and subject to external developments in South Africa which are outside Lesotho's control. The other major resource providing revenue from South Africa is water. The recent Lesotho Highlands Water Project (LHWP), a joint-venture project covering power and water, has resulted in fixed and variable royalties for Lesotho from the transfer of water to South Africa. Average royalties are about M15 million per month and by July 2002, Lesotho had received about M937 million in revenues from royalties.

The SACU revenue pool

The SACU Agreement, referred to earlier, is the principal treaty governing the common trade policy of SACU Member States. The Agreement requires that Members must apply the laws set by South Africa (the largest trading partner in the customs union) with respect to imports, customs, excise, sales, anti-dumping, countervailing and safeguard duties. The Agreement provides for duty-free circulation of goods within the customs union. Duties collected by SACU members on third country imports are pooled in a common fund and subsequently distributed to Member States by South Africa. The revenue-sharing formula was renegotiated under the recent Agreement to make it more equitable. Namibia, Swaziland and Lesotho are particularly dependent on SACU revenue, which currently accounts for about 27%, 44% and 41% respectively, of their total revenue. As SACU's external tariffs gradually decline owing to liberalisation under both multilateral and bilateral trade commitments, funds available to Member states under the revenue pool are expected to steadily decline. Hence, Lesotho, like the other smaller SACU Members, faces a major challenge to move away from over-reliance on the SACU revenue pool

[18] See Central Bank of Lesotho (2004). Interestingly, the 2003 WTO Trade Policy Review for Lesotho concludes the opposite, and in fact finds that remittance income from miners has fallen together with the fall in the number of migrant mine workers.

which is unsustainable in the long-term. This entails diversifying its tax base and promoting other non-customs revenue, as well as advancing fiscal reforms. Again, these reforms require technical assistance, for example to improve tax collection and budgetary support. This process is already underway among SACU Member States.

Manufactures and the garment industry

At independence in 1966, Lesotho had virtually no industrial base. However, construction (in part due to the LHWP and reconstruction following the destructive riots of 1998) and manufacturing have been significant growth sectors over the last decade, in particular, the clothing, textile and footwear industries.[19] In the early 1990s, food products and beverages were the key manufacturing industries, but these have been overtaken today by the clothing industry. Significant Foreign Direct Investment (FDI) flows into Lesotho, which has been marked by relative volatility and has been closely related to several factors, namely, Lesotho's preferential market access into the EU and US markets; Lesotho's reputation as an efficient producer of textiles; competitive wages; flexible labour market policies; low-cost inputs from Asia; and favourable tax treatment (Sandrey et al., 2005: 14).

Despite the clothing industry's rapid growth it faces a number of threats.[20] Ownership and management of Lesotho's clothing industry is dominated by South East Asians (mostly Taiwanese, Chinese and Malaysians) who came to the country starting from the late 1980s. Today, they control roughly 90% of the industry and employ over 90% of the labour (some 56 000 in 2003). This is a telling statistic. Lesotho, like many LDCs, suffers from either an insufficient entrepreneurial class, or existing and potential entrepreneurs face a myriad of challenges including lack of access to capital. As a result, the manufacturing sector is almost entirely foreign owned and characterised by weak linkages with the rest of the economy.[21] The garment industry is export driven, with over 90% of Lesotho's production going to the US. This is largely due to the African Growth Opportunity Act (AGOA) which has provided a stimulus for increased investment and growth. Exports into Southern Africa and Europe remain relatively small (possibly due to constraints posed by rules of origin)

[19] Although clothing and footwear now dominate Lesotho's exports, other exports include live animals, crude materials (inedible), television-related electronics, medicaments and other miscellaneous manufactures.
[20] See Salm et al. (2002).
[21] This feature also characterises the way the clothing industry operates.

and industrialists do not appear to be particularly interested in pursuing these markets. The phasing out of the Multi-Fibre Agreement under the WTO in 2004 has placed the industry under considerable strain, especially in light of concerns over the erosion of preference margins. This is largely due to the uncertain impact of competition in the US market from low-cost producers within similar product lines, particularly, Mexico, Vietnam and Central American countries (Sandrey et al., 2005: Chapter 3). Moreover, there are concerns over the possible end to the special proviso allowing derogation from the rules of origin under AGOA.

Other constraints within the industry relate to improving productivity and quality, poor working conditions, low wages and the failure of the industry (and market access under AGOA) to generate backward or forward linkages,[22] including a failure to transfer management skills to local workers.[23] Since 2004 more than 6000 workers have lost their jobs following the closure of six factories.[24] Hence, Lesotho's garment industry must look into reforms that will serve to (i) preserve current production in light of the expiry of the Multi-Fibre Agreement, and the possible termination of AGOA benefits; (ii) ensure competitiveness in clothing export markets and prevent the further closure of factories; and (iii) develop its established export base and seek new markets (mainly in Southern Africa and the EC).

Table 1 below, shows the growth of value added in some major sectors discussed above (See Sandrey et al., 2005: 17).

[22] Examples of potential backward or forward linkages between the foreign and local sectors which have failed to materialise include the manufacture of packing materials, labels and zippers for the clothing industry, the subcontracting of certain activities, and the establishment of industry-related training programmes, for example, for design or marketing (WTO, TPR 1998: 5).

[23] Foreign affiliates in Lesotho's garments industry continue to rely heavily on expatriates (mainly from East Asia) to fill technical, supervisory and managerial posts. One could argue that this is understandable given that the industry is still in its developmental stages. However, some firms have been in Lesotho for over a decade, without any discernible change in terms of technical and managerial skills transfer to locals.

[24] See Textile Industry Collapses, 15 March, 2005, in *Business in Africa*. [Online]. Available: http://www.businessinafrica.net/features/trade/424691.htm.

Table 1: Growth of value added (Percentage changes, 1995=100)

	1993	1995	1997	1999	2001	2003
Tertiary sector	9.7	-4.3	0.5	4.3	0.5	-1.8
Agriculture	10.1	-4.8	0.5	4.3	0.5	-1.9
Crops	23.1	-15.2	-3.2	-1.1	5.9	-6.9
Livestock	-2.0	13.5	7.9	16.3	-7.3	6.2
Services	4.1	6.2	9.2	-10.9	-16.9	0.0
Mining and quarrying	-43.2	1000	16.7	3.8	6.2	5.7
Secondary sector	-3.1	7.8	16.1	0.9	4.6	4.7
Manufacturing	13.5	7.1	4.8	-0.3	7.9	5.2
Food Products and beverages	8.1	5.0	3.5	-2.0	-3.1	-7.3
Textiles, clothing and footwear	20.2	3.0	5.9	-3.8	16.6	14.6
Textiles and clothing	9.6	-2.8	1.4	7.8	20.5	17.3
Footwear and leather	63.6	25.0	16.0	-36.3	-4.2	-6.7
Small scale tailoring	0.8	2.0	2.0	2.0	2.0	2.0
Other manufacturing[25]	17.2	19.6	5.7	9.3	13.0	1.9
Electricity and water	17.3	11.1	162.1	34.2	4.7	4.5
Construction	-14.6	7.9	4.2	-7.6	1.4	4.3
Tertiary sector	-3.1	7.8	16.1	0.9	4.6	4.7
Wholesale and retail trade	8.2	5.1	8.5	-5.0	2.5	5.3
Hotels and restaurants	1.7	20.7	5.1	14.3	-2.4	9.0
Transport and communications	7.1	9.3	12.3	5.3	6.2	5.2
Transport and storage	2.4	7.0	4.6	-2.5	3.0	4.6
Post and telecommunications	15.8	13.0	24.6	14.8	9.4	5.7
Financial intermediation	-1.0	-22.9	-11.4	32.3	4.4	9.5
Real estate and business services	1.7	-1.5	11.1	-2.2	-0.1	1.2
Owner occupied dwellings	2.0	2.0	2.0	2.0	2.0	2.0
Other real estate and business services	1.3	-9.3	34.7	-11.8	-6.1	-1.2
Public administration	7.9	15.7	3.8	-1.9	-0.8	2.5
Education	6.4	5.7	6.2	1.9	4.5	5.4
Health and social work	39.4	-6.3	-6.0	2.5	0.8	2.0
Community, social and personal services	2.1	-0.2	1.5	1.4	1.2	1.4
Financial services indirectly measured	1.5	-20.0	-10.3	34.6	2.9	8.1

Source: Bureau of Statistics, 2004

The direction of trade in Lesotho

Being an enclave, Lesotho's economy and trade are closely linked to its single neighbour, South Africa. 80% of Lesotho's imports come from South Africa and these are consistently in excess of domestic output.[26] A considerable share of its exports also goes to South Africa. South African investments also account for a substantial share of foreign direct investment (FDI). As a member of the Common

[25] Small scale manufacturing e.g., candles, medicines, etc.
[26] Imports of goods and services were 113% of domestic output in 1994 and 103% in 2002 (Sandrey et al., 2005: 12).

Monetary Area (CMA) (which includes all SACU Members save for Botswana), Lesotho's currency (loti; maloti plural) is tied to the South African rand at a fixed rate of 1:1. Thus there is no exchange rate policy separate from that of the CMA, nor are there any exchange controls on capital movements within the CMA.

Partly due to difficulties involved in collecting import and export data within SACU, trade statistics in Lesotho are recognised to be unreliable.[27] It is not surprising to find discrepancies between Central Bank data and that collected by the Lesotho Bureau of Statistics (BOS). This places some difficulties in analysing trends and formulating policy recommendations, particularly in case of trade in services which are traditionally difficult to measure. The direction of Lesotho's trade is highly concentrated. Over 90% of Lesotho's exports are destined for the US (mostly textiles and clothing under AGOA), surging from M218 million in 1995 to M3169 million in 2004 (Central Bank of Lesotho, 2004).[28] The other significant share of exports goes to SACU countries (about M700 million in 2003), whereas exports to the EC suffered a marked decline over the last decade (falling from M74 million in 1996 to about M4 million in 2003) largely due to difficulties with rules of origin, only to recover again in 2004 to an estimated M695 million. Recent amendments to Canada's rules of origin have also enabled exports from Lesotho to that market. It has even been suggested that Canadian rules of origin might serve as a useful model for the EPAs (Sandrey et al., 2005: 4).

Lesotho's exports to the Southern African Development Community (SADC) are almost negligible, although 2004 data indicates that encouraging exports of medicaments to Botswana have been growing recently. In terms of imports, more than 80% of Lesotho's imports originate from SACU (though this figure might well include inputs for the clothing industry being routed through South Africa from Asia). Again, imports from the EC and SADC remain relatively small.

[27] The WTO, TPR (1998:11) notes that detailed and disaggregated data for merchandise imports is not available for Lesotho. The free flow of goods and services from South Africa into Lesotho and the absence of an effective mechanism to compile and store data, means that highly aggregated import figures must be used to indicate trends.

[28] According to an analysis by Sandrey et al. (2005: 3–4), of the total exports for 2002 (the most recent official data available at the time of analysis), 11 of the top 20 trade lines at the HS 6 level are related to clothing exports, with either or both of the US and South Africa accounting for almost all of the trade. The other nine lines, including, footwear, water, bricks, TV components and milling products, are destined almost exclusively for South Africa. Other promising exports include diamonds (following the reopening of several mines) and furniture.

Supply-side constraints

Lesotho's landlocked location and the absence or poor quality of physical infrastructure affect the country's ability to trade competitively. Critical infrastructural challenges include improving the availability of electricity and telecommunications (including addressing high costs), water supply[29], and transport infrastructure (roads). These constraints affect the supply, competitiveness and the ability to export both services and manufactures. On its own, Lesotho does not have the financial resources or the technical capacity to address these challenges. Thus, if it is to address this infrastructure and supply challenges in a meaningful way, a combined effort is required, for example, under the trade facilitation and technical assistance mechanisms of the Integrated Framework[30]; various international organisations[31]; bilateral technical cooperation initiatives under SADC and SACU; and technical assistance and supply-side assistance under the EPAs and the Cotonou Agreement. Yet a note of caution needs to be sounded. The WTO, TPR (1998:20) notes that an estimated 50% of Lesotho's aid budget is directed at technical assistance. This means that Lesotho has been one of the world's highest recipients of per capita technical assistance. However, an unfortunate result of this, which local policy-makers must vigilantly guard against, might be a certain dependence on aid-funded foreign technical expertise. For example, technical projects could be designed but there will be a lack of sufficient domestic capacity or appropriate know-how to implement or support them. Providers of technical assistance should also be mindful of this challenge.

3. Services trade in Lesotho

The contribution of services[32] to GDP over the last five years has remained at an average of about 40% in Lesotho. It is important to identify the types of services

[29] Despite being an exporter of water, Lesotho's urban areas still face some challenges in regard to reliable water supply, largely due to the country's mountainous terrain and the significant cost involved in putting in place suitable infrastructure for water delivery.

[30] tralac has already been involved in Lesotho for some time now in implementing some of the activities identified in Lesotho's 'action matrix', such as improving trade data and addressing analytical capacity in support for trade and investment agreement negotiations.

[31] In the case of services, at the time of writing UNCTAD was in the process of identifying national consultants to conduct sectoral assessments (as part of a broader SADC project), and the ITC was conducting a six-phase project aimed at the private sector and services exports.

[32] This includes value added in wholesale and retail trade (including hotels and restaurants), transport, and government, financial, professional, and personal services such as education, health care, and real estate services.

being traded, the domestic suppliers and services exports, if the profile of services is to be raised among policy-makers. The International Trade Centre (ITC) has been conducting a programme to promote services in Lesotho, part of which includes identifying services activities in Lesotho and conducting training activities aimed at Small and Medium Enterprises (SMEs) on 'how to successfully export services'. Services activities and constraints faced by firms have been identified through interviews with industry associations and individual firms, as well as government. According to the WTO, TPR (1998:71) and ITC research, the growth of services sectors in Lesotho during the last decade has been spurred by government services, as well as wholesale and retail services. Other significant services sectors include banking and insurance, tourism, transportation and communications. Pockets of growth have also been identified in various types of business and professional services (for example security services). Balance of payments statistics indicate that the share of a number of services exports in total exports has declined over the last decade (from about 20% in 1995 to 9% in 2002), in particular transport services. However, certain services activities have shown some growth, for example, travel/tourism and the category 'other services'. Although the development of tourism in Lesotho is a priority, it still faces a number of constraints, such as the lack of infrastructure outside major towns and the high costs of travelling to Lesotho.

An interesting feature of services traded in Lesotho is the extent of foreign ownership, particularly South African, in key sectors. These include banking (where three of the four commercial banks are South African); communications (where one of the two mobile operators is South African, and South African investors also have a stake in the single fixed line operator); transport (where South African Airlink is the single commercial air transport provider operating between Lesotho and South Africa following the closure of Lesotho Airways); tourism (where several top hotels belong to South African chains); and distribution (i.e. wholesale, retail and franchising where a variety of South African interests hold significant market share in many outlets from clothing, supermarkets, fast-food, furniture, and so on). It is difficult to say to what extent this level of foreign ownership is problematic.[33] However, it would be desirable

[33] With reference to South African investment in Lesotho, some commentators have argued that certain South African companies, while being regional leaders, are not globally competitive. As a result of these companies having a 'first mover' advantage on the continent, the host countries might find themselves locked in with an investor that is not necessarily providing the most competitive service, bearing in mind that their domestic market might be too small to attract competition from other investors. An example of this is the high cost, comparatively

if national policy on services (as it should in other sectors) would provide for a greater 'indigenous' stake in the ownership of some of these industries.[34] A great challenge for the Ministry of Trade, Industry, Cooperatives and Marketing (MTICM) is to nurture local entrepreneurs who can develop services firms, and to impose conditions on foreign investors, for example, to enter into joint ventures with locals.[35]

4. Constraints faced by services suppliers and exporters in Lesotho

Several studies have looked at the challenges facing services firms in developing countries (Riddle, 2002) and the experience in Lesotho has confirmed some of their conclusions. The challenges to the private sector directly affect Lesotho's negotiating interests on services. If the private sector is weak, and lacks information on market access barriers in foreign countries or lacks the ability to either export such services or compete against foreign suppliers in the domestic market, then they cannot develop a significant lobby and/or provide supporting contributions to the negotiations process. Moreover, the fragmented nature of domestic services firms (scattered across various services sectors) means that they find it difficult to speak with one voice when engaging the Government. Sadly, industry associations and umbrella bodies in Lesotho are often poorly organised or *de facto* no longer functioning. Even where industry associations function relatively well, their focus is predominantly on the domestic market and not on exports.

Domestic firms in Lesotho also face problems characteristic of other LDCs, such as difficulties accessing capital (including the lack of a government guarantor) owing to the lack of collateral. Moreover, formal financial institutions tend to avoid lending to perceived 'high-risk' clients. This means small firms can only resort to informal lines of credit, which often involve high interest rates. Failure to access credit at reasonable rates means that firms are not in a position to take risks or to take advantage of possible market access opportunities. Firms also struggle to export due to lack of capacity to identify opportunities in export markets or to take advantage of such opportunities. In certain activities, such as education, training and consultancy,

speaking, of telecoms and banking services in South Africa. One could argue that South African firms in these sectors, take their 'high-cost services' with them into the continent and foist these expensive services upon the recipient countries. See Manduna, C. 16 May 2005, *Africans Investing in Africa.* [Online]. Available: http://www.tralac.org/scripts/content.php?id=3634.

[34] This would be a form of 'economic empowerment' for Lesotho nationals.

[35] Formulating the appropriate policy mix to ensure 'broad ownership' by locals, and avoiding the emergence of an elite of local business is not a simple task, as experience on the continent has shown.

it was observed that domestic firms sometimes faced significant competition from foreign suppliers, sometimes due to donor-funded projects in the case of consultancies.

Domestic firms (and some government officials) repeatedly complained about the high costs of telecoms and internet services. Both services are still to become readily available outside of the urban areas. The Government has yet to develop a strategy to promote services trade in Lesotho. The Lesotho National Development Corporation (LNDC) is the Government's main parastatal agency for implementing the country's industrial development policies. However, the LNDC's focus is predominantly on industrial goods and hence there is no government agency spearheading the development interests of services firms.

From the foregoing, it is not surprising that some might conclude that there is very little to be gained for domestic firms in the various services negotiations which the Government is currently engaged in. Indeed, Lesotho's interests would seem to be mostly defensive. This means ensuring that services concessions will result in development gains and that domestic firms are not overwhelmed by foreign competitors. It has already been mentioned that Lesotho exports excess labour, mostly into South Africa, and receives a significant amount of income in remittances. However, apart from migrant mine workers, the authorities were unable to provide data as to labour movement in other sectors, in terms of numbers of workers (especially university graduates/professionals/semi-skilled workers) leaving to work outside Lesotho; their destination countries; or whether this movement is temporary or permanent. Hence, even if we conclude that Lesotho has an interest in the movement of persons, in the absence of statistics as to the sectors where such movements occur and the markets to which such persons move, it is a challenge to formulate national position on this issue.

The MTICM which is responsible for formulating, implementing and coordinating Lesotho's industrial and trade policies has since taken an interest in domestic services and exports. It is hoped that this will result in the formulation of a services promotion strategy in the not too distant future. Part of this strategy will have to consider measures to promote and support domestic services firms in identified sectors. As a comparative example, firms in the garment industry receive significant

assistance in the form of subsidies (rebates), a two-tier exchange rate to offset against the strength of South African rand and a concessionary tax rate.

5. Challenges facing Lesotho in the services negotiations

The MTICM has faced considerable challenges in the services negotiations, both in terms of technical and institutional capacity, and also in coordinating the various ministries, private sector and non-state actors that ought to contribute to national debate on services. An analysis of Lesotho's experience in the Uruguay Round is telling. Lesotho's GATS schedule of specific commitments contains commitments in some 85 sub-sectors and activities out of a possible 155. This is similar to commitments made by some middle-income countries and differs markedly from other LDCs, the majority of whom made commitments in fewer than 20 sub-sectors or activities. Lesotho's commitments cover all but two sectors, that is (i) health[36] and (ii) recreational, cultural and sporting services. According to officials from the MTICM, towards the conclusion of the Uruguay Round, there was an urgency to become one of the founding Members of the WTO. It was rightly recognised that it would become difficult to negotiate favourable terms of accession after the establishment of the WTO. The truth of this fact is clear if one considers that low-income countries, such as Moldova and the Kyrygz Republic had to make commitments in nearly all services activities as part of their terms of accession. However, ironically, Lesotho finds itself having made extensive initial commitments, whose results might not be so different from those felt by some acceding countries. This has major implications in terms of restricting policy space.

During the Uruguay Round, the MTICM established an inter-ministerial committee, in order to obtain inputs from stakeholders as to the nature of policy in various sectors. These inputs then had to be formulated into a schedule of commitments. According to officials, there was little understanding at the time of the implications of WTO commitments. Indeed, Lesotho joined the Uruguay Round negotiations at a late stage and therefore did not put forward specific proposals to address its national concerns. Officials also had a great deal of catching up to do. Some Ministries were represented in the inter-ministerial committee by staff with a limited knowledge of the

[36] Note, however, that there may still be indirect implications for Lesotho's health sector, as the country has made commitments for health professionals, notably in medical and dental services, veterinary services, midwives and nurses, physiotherapists and paramedical personnel.

prevailing policy in their respective ministries, especially as it related to the trade negotiations. Indeed, in certain instances, representatives confused practice with policy. There was also a lack of understanding of the technical aspects of scheduling and the MTICM did not have much time to meet repeatedly with stakeholders to discuss policy and scheduling issues. Moreover, the MTICM itself had limited capacity and was therefore in a weak position to provide the required guidance to other stakeholders. Some assistance was received from the WTO Secretariat, which helped to clarify certain issues. The outcome of the exercise was the existing and rather extensive schedule of commitments. On close scrutiny, certain commitments inscribed in the schedule contain errors. Moreover, some do not accurately reflect Government policy as it was then and even as it is now. In certain instances, domestic legislation is still to be amended to reflect what is inscribed in the schedule.

6. Addressing the challenges in the present negotiations

Where do the above problems leave Lesotho today? The WTO Director-General, Pascal Lamy has indicated that he will seek to secure a conclusion to the Doha round as early as possible. Moreover, the EPA negotiations which also contain a trade in services component, are supposed to be completed before 31 December, 2007. Thus, whatever initiatives officials in Lesotho carry out in connection with the services negotiations, they need to be mindful of time. Bureaucratic decision making in developing sectoral policies must be removed as far as possible, especially since services require the involvement of various line ministries. It is suggested that in the present round of negotiations, it would be sufficient for Lesotho to confine itself to making technical rectifications and slight modifications to its schedules (as several other WTO Members have opted to do). A technically improved Schedule of Commitments would adequately reflect the current status quo in Lesotho; emphasise its development priorities through the inscription of appropriate conditions; and provide a sound basis for future liberalisation.

It is encouraging that officials in the MTICM recognise that they were ill prepared when negotiating on services in the Uruguay Round. And there is certainly a desire to be better organised in the current negotiations and also to improve institutional and technical capacity. Although Lesotho was yet to submit any individual requests or an offer at the time of writing, officials have begun to organise themselves institutionally

so that the necessary preparatory work can be carried out. These efforts coincide with the sectoral assessments that the United Nations Conference on Trade and Development (UNCTAD) will be assisting Lesotho with. A working group on services has been established, and should be formalised shortly to include representatives from various ministries, the private sector and non-state actors. However, this time around, it is envisaged that considerable effort will be made to discuss sectoral policies and to assess existing commitments. Indeed, it will be interesting to investigate what the result of having scheduled extensive commitments in the Uruguay Round has been, and whether foreign suppliers have entered or are supplying services to Lesotho in any significant numbers. International organisations providing technical assistance can certainly play a meaningful role here, in terms of providing training for stakeholders on the GATS and the EPA negotiations, providing assistance in the development of a national policy for the promotion of services industries and assisting with assessments.

Without reliable and comprehensive data on trade in services, it is difficult for officials to measure sectors of strength (comparative advantage), growth potential or weakness, or identify where their offensive or defensive interests lie, except in very general terms. It is suggested that a project to establish permanent mechanisms for the collection, analysis and storage of services data is required.[37] in addition, improved data would aid policy makers to monitor the effects of reforms and identify areas where their promotion strategies are succeeding or failing. Interventions on the improvement of data should be consistent with initiatives on data collection being undertaken under SACU structures. In fact, the ideal situation would be for SACU as a whole to eventually develop uniform mechanisms for dealing with data on services. This is so, especially when SACU begins to develop regional policies on the liberalisation and promotion of intra-SACU trade in services.

Given the high degree of inter-linkage between Lesotho's and South Africa's economies, Lesotho should strive to exploit its structural complementarities with its larger neighbour and identify specific services activities which can be developed and exported into the South African and broader SACU market. Measures that affect the Mode 4 supply of services by Lesotho nationals into South Africa, such as permits or

[37] Existing initiatives focus on trade data for goods.

work visas and the recognition of qualifications need to be identified in order to develop proposals to address these issues.

The MTICM also faces problems due to the departure of staff and the loss of institutional memory. There are no easy ways to address this situation, and it requires balancing staff needs for further training, and the provision of competitive remuneration.

The involvement of the private sector in the trade negotiations is crucial since it is the private sector that is mainly engaged in trade. The MTICM has to increase awareness and understanding on trade in services and opportunities (both domestic and for export) among local firms. Government support to the private sector is also required to help address issues such as barriers to entry in foreign markets, access to capital and so on. The MTICM needs to embark on a process to organise services industry associations into a coherent group or industry coalitions, through which the parties can engage in dialogue with Government, identify the needs and interests of local firms and develop strategies to address these.

The dearth of internal technical expertise affects not only the ability to deal with services nationally, but also limits the amount of support which the MTICM can provide to negotiators in Geneva. To some extent this weakness has been mitigated by the existence of an LDC group in the WTO, which adopts common positions on certain issues. However, it is still necessary and desirable for Lesotho to develop significant institutional capacity to enable it to be an active player in its own right and within the LDC group as well.

Finally, it is worth mentioning that the GATS Preamble, Articles IV and XIX:2, the Modalities for the Special Treatment for Least Developed Country Members in the Negotiations on Trade in Services[38] and the Guidelines and Procedures for the Negotiations on Trade in Services[39] all contain various provisions that recognise the negotiating difficulties facing LDCs and their special economic situation. This includes the lack of institutional and human capacity to analyse and respond to requests and offers.

[38] WTO Document No. TN/S/13 (5 September, 2003).
[39] WTO Document No. S/L/93 (29 March, 2001).

Having highlighted above some of the difficulties facing Lesotho, other WTO Members should take heed of these issues in the negotiations when making requests to Lesotho and other LDCs and also in allowing sufficient flexibility for them. Lesotho's negotiators should also be mindful of the fact that LDCs are entitled to make limited commitments in terms of sectors, modes of supply and scope, which are compatible with their development, trade and financial needs. Moreover, they are entitled to attach conditions to the provision of market access aimed at achieving the objectives of GATS Article IV, i.e. increasing the participation of developing countries in trade in services.[40]

An analysis of Lesotho's GATS schedule of specific commitments reveals that such conditions aimed at operationalising GATS Article IV are virtually non-existent, save for a proviso on Mode 4 under horizontal commitments which states that 'enterprises must also provide for training in higher skills for the locals to enable them to assume specialized roles'. It is suggested that Lesotho needs to consider ways in which such conditions can be built into the schedule based on predetermined sectoral policies. An analysis of Lesotho's investment framework reveals that although certain 'development' provisions are included, for example, requirements for investors to transfer skills, these are generally not 'policed' by authorities. A clear example of failure to monitor implementation of 'development' conditions is in the garments sector, where despite the existence of some firms for over a decade, management and more technical skills still remain with expatriates. Therefore, it is crucial to monitor implementation of conditions if Lesotho is to ensure that the desired development gains materialise.

7. Conclusion

This paper has sought to provide a brief sketch of some of the challenges confronting Lesotho in both previous and in the current negotiations on trade in services. These problems are not unique to Lesotho but also affect other LDCs and even some developing countries.

[40] A communication from Cuba and other developing countries noted that GATS Article IV and other declarations in favour of developing countries have so far not been implemented, and there is an urgent need to rectify this shortcoming. See Communication from Cuba, Pakistan, Senegal, Sri Lanka, Tanzania, Uganda, Zambia and Zimbabwe (WTO Document No. S/CSS/W/131 (6 December 2001)).

The problems relate first to internal constraints within the MTICM, which is the ministry responsible for coordinating national activities on services. Thus the MTICM needs to address institutional capacity constraints, so that it can be in a position to provide guidance to other line ministries and the private sector in the negotiations. The second problem relates to the fragmented nature and weakness of the private sector. Domestic services firms are generally inward looking, not focused on exports,[41] and face competition from South African and other foreign firms. This competition may well increase especially with the conclusion of the EPAs. Hence, the MTICM needs to embark on a comprehensive programme to identify sectors and activities where Lesotho's comparative advantage lies, and develop measures to promote and support domestic firms to become more competitive in these sectors.

It was suggested that Lesotho would do well to embark on a programme to significantly improve mechanisms for the collection, analysis and storage of data. There is significant scope for technical assistance in addressing all the above challenges. It has been cautioned that technical assistance should ensure that domestic capacity is built and that skills are transferred to ensure that there is domestic capacity to evaluate and implement policy recommendations. Other WTO Members should be mindful of the serious constraints that face LDCs both in the negotiations, and in terms of trying to develop their services capacity. Members should therefore afford LDCs the flexibility to pursue their development objectives, and provide them with support to develop and strengthen their domestic firms as set out in the GATS, the Modalities for LDCs and the Guidelines for the Services Negotiations. This includes the provision of market access in sectors and modes of supply of interest to LDCs. Finally, Lesotho should continue looking at possibilities for diversification. By raising the profile of services, the MTICM can explore ways to develop various services sectors and activities and generate much needed employment and income.

[41] This is not to suggest that the promotion of exports should be the sole priority. Rather, there should be a dual and complementary approach, which targets and promotes certain services activities for export and other activities for the domestic market.

References

Abugattas Majluf, L. 2005. *WTO and FTAA Services Trade Negotiations: Challenges for Developing Countries with Special Reference to CARICOM.* [Online]. Available: http://www.crnm.org/documents/studies/WTO%20&%20FTAA%20Services%20Trade%20Negotiations%20-%20Majluf.pdf.

Central Bank of Lesotho. 2004. *Annual Report*. [Online]. Available: http://www.centralbank.org.ls/publications/FULL%20Lesotho_AReport.PDF.

The Economist Intelligence Unit. 2005. *Country Report: Lesotho, July 2005.* [Online]. Available: http://www.eiu.com.

Manduna, C. 2005. *The WTO Services Negotiations: An Analysis of the GATS and Issues of Interest for LDCs*, South Centre T.R.A.D.E. Working Paper No. 23. [Online]. Available: http://www.southcentre.org/tadp_webpage/research_papers/services_project/trade_wp23_dec04.pdf.

Riddle, D.I. 2002. *Services Export Capacity in Developing Countries*. Paper prepared for the WTO Symposium on Assessment of Trade in Services, 15 March 2002. [Online]. Available: http://www.wto.org/english/tratop_e/serv_e/symp_mar02_riddle_e.doc.

SAIIA. 2004. *A SACU-China FTA: What's in it for SA?* The South African Policy Monitor. [Online]. Available: http://www.polity.org.za/pdf/FPM.pdf and http://www.saiia.org.za/modules.php?op=modload&name=News&file=article&sid=516.

Salm, A, Grant, W.J., Green, T.J., Haycock, J.R. and Raimondo, J. 2002. *Lesotho Garment Industry Sub-sector Study for the Government of Lesotho*. SAPRN. [Online]. Available:http://www.sarpn.org.za/documents/d0001166/P1285-lesotho_garment_January2002.pdf.

Sandrey, R, Maleleka, D., Matlanyane, A. and Van Seventer, D. 2005. *Lesotho: Potential Export Diversification Study*. Lesotho Trade and Poverty Programme, July 2005.

Sauve, P. 2005. *Towards Development-Friendly Services Negotiations*. Paper prepared for the Asian Development Bank High Level WTO Meeting on Key Doha Round Issues: Osaka, Japan, 3–5 August, 2005. [Online]. Available: http://www.adb.org/Documents/Events/2005/High-Level-Meeting-on-WTO/paper-sauve.pdf.

Siddiqui, H. 2004**.** India, SACU Gearing Up for FTA. *The Financial Express*, 25 November. [Online]. Available: http://www.bilaterals.org/article.php3?id_article=1008 and http://www.bilaterals.org/article.php3?id_article=605.

UNCTAD. 2005. *Trade In Services and Development Implications*. UNCTAD Doc. No. TD/B/COM.1/71 (20 January).

UNCTAD. 2003. *Trade in Services and Development Implications*. UNCTAD Doc. No. TD/B/COM.1/55 (20 December).

WTO. *Trade Policy Review: Lesotho 1998 & 2003*. WTO Documents WT/TPR/S/36 & WT/TPR/S/114/LSO.

Chapter 8

Trade facilitation and the WTO: a critical analysis of proposals on trade facilitation and their implications for African countries

by Gainmore Zanamwe[1]

1. Introduction

When the General Agreement on Tariffs and Trade (GATT) was negotiated, its pre-eminent objective was to bring down tariff walls that hindered the free flow of goods. Since 1948, tariffs in developed countries have been cut by more than 80% in eight successive rounds of trade negotiations (Panichpakdi, 2005). However, while the level of tariff protection has decreased substantially, the ingenuity of some Members to invent new measures of protection has increased and non-tariff barriers are now ubiquitous.

Members tried to tackle some of the non-tariff barriers (NTBs) during the Uruguay Round and currently the Doha Development Agenda mandated Members to address NTBs in the Non-Agricultural Market Access (NAMA) context in collaboration with relevant World Trade Organization (WTO) bodies. Those NTBs relating to trade facilitation have been referred to the negotiating group on trade facilitation. In order for Africa to derive maximum benefits from trade, it is important and indeed necessary to look at all the NTBs hindering the free movement of goods across frontiers including trade facilitation barriers. In this context, it is important to note that efforts to address trade facilitation barriers have been undertaken by a number of international organisations such as the World Customs Organization (WCO), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Economic Commission for Europe (UNECE) and the World Bank, only to mention a few.

The WCO focuses on customs administrations. The most important instrument it has developed is the 1973 International Convention on the Simplification of Customs Procedures (the Kyoto Convention) as amended[2]. It contains provisions on customs

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[2] Substantial reviews to the Convention were carried out in 1999. For further information, see http://www.wcoomd.org/ie/En/en.html.

automation, electronic commerce, audit based reviews and risk management techniques (Cosgrove-Sachs: 2005).

The most common trade facilitation instrument developed by UNCTAD is the Automated System for Customs Data and Management[3] (ASYCUDA). This software programme was developed specifically for developing countries. It is designed to simplify and automate customs functions, speed up the clearance of goods, and improve data collection and dissemination while ensuring effective revenue collection.

UNECE's Centre for Facilitation of Procedures and Practices for Administration, Commerce and Transportation (CEFACT) is responsible for developing trade facilitation recommendations, setting norms and standards and automation of trade facilitation[4]. Its latest recommendation deals with the establishment of a single window which allows the lodgement of standardised information and documents with a single entry point to fulfil all export, import and transit requirements. It has also developed the Electronic Data Interchange (EDI), an electronic commerce facility that allows structured exchange of data between two parties to a trade transaction. In the context of transit, the most important instrument which originated from UNECE is the TIR (*Transports Internationaux Routiers*[5] — International Road Transport) transit system of 1949 as amended. Currently, this process is being computerised to allow international transfer of advanced cargo information for TIR transport to reduce fraud and smuggling during transit.

Inspired by developments outside the WTO and the need to facilitate the movement of goods, the *demandeurs*[6] proposed to write global rules on trade facilitation. Trade facilitation is one of the infamous Singapore issues[7] (WTO: 1996). This mandate was renewed in 2001 at the Doha Ministerial Conference, where trade Ministers agreed that negotiations would take place after the Fifth Ministerial Conference only after explicit consensus. However, explicit consensus proved to be a holy grail in Cancun

[3] See http://www.unctad.org/Templates/Page.asp?intItemID=1965&lang=1.
[4] See http://www.unece.org/cefact/.
[5] The official name of the Convention is: CONVENTION ON THE INTERNATIONAL TRANSPORT OF GOODS UNDER COVER OF TIR CARNETS (TIR CONVENTION, 1975)
[6] These are mainly the EC, Japan and Korea.
[7] The other Singapore issues are investment, competition and transparency in government procurement. At this Ministerial Conference, the Goods Council was mandated to undertake analytical and exploratory work on the simplification of trade procedures in order to assess the scope for WTO rules on trade facilitation.

but Members finally managed to untie the Gordian knot in Geneva and agreed in July 2004 to start negotiations on trade facilitation.

Negotiations on trade facilitation are now in full swing, and for African countries to participate fully in these negotiations means that they have a lot of catching up to do. Not only are they required to study and analyse the implications of the proposals on the table, but also to formulate proposals which reflect their trade facilitation needs and priorities. However, with the limited capacity of African countries, both in Geneva and capitals, this is a tall order. This means that African negotiators have to burn the candle at both ends to make sure that they make substantial contributions to the negotiations.

This paper will give a brief overview of the definition of trade facilitation and the problems faced by African traders. It will also explain in simplified terms the salient elements of Article X, VIII and V of GATT 1994 and how they have been interpreted by GATT and WTO panels. This will be followed by a critical analysis of the proposals that have been submitted by the *demandeurs* and their implications for poor African countries. It will also address some of the cross-cutting issues that are related to all three Articles. The last sections will flag the concerns of the African countries and offer some concluding remarks on what needs to be done at the next at the WTO.

2. What is trade facilitation?

It is important to note that there is no agreed definition of trade facilitation. Various international and regional organisations define trade facilitation according to their mandate and objectives. As will be shown below, some define it narrowly, while others define it broadly.

UNECE defines trade facilitation as a '*comprehensive and integrated approach* to reducing the complexity and cost of the trade transactions process, and ensuring that all these activities can take place in an efficient*, transparent, and predictable manner*, based on internationally accepted norms, standards, and best practices' (UNECE: 2002).

The Organization for Economic Cooperation and Development (OECD) defines it as 'the simplification and standardization of procedures and associated information flows

required to move goods internationally from seller to buyer and to pass payment in the other direction'[8]. It also defines it broadly as 'all the steps that can be taken to smooth and facilitate the flow of trade, import and export procedures at the border, (customs, licensing and quarantine), transport formalities, payments, insurance and other financial requirements' (OECD: 2003).

According to the Asia-Pacific Economic Cooperation (APEC), trade facilitation generally refers to the 'simplification, harmonization, use of new technologies and other measures to address procedural and administrative impediments to trade' (APEC: 2002). This definition focuses on ports, customs procedures, own regulatory environment, standards harmonisation, business mobility, electronic commerce, administrative transparency and professionalism.

The World Bank defines trade facilitation as encompassing 'the domestic policies, institutions and infrastructure associated with the movement of goods across borders'. This includes ports, customs administration, transit, transportation systems for trade, and the management of information and systems technology (World Bank, 2004).

However, the WTO definition limits trade facilitation to the 'simplification and harmonization of international trade procedures, including activities, practices, and formalities involved in collecting, presenting, communicating, and processing data required for the movement of goods in international trade'[9]. This definition includes such functions as export and import formalities (procedures), customs clearance and transport formalities. It is very narrow in comparison to the approach adopted by UNECE, the World Bank and APEC.

From all these definitions, it is possible to derive a complete picture of trade facilitation. It must be seen as a comprehensive and integrated approach to improve the environment in which international trade transactions take place. The starting point must be to reform and standardise physical infrastructure and facilities (this includes customs and transport facilities and all the institutions or agencies that deal

[8] The definition was formulated by the former Director General of the International Express Carriers Conference (IECC), Mr John Raven, in a communication to the OECD Secretariat on 18 May 2001.
[9] This definition is on the WTO website, and is also quoted in the UNCTAD (2001:180). The same definition is also contained in UNECE (2003: 41). See also the reference made to UNCEFACT Recommendation 18. This definition originated from UN/CEFACT 2001 Recommendation 18.

with trade facilitation). The second step must focus on the use of international standards and best practices to rationalise, simplify and harmonise customs procedures, formalities, documents, regulations and laws related to import, export and transit of goods, and making them transparent, efficient and predictable. The third step should then look at automation and the use of cutting edge information and communication technology to exchange trade facilitation-related information. The objective will be to expedite the movement, clearance and release of goods while optimising necessary controls and revenue collection.

It is thus clear that trade facilitation cuts across a wide range of issues and sectors, from government regulations and controls, business efficiency, transportation, information and communication technology to the financial sector. Not only is it a technical issue, but also an economic, business, administrative and political issue.

While it is important to limit trade facilitation negotiations at the WTO to clarifying and improving a few GATT Articles dealing with transparency and administration of trade regulations (X), import and export formalities (VIII) and transit (V), it is also important to bear in mind a broad picture of trade facilitation as defined above.

3. What problems do African traders face?

The main problems plaguing traders were identified at the World Trade Facilitation Symposium held at the WTO (WTO, 1998). At this symposium Mr Danny Meyer, in his capacity as the President of the Zimbabwe National Chamber of Commerce, articulated the major problems affecting cross-border movement of goods in Southern Africa. These include political unrest[10], poor infrastructure development, particularly roads, rail and air links, and the hostile attitude of the public to private sector initiatives. Mr Meyer indicated that other problems related to unclear, unspecified, bureaucratic and irrelevant customs procedures, underdeveloped facilities at borders and understaffing, excessive charges, levies and fees, corruption and lack of transparency.

Further problems resulted from the use of outdated procedures, excessive documentary requirements, lack of automation and information technology, too many

[10] For example, the closures of neighbouring transport corridors in the 1980s because of civil unrest caused Malawi cumulative losses of more than $75 million in additional transport charges (OECD, 2005)

roadblocks, and long customs and administrative delays at ports and borders. Moreover, poor international payment and insurance mechanisms dealt a debilitating blow to African trade. All these problems add to the already high transport and communication costs.

With all these problems, it is not surprising that sub-Saharan Africa suffers from the highest average customs delays in the world.[11] In Estonia and Lithuania for example, it takes an average of one day for customs clearance, but in Africa, delays at the customs are as long as 10–30 days and traders can wait for up to 24 hours to pass through borders (Commission for Africa, 2005). This was also confirmed by UNCTAD in its 1994 report where it noted that on average, trade transactions in developing countries went through between 20 and 30 parties and needed at least 40 documents requiring some 200 separate data elements. And 15% of these elements were re-keyed up to 30 times whereas 60–70% were re-keyed at least once (WTO, 1998:40). Furthermore, the OECD estimates that the trade transaction costs are between 2% and 15% of the value of goods (OECD, 2002). Interestingly, these costs sometimes exceed import tariffs, and as opposed to tariffs, are dead-weight losses for the economy with no redistributive effects (Cosgrove-Sacks:2005)

Therefore, it goes without saying that these delays and additional costs make it very difficult for African goods to get to markets at competitive prices. Traders, especially small and medium enterprises (SMEs), often lose business opportunities due to these border delays.[12] These are real problems affecting the movement of goods and it is in nobody's interest to see trucks idling for hours at the borders or to see containers languishing at customs houses. Real long-lasting and practical solutions need to be found urgently and the Doha Development Agenda offers an excellent opportunity for this.

[11] According to a 2000 World Bank study, delays at Machipanda (Mozambique-Zimbabwe) amounted to 24 hours, 36 hours at Beit Bridge (South Africa-Zimbabwe), 36 hours at Victoria Falls (Zimbabwe-Zambia) and 24 hours at Kazungula (Botswana-South Africa). See World Bank (2005).

[12] For example, delays result in traders missing connecting ships and incurring penalties. In some cases delays in delivery result in lost contracts, and in the case of perishables, deterioration of merchandise is a risk.

4. Benefits of trade facilitation

It is estimated that the benefits of trade facilitation to developing countries may be many times more than the reduction or removal of tariff barriers. Trade facilitation will bring more benefits to SMEs which are normally unable to cope with the high costs of compliance. It can also play a role in attracting supply chain related investment. In 1997, APEC estimated that trade facilitation measures already committed were going to add 0.25% to real gross domestic product or about US$46 billion in 1997 prices by 2001 compared to gains of 0.16% of real GDP from trade liberalisation (Wilson and Yuen Pau Woo, 2000).

The government will benefit from better controls and enforcement through use of sophisticated risk-management techniques, correct revenue yields, allocation of resources, increased compliance from traders, economic competitiveness and increased transparency and integrity. Traders will see a reduction in costs through reduction of delays, faster clearance and release, predictable application and explanation of rules, more efficient and effective deployment of resources and increased transparency and integrity. These benefits may be passed on to consumers in the form of lower prices. The benefits of trade facilitation can best be illustrated by the experiences of a few countries in Boxes 1 to 5.

Box 1

The Chilean Experience

Chile invested $5 million to overhaul its customs system but in less than a year it had recouped this amount. The benefits included a 75% drop in the average processing time and substantial reductions in costs both to the government, business and the ultimate consumer (UNECE, 2003: 141).Other developing countries that have benefited from improving trade facilitation measures include Peru, Mauritius, Singapore, Morocco, Sri-Lanka, Philippines, Jamaica and Panama.

Box 2.

The Tunisian Experience

In Africa, Tunisia is a good example of a country that has seriously invested in trade facilitation and derived maximum benefits. Perhaps this should be used as an example of best practices that should be followed by other African countries. Tunisia established the Tunisian Trade Net (TTN) which is an automated system that provides a one-stop trade documentation–processing platform connecting the main actors in trade. Before the TTN system was introduced in 2000, clearance took 5-17 days with an average of eight days, and ports were always overloaded. The TTN is expected to reduce shipment clearance to three days and productivity gain is estimated at 7%. With regard to costs, the TTN was created with equity of US$2 million and is jointly controlled by state (85%) and private sector (15%) (ECA, 2004). This is a good example of how the public-private partnership can work in the context of trade facilitation.

Box 3

The Senegalese Experience

Another example is Senegal. During the Capacity Building Workshop on Trade Facilitation which was held on 10 March 2005, organised by the United Nations Economic Commission for Africa (UNECA), and UNECE at the WTO, Senegal was invited to share its experiences with other African countries. Mr Ibrahima Diange indicated that the reform process was not easy because customs was initially hostile to reforms; and people feared that they were going to lose their jobs and their power, especially those with authority to sign and put the important seal. However, when Senegal created the single window system (ORBUS 2000) this played a vital role in facilitating trade. Other countries in the region have greatly benefited from the Senegalese experience and are moving towards this trend. Mr Diange also underscored the importance of political commitment for the project to be successful; and other African countries should take a cue from the Senegalese experience.

Box 4

The Trans-Kalahari Corridor (TKC)

The TKC is a route between South Africa and Namibia via Botswana. The TKC pilot project, initiated in 2003, replaced various existing documents with a single administrative document, which is complemented by a website with the details of the documentation process developed by the South African Customs. This initiative led to a reduction in border processing time from an average of 45 minutes to 10-20 minutes, and an estimated cost of US$2.6 million a year was saved (Commission for Africa, 2005).

Box 5

The Mozambican Experience

Immediately after the 1975-1994 civil war, the Mozambican revenue collection system was in a complete shambles. Customs was a breeding ground for fraud, corruption and various other nefarious activities that occur at the borders. Traders were solicited to pay fees between $4 and $400 that were not required by law. However, when Crown Agents was selected to manage custom operations, it trained customs officials and adopted a wide range of measures aimed at facilitating trade. This reform led to about 130 customs officials being charged with serious offences. Clearance of goods is now 40 times faster than the pre-performance rate. Imports can be cleared by customs within 24 hours of submission of correct documentation and even though imports decreased in the first two years by 0.2%, customs revenue actually increased by 38.4% (Commission for Africa, 2005).

5. Trade facilitation and the WTO

As seen above, there are numerous organisations dealing with trade facilitation, and questions have been raised as to why the WTO should take on this issue and why now. A simple answer is that trade facilitation is already incorporated into the WTO. References to trade facilitation can be found in the various Agreements on Customs Valuation, Import Licensing, Pre-shipment Inspection, Rules of Origin, Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures. Furthermore, GATT Article X (publication and administration of trade regulations), VIII (fees and formalities connected with the import and export of goods) and V (freedom of transit of goods) deal directly with trade facilitation matters.

Efforts to write detailed global rules on trade facilitation in the WTO started at the 1996 Ministerial Conference in Singapore when the *demandeurs* proposed to bring Singapore issues under the rubric of the WTO. However, developing countries vehemently refused to launch negotiations on these issues. They called for analytical and clarificatory work on all Singapore issues and various working groups were established to undertake this exercise.

In 2001 the Doha Ministerial Declaration took the issue of trade facilitation a step further. According to Paragraph 27 of the Doha Declaration, all the Members recognise that there is a case for expediting the movement, release and clearance of goods including goods in transit. The Doha Declaration states clearly that developing countries need technical assistance and capacity building in this area.[13] The Council for Trade in Goods was given a specific mandate to review and, as appropriate, clarify and improve relevant aspects of Articles X, VIII and V of GATT 1994. Furthermore, the Council was instructed to identify the needs and priorities of Members, especially those of developing and least developed countries. The Doha Declaration stated clearly that negotiations were to take place after the Fifth Ministerial Conference on the basis of a decision to be taken by explicit consensus (WTO: 2001). After almost seven years of analytical and clarificatory work, many developing countries refused to launch negotiations on Singapore issues and this partly contributed to the failure of Cancun talks in September 2003.

The main reason why developing countries opposed negotiations on trade facilitation is that they were concerned that such an agreement would have a negative impact on their domestic policies. They do not have adequate negotiating resources or the capacity to implement the resulting obligations. More importantly, they were opposed to binding rules on trade facilitation because they did not want to be hauled before the dispute settlement body for failing to implement commitments.

However, Members finally managed to put the negotiations back on track through the 1 August 2004 Decision (the July Package) (WTO, 2004). All the other Singapore issues were dropped from the Doha Development Agenda and Members launched negotiations on trade facilitation.[14] Annex D of the July package provides the modalities for negotiations. It reaffirms Paragraph 27 of the Doha Declaration which limits negotiations to clarifying and improving relevant aspects of Article X, VIII and V with a view to expedite the movement, release and clearance of goods including goods in transit. The footnote in Annex D provides that such clarification and improvement will be done without prejudice to the possible format the final result will

[13] Members stated categorically that they were committed to ensure that technical assistance and support for capacity building would be provided. For the Doha Development Round to be truly a development Round, Members must operationalise this provision.

[14] However, some delegates argue that these issues were not altogether dropped from the WTO but were momentarily shelved and may come back in the future.

take. This means that various options will be considered. It could take the form of a new agreement, an annex, an understanding or an amendment to the three Articles. It also implies that no decision has been made on whether the outcome will be binding or non-binding.

The modalities also put technical assistance and capacity building at the heart of trade facilitation negotiations.

Another important element included in the modalities is the need to have effective cooperation between customs or any other authorities on trade facilitation and customs compliance issues. This is really important and can go a long way in facilitating trade.

Special and differential treatment (S&D) is also an integral part of the modalities. Annex D makes it patently clear that SDT should not be limited to the traditional longer transition periods for developing and least-developed countries (LDCs) to implement commitments. The extent of commitments and when they should be implemented depends on the implementation capacity of developing and least developed countries.

Since trade facilitation requires huge investments in infrastructure which many poor African countries will not be able to undertake, the modalities make it clear that these countries will not be obliged to undertake investments in infrastructure beyond their means. A common provision for least developed countries, which runs through many WTO agreements like a golden thread has also been included in the modalities. This ensures that LDCs will only undertake commitments that are consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

The modalities also provide that Members shall identify their trade facilitation needs and priorities. This is a daunting task for poor African countries. For them to participate effectively in these negotiations, they need to identify their needs and priorities. This must be done in consultation with various stakeholders including but not limited to customs officials, traders, various government departments, civil society and non-governmental organisations. Technical assistance in this exercise is vital and should be delivered quickly before negotiations are advanced. Developed

countries must adhere to their commitment to ensure that they give poor countries technical assistance during negotiations.

Technical assistance should also be provided during the implementation phase. Members recognise that 'some Members' would require support for infrastructure development. However, this provision raises a number of questions, firstly, who falls under the 'some Members' category and what criteria will be used to give such support for infrastructure development. It is submitted that in the provision of this support there should be no discrimination between Members with similar needs for infrastructure; and efforts must be made to ensure that no African country will *a priori* be excluded.

It is sad to note that the modalities limited support for infrastructure development to a few cases, while there are many poor countries that require this support. The modalities make it clear that commitments by developed countries to provide such support are not open-ended. It seems as if it is up to the developed countries to decide whether they have done enough or not, and the recipients have little say over this issue.

However, to address the concern about technical assistance, Members agreed that if support for infrastructure is not forthcoming and if developing and least developed countries lack the necessary capacity, they should not be required to implement the commitments. This provision is very important when viewed against the dwindling official donor support. One really wonders whether there will be a huge injection of funds into trade facilitation infrastructure projects. With the Iraqi war, the Tsunami disaster and needs in Africa like alleviation of poverty and disease (especially the AIDS pandemic ravaging the poor African countries), it is doubtful whether much will be done on the infrastructure side. The Africa Commission Report commissioned by the British Prime Minister Tony Blair raises a ray of hope but its implementation remains to be seen.

Ways and means of funding infrastructure must be found and poor African countries must not be subjected to further loans or debts from the World Bank and the International Monetary Fund. Assistance to develop infrastructure would be appreciated if it comes in the form of aid and grants. Cooperation with the IMF,

OECD, UNCTAD, WCO and the World Bank in the provision of technical assistance is vital and should be strengthened. This will help to avoid duplication and ensure targeted assistance in the form of money for infrastructure development and policy advice during negotiations and implementation. The Integrated Framework for Trade-Related Technical Assistance to LDCs (IF) which was set up in 1997 by the IMF, United Nations Development Programme, World Bank, UNCTAD, International Trade Centre and the WTO should be strengthened, well funded and be extended to other poor African countries which are not LDCs. This initiative should complement the Global Facilitation Partnership launched by the World Bank.[15]

Given the unpleasant experience with support and assistance promised under various WTO agreements, developing and least developed countries were wise to include provisions to review the effectiveness of the support and assistance provided. This includes a review of how far such assistance goes in supporting the implementation of the obligations undertaken by Members.

As provided by the modalities, the Negotiating Group on Trade Facilitation was established and real work on trade facilitation has started on a high note. The first meeting in 2005 was held on 7 and 9 February. A number of proposals on Article X, VIII and V have been submitted by the *demandeurs* and in this context it is important to analyse the implications of these proposals for African countries.

6. A critical analysis of the proposals on trade facilitation and their implications for Africa

GATT Article X: Publication and administration of trade regulations

This section will first provide a brief overview of the history of Article X. This will be followed by an analysis of the text of Article X and how it has been interpreted by the GATT or WTO panels. Finally there will be an analysis of the various proposals that have been submitted on trade facilitation to date.

[15] See http://gfptt.org/ for further information.

6.1 Negotiating history of GATT Article X

The issue of transparency in the publication and administration of trade regulations is not new. As early as 1923, transparency was a major issue in international conventions. It is therefore not surprising that GATT Article X is based on the 1923 International Convention Relating to the Simplification of Customs Formalities. Furthermore, most of the provisions in Article X are also found in Article 37 of the Havana Charter (WTO, 2005a). It is interesting to note that during the negotiations on Article X, the Geneva text went as far as requiring governments to supply the Organisation with copies of their laws and regulations. The Havana Charter also contained the obligation that suitable facilities shall be afforded for traders directly affected by any of those laws or regulations to consult with the appropriate governmental authorities. However, none of these changes were included in GATT and so far this Article has not been changed.

6.2 The text of GATT Article X

The main thrust of Article X is transparency in the publication and administration of trade regulations. Paragraph 1 of Article X requires a Member to promptly publish its laws, regulations, judicial decisions and administrative rulings of general application that affect imports and exports.[16] Members are also obliged to publish Agreements affecting international trade policy. Such publication must be in a form that enables governments and traders to become acquainted with such Agreements. However, Members are not required to disclose confidential information which would impede law enforcement or which is contrary to the public interest or which would prejudice the legitimate commercial interests of particular enterprises.

In *EC — Poultry*, the Appellate Body made it clear that 'Article X relates to the publication and administration of laws, regulations, judicial decisions and administrative rulings of 'general application' rather than to the substantive content of such measures[17]. The Appellate Body further held that licences issued to a specific company or applied to a specific shipment cannot be considered to be 'measures of general application' within the meaning of Article X. Furthermore, the Appellate Body

[16] The laws that must be published pertain to the classification or valuation of products for customs purposes, rates of duty, taxes or other charges among other things.
[17] Appellate Body Report. 1998. *European Communities –Measures Affecting the Importation of Certain Poultry Products*, (EC-Poultry), WT/DS69/AB/R, adopted 23 July 1998, par. 115.

in *US — Underwear*[18] confirmed that the term 'measure of general application' includes ‘administrative rulings’ in its scope. The fact that the restraint was an administrative order or that it was a country specific measure does not mean that it is not a measure of general application.

There is no certainty with regard to the meaning of the words 'published promptly in such a manner as to enable governments and traders to become acquainted with them', and no time limit or delay between publication and entry into force was specified by this provision.

Paragraph 2 provides that Members must not enforce certain measures before they are officially published. This includes measures effecting an advance in a duty rate or other charge on imports under an established and uniform practice or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments.

Furthermore, Members are required by Paragraph 3 to administer all their laws, regulations, decisions and administrative rulings in a uniform, impartial and reasonable manner. To this end, Members are required to maintain or institute judicial, arbitral or administrative tribunals or procedures as soon as practicable for the purpose of prompt review and correction of administrative action relating to customs matters. These procedures or tribunals must be independent of the agencies in charge of the administrative enforcement.

It should be noted that only the administration of laws and regulations can be challenged under Paragraph 3(a) and not the laws and regulations themselves. The requirement of uniformity, impartiality and reasonableness does not apply to the laws, regulations, decisions and rulings themselves but to the administration of those laws, regulations, decisions and rulings. However, the substantive contents of laws and regulations can be challenged under the relevant provisions of WTO Agreements.

[18] Panel Report. 1997. *United States-Restrictions on Imports of Cotton and Man-Made Fibre Underwear,* (US-Underwear), WT/DS24/R, adopted 25 February 1997, as modified by the Appellate Body Report, WT/DS24/AB/R, and par. 21.

In *EC-Bananas III*[19], the panel dismissed the argument that Paragraph 3 applies to internal measures only and held that internal laws regulating border measures constitute requirements on imports in the meaning of Paragraph 1 which defines Paragraph 3's coverage and cannot be excluded from its scope. The scope of paragraph 3 also includes licensing regulations for tariff quotas.

Lastly, in *Canada-Alcoholic Drinks*[20], the panel held that Article X does not require Members to make information affecting trade available to domestic and foreign suppliers at the same time, nor does it require contracting parties to publish trade regulations in advance of their entry into force.

6.3 Proposals on GATT Article X

(a) Publication and availability of information

The EC (TN/TF/W/6)[21], the US (TN/TF/W/13), Hong Kong China (TN/TF/W/32), Japan, Mongolia, and Chinese Taipei (TN/TF/W/8) [22], Korea (TN/TF/W/7), China (TN/TF/W/26) and Peru (TN/TF/W/30) propose that the information contained in Article X, other relevant trade regulations and penalty provisions must be published, and be made easily available on a non-discriminatory basis, and at no cost or at minimal cost. Such information can be published in official gazettes and journals but the *demandeurs* prefer to have this information on the Internet. As a rule,[23] they

[19] Panel Report. 1997. *European Communities-Regime for the Importation, Sale and Distribution of Bananas* (EC-Bananas III), WT/DS27/R/GTM, adopted 25 September 1997, as modified by the Appellate Body Report WT/DS27/AB/R, par.7.206.

[20] Panel Report. 1992. *Canada-Import, Distribution, and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, (Canada-Alcoholic Drinks) adopted on 18 February 1992, BISD 39S/27, 85-86, par.5.34.

[21] Among other things it proposes that Members must provide information on customs and other border related agency processes including port, airport and other entry-point procedures and relevant forms and documents and conditions for different forms of customs treatment. The EC calls for appeal procedures, including standard times and conditions for appeal, all fees and charges applicable to import, export and transit procedures and requirements to be published. It also proposes that Agreements with any other country relating to the issues mentioned above, as well as customs' and other government agencies' management plans relating to implementation of WTO commitments must also be published. Furthermore, it wants standard processing times or relevant reform and modernisation programmes and all significant amendments thereto to be published. Most importantly, it proposes that there should be an officially designated medium and where possible, the information referred to above should be online.

[22] These Members propose that all trade related laws and regulations, including treaties and agreements, procedures and administrative rules of border agencies must be published in the government gazettes, the official website of any competent government or governmental agency. They want documentation formats, decisions and examples of customs classification, fees and charges imposed on or in connection with importation or exportation, details of service contracts between Pre-Shipment Inspection entities and governments, details of export inspection for safety standards and standards processing period for major trade procedures to be published.

[23] However, in extraordinary circumstances like imminent threats to national security or health, specific measures setting foreign exchange rates or monetary policy and other measures the publication of which would impede law enforcement, such time interval may be reduced or omitted.

suggest that there should be a reasonable period (China proposes 30 days) between publication of new or amended measures and their entry into force.[24]

There is no doubt that transparency is a noble goal. The obligation on transparency takes its natural place in many WTO Agreements. However, this obligation must not impose onerous burdens on poor nations. The proposals by *demandeurs* on this obligation are too ambitious and seek to extend the scope of Article X rather than to clarify or improve it. In essence, they are actually creating new obligations which may be too onerous for African countries. The EC, for example, wants Members to publish administrative guidelines, management plans, standard processing time and modernisation programmes and to provide information on customs and other agencies and different forms of treatment. Japan and other co-sponsors came up with a shopping list of what is to be published and their proposal to notify the Secretariat of all trade-related regulations can prove to be onerous for poor Members and may overburden the Secretariat unnecessarily.

The proposal to have a time interval between publication and entry into force is a sound one because Article X is silent on this. However, the proposal to limit the cost of information may be difficult to accept because the cost of information varies according to the level of development of countries and the information systems they have.

The information to be published must be limited to that which is in Article X but those Members that have resources and are in a position to do so must publish as much information as they can as this will be in their interest. Whilst the Internet is the most effective and efficient way of achieving transparency, many poor countries may still have difficulties as the recurring costs of updating and maintaining the website may be high. This should not be accepted as a binding obligation but countries may accept this on a best endeavour basis and in accordance with their resources.

(b) Advance ruling

Canada (TN/TF/W/9) proposes that any competent authority must provide a written ruling with respect to the classification of the goods, the applicable rate of duty, or

[24] Similar provisions can be found in Articles 2.9 and 2.10 of the TBT and Annex B of Articles 5 and 6 of the SPS Agreement.

any tax applicable upon importation. The US (TN/TF/W/12) wants advance rulings to be issued in areas like tariff classification, customs valuation and duty deferral.[25] Chinese Taipei (TN/TF/W/10), Japan, Mongolia and Chinese Taipei (TN/TF/W/8) and Singapore (TN/TF/W/38) also call for the establishment of an advance rulings system as in Article 2(h) of the Agreement on Rules of Origin. Turkey proposes that advance rulings should be case-specific and binding only to the extent that the declared data is correct and that the relevant national legislation on which the ruling has been provided remains unchanged (Turkey N/TF/W/45).

The advantage of this system is that it brings certainty and allows reorientation of certain customs administrative decision-making away from the border. However, it should be noted that advance rulings are specific rulings and not rulings of general application. Article X requires only rulings of general application to be published and not specific ones. The panel in *EC-Poultry* made it clear that Article X does not require the publication of specific rulings. Thus it can be argued that advance rulings are outside the scope of Article X and the mandate of negotiations.

Furthermore, it may be difficult to accept the US proposal which includes customs valuation and duty deferral systems. The Canadian proposal is a fairly sound one because it does not cover these issues. It also contains a lot of flexibilities. The proposal by Singapore is also interesting because it suggests that as an S&D component, developing and least developed countries could initially commit to advance rulings for tariff classification, have longer implementation periods, and phase in some elements while implementing others on a best endeavour basis. However, binding rules on this issue may be onerous for African countries as many do not use such a system. African countries should accept this proposal on a best endeavour basis.

(c) Consultation and prior comment

The EC (TN/TF/W/6), Hong Kong China (TN/TF/W/32), Japan, Mongolia, Chinese Taipei (TN/TF/W/8), New Zealand (TN/TF/W/24), China (TN/TF/W/26) and Korea (TN/TF/W/7) propose that there must be consultation between interested parties,

[25] The US issues such rulings within 90 days of application and a similar provision in the Agreement on Rules of Origin provides that assessment of origin must be determined as soon as possible but not later than 150 days after request.

especially between governments and the private sector, on new rules applied to import and export administration and goods in transit.[26] The *demandeurs* argue that prior consultation ensures predictability and good regulation, and helps to avoid unnecessary barriers to trade, thereby encouraging compliance by traders. They further argue that this will help governments to avoid mistakes or excessive regulation not tailored to business needs.

As was discussed under the negotiating history of Article X, in the 1940s Members proposed a similar obligation to provide facilities for consultation but this was rejected. This raises the question whether it should be accepted now. This proposal goes well beyond Article X and to make consultation obligatory may prove onerous for many African countries that have scarce resources. This should rather be voluntary and be left for Members to decide or it can only be accepted on a best endeavour basis. It would have been understandable if prior consultation were limited to the domestic level and not extended to foreigners.

(d) Appeal procedures and administration of trade regulations

The EC (TN/TF/W/6) proposes that Members should have provisions which encourage Members to use administrative appeal procedures which can deliver solutions more quickly and cheaply than the courts which are generally slow and expensive. In line with this, the EC proposes that there should be an obligation to provide a non-discriminatory, legal right of appeal against customs and other agency rulings and decisions initially within the same agency or other body and subsequently to a separate judicial or administrative body. A standard time should be set for resolution of minor appeals at administrative level. It also proposes that these procedures should be accessible to SMEs and that the costs must be reasonable

[26] The EC submits that there should be adequate time periods for comment on proposed rules and procedures and calls for a minimum period to be agreed and exceptions to be allowed when there are urgent problems. Furthermore, it argues that consultations should take place at a stage where comments can be taken into account and a statement of policy objectives sought must be provided. New Zealand suggests that where a measure is not amended in accordance with the comments or where they are not taken into account, the responsible authorities should be required to justify the decision. Korea proposes that Members should notify the Secretariat of proposed core measures and their amendment at an early stage; and the Secretariat should disseminate such information to interested parties who may make comments in writing; and Members must give due consideration to those comments as is the case in the TBT and SPS Agreements.

and commensurate with costs of providing appeals. Moreover, companies should have the right to be represented by an agent or legal representative.

The EC is also suggesting that where a disputed decision is subject of an appeal, goods should normally be released and the possibility be available in given circumstances for duty payment to be left in abeyance. It proposes that a guarantee or surety or deposit can be provided in such a case.

Japan, Mongolia, and Chinese Taipei (TN/TF/W/8) also propose that there should be uniform administration of trade regulations throughout the Members' territories. To this end, they propose that Members must establish a central function within the government which has the primary responsibility to interpret trade regulations such as those relating to customs classification or customs valuation. They propose the compilation and distribution of casebooks and examples of customs classification and customs valuation and training of staff based on casebooks. Furthermore, they are calling for maintenance of integrity among officials and suggest that codes of conduct for staff or border agencies be developed.

As Members already have an obligation to provide an appeal procedure, this proposal should not be difficult for African countries. However, they need to reflect deeply on the proposal that during an appeal, no duties should be collected as this is a new obligation. There is also a new obligation that appeal costs must be reasonable and commensurate with the cost of providing an appeal. Under the current appeal system Members are free to charge what they consider to be reasonable but this proposal seeks to curtail this flexibility. Again the question of what are reasonable costs of appeal and which are unreasonable varies widely with the level of development of such facilities.

The proposal by Japan and other co-sponsors on establishing a central system to interpret regulations may be difficult for Members with federal systems. While it is a sound proposal to have integrity among customs officials and to compile and distribute casebooks to customs officials, this may prove to be onerous for poor countries, and besides, these issues fall outside the scope of negotiations and are better left to the authorities of respective countries.

(e) Enquiry points

The EC (TN/TF/W/6) proposes the establishment of enquiry points or trade desks providing information on all the measures and information discussed above, for the use of governments and traders on a non-discriminatory basis. It is proposing something similar to enquiry points in the TBT and SPS Agreements. Japan, Mongolia, and Chinese Taipei (TN/TF/W/8), Chinese Taipei (TN/TF/W/10), Korea (TN/TF/W/7) and Peru (TN/TF/W/30) also support the establishment of enquiry points. China (TN/TF/W/26) proposes the establishment of one or more enquiry points according to the Members' real situation. It suggests that the information requested must be given within 30 days or 45 days in exceptional cases. China also wants the replies to Members to be complete and to represent the authoritative view of the Member government.

This proposal is a sound one and African countries must be given adequate assistance to establish these enquiry points where they do not exist or are not fully functional. However, the proposal by China that replies must represent the authoritative view of government requires greater analysis as this may have hidden implications.

(f) Special and differential treatment, technical assistance and capacity building

The EC, the US, Canada, New-Zealand and China expressed their commitment to provide technical assistance and capacity building. The EC indicated that it would provide bilateral technical assistance to developing countries to establish requisite information platforms in electronic format. It offered to provide technical assistance needed to establish enquiry points, advance ruling systems, administrative appeals and for the publication of rules and procedures.

The US argues that the costs of publication will be minimal since many developing countries have already established comprehensive websites. It also pointed out that the cost associated with the development and maintenance of an Internet website has been dropping dramatically due to advancement in technology. On advance rulings, the US pointed out that costs may be met by having a fee structure for obtaining a ruling or by establishing a regional ruling authority. The US proposes a

situational approach which looks at the unique situation of each individual Member and proposes the use of diagnostic tools to assess specific needs which then lead to appropriate and workable transition periods and targeted assistance in individual situations.[27]

Canada has also proposed SDT provisions in the form of deferred implementation and different time requirements. Korea suggests that developing countries and least developed countries could be given longer implementation periods with respect to the obligations created. New Zealand admits that its proposal on consultation and commenting may lengthen the customs regulation process and increase the administrative burden, especially for developing countries. It proposes that SDT and technical assistance to mitigate such burdens will be considered. China made it clear that the establishment of enquiry point and Internet enquiries requires relatively high resource input, technical assistance, capacity building and longer implementation periods. However, with regard to SDT, what is worrying is the new concept of a situational approach. This implies that SDT will not be automatic but contingent upon the assessment carried out.

GATT Article VIII: Fees and formalities for importation and exportation

As was done with respect to Article X above, this section will first give an overview of the history of Article VIII. This will be followed by a brief look at the main elements of Article VIII and how it has been interpreted by the GATT or WTO panels. Finally, there will be an in-depth analysis of the proposals that have been submitted to date.

6.4 Negotiating history of GATT Article VIII

It is interesting to note that much of the language in Article VIII of GATT was drawn from a proposal submitted by the US in September 1946.[28] The US proposal was largely based on the International Convention Relating to the Simplification of Customs Formalities of 3 November 1923[29] and recommendations made by the

[27] As a way forward the US suggests that Members should undertake country-specific diagnostics and see what resources will be required and the time needed to implement this commitment.
[28] This Article first appeared as Article 13, Suggested Charter for an International Trade Organization of the United Nations, submitted by the US in September 1946. Department of State, Publication 2598, Commercial Policy Series 93. For more details see WTO (2005b).
[29] League of Nations Treaty Series, Vol.30, p.372 (1925).

World Economic Conference of 1927[30]. The aim of these documents was to reduce consular fees imposed when issuing visas for commercial travellers and consignment of goods and to limit such fees to the cost of the relevant government activity performed.

As early as 1927, the World Economic Conference recommended that consular fees should be fixed in amount, not exceed the cost of issue and not serve as a source of revenue. The main principle which emerged from the Conference is that arbitrary or variable consular fees lead to unexpected increases in charges and cause unwarranted uncertainty in trade. Article 36 of the draft Havana Charter also dealt with the same issues covered by Article VIII but with minor differences. The negotiating history of Article VIII is very important, not only in understanding and interpreting Article VIII, but also when seeking to clarify and improve it.[31]

6.5 The text of GATT Article VIII

Article VIII deals with fees and formalities connected with the importation and exportation of goods. The disciplines on Article VIII apply to all fees and charges of whatever character imposed on imports or exports but do not cover import and export duties and internal taxes within the scope of Article III of the GATT. Examples of these fees and charges, formalities and requirements are set out in paragraph 4[32] of Article VIII.

The panel in *US-Customs User Fee* clearly summarised the provisions of Article VIII and the types of fees and charges covered. It held that the merchandise processing fee for imports was covered by Article VIII: 1(a). However, in *EEC-Minimum Import Prices*[33], the panel held that the forfeiture of a security lodged in anticipation of importation when no importation took place within the specified date in an import certificate does not constitute a charge in the context of Article VIII: 1(a). Such a penalty should be considered as part of an enforcement mechanism and not as a fee or formality in connection with importation within the ambit of Article VIII.

[30] League of Nations Document C.356.M.129. 1927.II, par.5 (1).
[31] Panel Report. 1988. *United States-Customs User Fee* (US-Customs User Fee), adopted 2 February 1988, BISD *35S/245.* The panel in this case considered the negotiating history of Article VIII.
[32] These relate to consular transactions, such as consular invoices and certificates, quantitative restrictions, licensing, exchange control, statistical services, documents, documentation and certification, analysis and inspection and quarantine, sanitation and fumigation.
[33] Panel Report. 1978*. EEC-Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables* (EEC-Minimum Import Prices) adopted 18 October 1978 BISD 25S/68, par. 4.3.

Paragraph 1(a) requires Members to limit the above-mentioned fees to the approximate cost of services rendered. Such services rendered refer to government regulatory activities performed in connection with the importation and customs entry processes, such as the processing and clearing of documents and goods, as well as inspections. Such fees must not 'represent an indirect protection to domestic products or a tax of imports or exports for fiscal purposes'.

In *Argentina-Textiles and Apparel*[34], the panel held that 'an ad valorem duty with no fixed maximum fee, by its very nature, is not limited in amount to the approximate cost of services rendered'. An ad valorem duty means that high priced products will attract a higher tax than low priced goods yet the services rendered to both is essentially the same.[35] An unlimited ad valorem charge on imported goods violates Article VIII because such a charge cannot be related to the cost of the service rendered. In the same case, the panel held that the statistical tax (3%) was used for fiscal purposes thereby violating Article VIII. It was further held that even though Argentina was collecting this fiscal tax in the context of its undertakings under the IMF, the charge was in excess of the approximate costs of the statistical services rendered.

The relationship between fees and charges in the context of Article VIII: 1 and Article II of GATT was also dealt with in *US-Customs User Fee*. In this case, the panel held that Article II: 1(b) imposes a ceiling on the charges that can be levied on a product whose tariff is bound. However, over and above the import duties imposed on bound tariffs, Members are allowed to impose fees and charges commensurate with the cost of services rendered.

In paragraph 1(b) and (c), Members merely recognise the need to reduce the number and diversity of fees and charges covered by Article VIII and to minimise the incidence and complexity of import and export formalities and to decrease and simplify import and export documentation requirements. These paragraphs are hortatory in nature and do not impose specific obligations on Members.

[34] Panel Report. 1998. *Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and other Items* (Argentina –Textiles and Apparel), WT/DS56/R, adopted 22 April 1998 as modified by the Appellate Body Report, WT/DS56/AB/R and Corr.1 DSR 1998; III, 1033, par.120.

[35] To illustrate this, the services offered to an importer of a container of mobile phones will attract a higher charge than the importer of the same sized container of bond paper but the services rendered in both instances at the customs may involve similar procedures.

According to Paragraph 2, a Member is required to review the operation of its laws and regulations in light of Article VIII when requested to do so by another Member or by the WTO body.

Paragraph 3 prohibits Members from imposing substantial penalties for minor breaches of customs regulations or procedures. If mistakes or omissions by traders are not fraudulent or do not amount to gross negligence, the penalties imposed must only serve as a warning. The 1952 Recommendations[36] provide that no charge, save for the regular charge for getting a new document, should be imposed for bona fide mistakes and that corrections should be allowed within reasonable limits.

The interpretive notes to Article VIII provide that the use of taxes or fees as a device for implementing multiple currency practices is inconsistent with Article VIII. However, in accordance with Article XV: 9(a) of GATT, a Member may use multiple currency exchange fees for balance of payments reasons with approval from the IMF. The other exception relates to the production of certificates of origin, the requirement to produce certificates of origin as such is not inconsistent with Article VIII but such certificates should be only required to the extent that they are strictly indispensable.

6.6 Proposals on GATT Article VIII

(a) Reducing the diversity of fees and charges

Article VIII merely recognises the need for reducing the number and diversity of fees and charges but does not actually oblige Members to do so. There are excessive fees and charges which are being imposed for revenue or protection purposes. This leads to uncertainty and unwarranted costs to traders. To solve this problem, the EC and Australia (TN/TF/W/23), the US (TN/TF/W/14[37]), Japan and Mongolia (TN/TF/W/17), Chinese Taipei (TN/TF/W/25) and Hong Kong China (TN/TF/W/31) propose that there should be parameters or disciplines on fees and charges.[38] They

[36] BISD 1S/26, par. 4.

[37] As a way forward the US proposes that Members should clarify the amount of fees, how fees are calculated and by whom, and where they are payable. A diagnosis of the implications of this commitment is also warranted.

[38] The EC and Australia (TN/TF/W/23) propose that (a) the service provided must be related to the product in question; (b) the fees or charges levied must refer to the approximate cost of the service rendered; (c) the fees or charges in question may not be calculated on an ad valorem basis; (d) the administrative or operational costs not associated with the treatment of imports or exports respectively may not be imposed on such imports or exports; (e) there should be non-discrimination in the design and application of fees and charges. They also propose that these general disciplines apply not only to customs authorities but also to other agencies involved in the imposition of import and export charges.

want these fees and charges to be reviewed, consolidated, justified, notified and published.[39]

Furthermore, the EC and Australia (TN/TF/W/23) propose to establish a list of permissible fees and charges, and time intervals between their publication and entry into force, and to discontinue the levying of 'consular fees' or 'consular invoices'. Uganda and the US (TN/TF/W/22) also propose to ban fees and charges imposed on consular transactions, including consularisation-related fees and charges which are imposed in connection with the importation of goods.[40] Chinese Taipei also complained about high fees for consular invoices and certificates charged by importing Members.

According to an OECD study (OECD: 2005)[41], it is clear that most of the customs fees and charges on imports are excessive and unjustified because they are applied on an ad valorem basis and are not limited to the underlying costs of the services rendered. For example, some charges are used to raise revenue and to protect industries.

The OECD study also shows that the use of customs surcharges and consular invoice fees has markedly declined over the last two decades and many countries now impose importers' fees for the use of various customs-related services. So the proposal to abolish consular fees should not cause a lot of difficulties because only a few countries still impose them. Moreover, this problem was noted as early as 1927 at the World Economic Conference. It is fitting that the Doha development Agenda should address this problem. After all, the purpose served by consularisation is no longer justified given the fact that the same service will be performed at the borders by people who are more knowledgeable and qualified than those at the consulate. In

[39] Chinese Taipei (TN/TF/W/25) proposes that a periodic review should take place at least once every three years. It also proposes a scientific method for calculating fees and charges and wants the costs of services rendered to be broken down into direct and indirect costs using the Generally Accepted Accounting Principles.

[40] This problem is not affecting developed countries only but also many African countries. For example, Ambassador Ruhemba of Uganda in his presentation at the APEC/WTO Trade Facilitation Round Table in Geneva held at the WTO on 10 February 2005 indicated that Ugandan tobacco exporters are required by the Embassy of Egypt to have all shipment documents legalised at the cost of US$80 per page. These documents include an original invoice, customs declaration, waybill manifest, in transit manipulation, bill of entry and packing list. The legalisation process alone will cost at least US$480. One may well ask whether these charges are reasonable or not.

[41] It should be noted that some of the fees and charges have since been eliminated or reduced, so the study may not be accurate; however, it does give a general picture.

today's world of just in time delivery, such a duplication of duties imposes huge costs and delays on traders and is inimical to the virtues of trade facilitation.

It is submitted that some disciplines to clarify the fees and charges imposed are necessary given the multiplicity of fees and charges imposed by Members. There are no major changes that will be required by the proposals discussed above since most of what is being proposed is already covered by Article VIII and the panel has already ruled that fees or charges cannot be calculated on an ad valorem basis without a limit. This should be made clear in Article VIII and all those Members still engaging in this practice must comply with Article VIII.

However, certain elements of these proposals may pose some difficulties for African countries. First, the number of fees and charges differ significantly according to the different systems and infrastructure of Members. Second, the approach suggested by Chinese Taipei is too prescriptive. This raises questions about the criteria that will be used to draw a list of permissible fees and whether this will be exhaustive or indicative in nature, merely serving as a guide to Members. Third, clarifying the amount of fees and how they are calculated may be viewed as excessive interference into a Member's internal activities. Some developing countries prefer to determine their fees and be able to adjust them in line with changing circumstances.[42] Fourth, the proposal to ban the collection of unpublished fees seems to be too drastic and may not be accepted by some Members. Fifth, the above proposals will affect poor countries adversely because they seem more likely to use ad valorem fees for revenue purpose and protection than richer countries.

Despite the above concerns, ways and means must be found to reduce the number and diversity of fees and charges and to ensure that they are limited to the costs of services rendered. To assist African countries in overcoming some of these concerns there should be adequate flexibilities and SDT. The provision of technical and financial assistance to help poor countries upgrade their ports and roads, and to carry out various customs-related changes might assuage their loss because many of them use some of these charges to raise revenue for port development and other customs-related purposes.

[42] For example, some Members may need to adjust the fees according to changes in inflation. This means that fees can be reviewed upwards or downwards.

(b) Reducing the incidence and complexity of import and export formalities and simplification of document requirements

The EC (TN/TF/W/46), Japan and Mongolia (TN/TF/W/17), Korea (TN/TF/W/18), Canada (TN/TF/W/20) and Hong Kong China (TN/TF/W/31) propose that in order to reduce the incidence and complexity of import and export formalities, Members must use international standards to the extent possible[43], accept copies in certain cases, accept commercially available information[44] and establish a single one-time presentation of data to one agency. They also propose that there should be coordination of time and place of physical inspection among relevant authorities to the extent possible and integrated border controls through single, shared physical infrastructure in which the neighbouring countries' customs services operate side by side. The EC (TN/TF/W/46) also calls for the application of the principle of non-discrimination in the design and application of import and export procedures and formalities, in respect of licensing of customs brokers and an obligation to phase out the mandatory use of customs brokers.[45]

Japan and Mongolia (TN/TF/W/17) propose the use of least trade restrictive import and export documentation requirements and a periodic review of these documents based on comments from the private sector. They suggest that the documentary examination and physical inspection must be done without delay and documents must not be rejected because of minor breaches. Furthermore, they want the practice of compensating customs officials according to the penalties they impose to be discontinued and all unpublished penalties to be prohibited.

New Zealand, Norway and Switzerland (TN/TF/W/36) want the documents to be simplified, standardised and reduced in number to make it easy to translate and

[43]Korea proposes that Members must use the UN Layout Key for Trade Documents to align documents and the WCO Customs Data Model to harmonise and standardise the format of documents and accept commercially available information. New Zealand (TN/TF/W/24) proposes that all Members must use the WCO's Convention on the Harmonised Commodity Description and Coding System (HS Convention) for classifying goods to ensure that tariff classification decisions are not used as disguised protection of domestic industries. It suggests that where it is not possible to determine accurately the classification of a product using the HS system, an objective test must be developed.

[44]This is information which is normally included in business-to-business transactions such as bills of lading or commercial invoices.

[45] The EC also supports the periodic review of procedures or formalities, the use of international standards and instruments, the use of a least trade restrictive test, the principle of a single, one-time presentation to one agency, normally the customs, of all documentation and data requirements for export or import, the use of risk analysis methods and the elimination of Pre-Shipment Inspection Arrangements.

complete them.[46] They suggest that the contents of requirements for goods declarations must be set out in national legislation. New Zealand (TN/TF/W/24) further proposes that Members notify the documentation and entry systems which they currently implement or have in preparation, and based on this notification, Members could look at practical ways to minimise fees and formalities and to reduce excessive documentation requirements.

Since many countries already use some of the recommendations in the Kyoto Convention and the UN Layout Key, this proposal is something that Members should seriously consider in order to simplify import and export formalities and facilitate trade. However, Members should not be obliged to harmonise and standardise their import and export requirements. First, the mandate is not about harmonisation and even the EC and other Members talk of the use of international standards to the extent possible. They recognise that one size does not fit all. Second, most African countries did not participate actively in the designing of these standards. Therefore they must not be imposed on them if they do not want to use them.

The suggestion to have a one-time single submission to one agency is something that Members must strive to achieve but again this should not be obligatory. The same goes for acceptance of copies and periodic reviews. These are issues that must be left to the various customs administrations and agencies. Publication of penalties is good and should be encouraged. The proposal to use the HS code when classifying goods is a sound one and Members must consider adopting it.

The proposal by Hong Kong China on the use of the necessity test to minimise the incidence and complexity of import and export formalities and to decrease and simplify import and export documentation requirements is good. It is cast in general terms because circumstances vary from one Member to another. Flexibility is also found in its proposal on self-review of fees and formalities. Hong Kong China does not define a rigid standard time for intervals to take into account different circumstances of Members.

[46] The need for translation can be minimised by using net-based documents where users select the language and for those who cannot provide net-based documents a common international net-based 'bank of documents' under the WTO or other organisation where the user can choose language has been proposed. A document could be presented in the language of the importing country even if it was originally filled out in another language.

(c) Simplified or fast track clearance procedures

The EC (TN/TF/W/46))[47], Japan and Mongolia (TN/TF/W/17), Peru (TN/TF/W/30)[48], Korea (TN/TF/W/18), Canada (TN/TF/W/20), the US (TN/TF/W/15), and Chinese Taipei[49] call for the simplification of import and export procedures by adopting fast clearance procedures like automation[50], risk assessment, authorised traders' facilities, and the use of pre-arrival and post-audit clearance systems. The EC and Korea propose that Members commit to reducing the standard processing time and publish the average time taken for clearing and releasing goods.[51]

Australia and Canada (TN/TF/W/19)[52] propose the separation of the process of fulfilment of customs obligations including payment of duties from the actual release of goods. This can be done by use of collateral or monetary securities like bonds or other financial guarantees.

The US proposes that Members should provide specific expedited procedures for express shipments.[53] It argues that the silence of Article VIII regarding how express shipments should be treated reflects a major difference between the trading world of 1947 and 2005. Chinese Taipei (TN/TF/W/44) and Turkey (TN/TF/W/45) have also submitted detailed proposals on how to expedite procedures for express shipments. This is something which is good but since it does not clearly fall under any of the three Articles, it may present problems because the mandate is to clarify and improve relevant elements of Article X, VIII and V.

[47] The EC recommends progressive implementation of simplified and standardised import and export procedures, based on international standards and instruments, including the WCO Kyoto Convention and all Members to introduce simplified customs release and clearance procedures.
[48] Peru recommends the establishment of a single window and accession to Conventions which seek to simplify and harmonise customs procedures.
[49]Chinese Taipei also calls for speedy clearance for express consignments using the WCO Customs Guidelines for Express Consignments.
[50] They suggest the possibility of electronic presentation of customs and other declarations and for the payment of duties or other fees and charges.
[51] Korea recommends the use of the *WCO Time Release Study: Guide to Measure the Time Required for the Release of Goods* to measure the average time for clearing goods.
[52]Security can be given where delays are encountered in completion of final clearance procedures because the trader will be waiting for a decision on the correct tariff classification or where goods are imported to fulfil a specific purpose and subsequently duty paid or exported after use (as in cases where there is authorisation to import goods for 'inward processing' without payment of duties and taxes, provided that the finished goods are subsequently exported)
[53] It suggests that there should be de minimis procedures for low value shipments, an absence of weight or value restrictions on what is considered 'express', and the submission of import data in advance for goods to be released rapidly.

Most of the measures suggested, such as automation, risk assessment, and the use of pre-arrival and post-audit clearance system, are what all Members should ideally aim to have. They can go a long way in facilitating trade. However, these techniques require a lot of resources which are lacking in many African countries. Moreover, some of the techniques like post-audit clearance may pose some difficult challenges to some African countries. There are concerns that these systems may make African borders more porous with serious consequences on revenue. Some delegates argue that these measures may be onerous to SMEs and others are worried about overnight importers who fly back to their countries before a post-audit clearance is conducted.

With regard to exports, some traders do not declare the correct value of the products and in many instances they do not provide truthful information about the contents or the level of processing their exports have undergone.[54] This may necessitate physical checks on a regular basis. Therefore having binding rules on risk assessment techniques, pre-arrival and post-audit clearance systems may not be commensurate with the level of development, the capacity and the expertise of African countries. The technology gap between Africa and the world is huge. Most of the above measures require extensive use of risk assessment and management procedures. Some African countries are not ready for this and may require an incremental approach coupled with technical and financial assistance.

The above comments also apply to the Australian and Canadian proposal on collateral security. Many traders, especially SMEs, may not be in a position to furnish such security, and the private finance sectors in many African countries are not as highly developed as those in developed countries to be able to adequately finance such a facility. This may end up by being an obstacle to them. This proposal should be accepted on a best endeavour basis.

[54] This is related to smuggling and is a major problem in Africa. For example, minerals for export may be declared as unprocessed but in actual fact they would have undergone substantive processing. Some exporters declare that they have raw materials and put a few of these on top but beneath that there will be value-added goods.

(d) Special and differential treatment, technical assistance and capacity building

On fees and charges and express shipments, the US argues that these are issues of regulation and will have no huge cost implications. It proposes that the costs can be borne by those receiving express shipment services. The *demandeurs* argue that since Article 13 of the Agreement on Customs Valuation already requires Members to provide for security instruments in cases of the delays in the final determination of customs value, the costs of collateral security services will be limited to training officers on the wider uses of collateral security arrangements, and technical assistance in this respect will be provided. They also propose that provisions reflecting the specific circumstances and capacity to deliver collateral security services in individual Members can be incorporated within commitments in the form of deferred implementation. Notwithstanding the above, the *demandeurs* said that technical assistance can be provided in cooperation with other organisations and the private sector.

The *demandeurs* also indicated that a range of S&D measures, such as less onerous initial commitments for poorer developing countries, transitional periods for the assumption of commitments, and more stable provisions regarding the supply of technical assistance would be considered. The US in particular suggests that the needs of developing countries must be assessed as early as possible to see what transition periods are needed for implementing commitments. Canada proposes S&D in the form of progressive implementation. Japan, Korea and Mongolia noted that S&D, technical assistance, capacity building and cost implications are important elements of the negotiations. They also proposed granting a transition period in accordance with developing Members' implementation capacity or support based on coordination among relevant institutions, such as, the IMF, OECD, UNCTAD, WCO and World Bank.

However, several developing countries are concerned that there are no concrete proposals on S&D and technical assistance. Developed countries made a commitment to assist some Members with infrastructure development and they should deliver on their promises. Cooperation with other organisations is also important to deliver concrete results. Developed countries should not simply refer to

wider development funds that are already committed to other priority areas. They should mobilise specific funds for trade facilitation. African countries should push for provisions of a contractual right, on the funding arrangements for them to receive appropriate and adequate technical assistance and capacity building aid to implement new obligations as recommended by the Consultative Board to the Director General (WTO 2005, 82).

GATT Article V: Freedom of transit

This section looks at the problems faced by landlocked African countries, the negotiating history of Article V, its salient elements and the proposals on how to clarify and improve it.

6.7 Problems faced by landlocked countries

Landlocked countries[55] are those without direct coastal access to the sea. In sub-Saharan Africa, the situation of these countries is made worse by the fact that they are far from the coast and major markets. Landlocked countries often have poor infrastructure[56], an inadequate legal environment and high transport costs[57]. It is estimated that in landlocked sub-Saharan African countries[58], about three quarters of the value of their exports goes to transport (Commission for Africa, 2005). Trade competitiveness is further reduced by transit charges, such as port charges, road tolls, excessive deposits and forwarding fees. Cumulatively, these factors significantly reduce the competitiveness of landlocked countries in the global market.

The countries that are challenged by geography often face problems in accessing the sea and sometimes their neighbours have little interest in making the flow of goods across their borders easy for them. The attitude of some customs officials to transit trade is very negative. Since they do not get revenue from transit, they see no benefit

[55] For more information see UNECE (2003: 81).
[56] The problem is that these poor African nations are surrounded by other poor transit countries which do not have the financial means to maintain transport infrastructure. For a number of countries like Uganda, Malawi and Eastern Zaire, Tanzania is the cheapest transit to sea but its roads and railway systems are poor and this option is ruled out.
[57] For example, the shipping cost for a standard container from Baltimore (US) to Ivory Coast is US$3,000, but sending the same container to landlocked Central African Republic will cost up to US$13,000. See Hausmann (2001). A container that is sent from Rotterdam in the Netherlands to Dar es Salaam in Tanzania over an air distance of 7,300km for US$1,400 is then transported to Kigali in Rwanda over a distance of 1,280km by road for twice as much (Sachs and Gallup, 2001). Furthermore, it costs US$1,500 to ship a car from Japan to Abidjan but US$5,000 to ship the same car from Abidjan to Addis Ababa (Commission for Africa, 2005).
[58] These are Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Zambia and Zimbabwe.

in facilitating the trade of their neighbours. The problem becomes acute if neighbours have economic or military incentives to block their access to the sea or transit through their territory. Even though there are many resolutions, declarations and conventions giving the right of access to sea and freedom of transit[59], these have not been fully implemented.

Although public international law provides the right of access to and from the sea and the freedom of transit, it also provides the sovereign state with the right to take the necessary measures to ensure that the transit right given to landlocked countries does not infringe their legitimate expectations. Therefore there should be a delicate balance between the right to transit and sovereignty of states to ensure that this right will not be abused under the pretext of legitimate expectations. It is not sufficient for landlocked countries to depend on the goodwill of their neighbours to access world markets. Thus, traders propose that there should be an enforceable agreement to protect their rights and increase certainty. Improving Article V may be one way of achieving this objective, but a lot of political will is required to strengthen this Article and safeguard the interests of landlocked countries.

It is interesting to note that in Africa efforts are being made to facilitate freedom of transit. In West Africa, for example, Members of the Economic Community of West African States (ECOWAS) signed the Convention for the establishment of an ECOWAS Inter-State Road Transit System also known as TRIE (Transport Routier Inter-Etats) which was ratified in 1982 but is not yet fully operational. Many ECOWAS Members still rely on bilateral and national regulations which are inward looking and inefficient. The Southern African Development Community (SADC) has a Protocol on Transport, Communication and Meteorology of 1996 and an Agreement on one-stop border posts; but again this has not been fully implemented.

The Common Market for Eastern and Southern Africa (COMESA) has an ambitious agenda to establish a regional customs transit system and the COMESA carrier licence is already functioning. In order to facilitate transit trade, COMESA adopted a

[59] For example, the United Nations Convention on the Law of the Sea, of 1982 which entered into force in 1994 gives landlocked the right to and from the sea and the freedom of transit in Part X. The other one is the United Nations Convention on the transit Trade of Landlocked countries of 1965. There are about 99 UN resolutions in the area on trade facilitation (see WTO, 2000).

Protocol on Road Transit Facilitation, Harmonised Axle[60] load controls and Harmonised Transit Charges. Other important instruments include the Yellow Card insurance scheme covering third party liability[61] and the Customs Bond Guarantee Scheme[62]. However, the COMESA Customs Document still faces implementation problems and not all countries are using it. The IMF and World Bank have done some work to improve these conditions but a lot still remains to be done.

Even though many African countries have signed numerous agreements relating to trade facilitation, the benefits of such agreements have been limited because of non-compliance to the agreements, poor programme implementation, lack of coordination and absence of a multi-sectoral approach to trade facilitation (ECA, 2004).

The problem of transit in Africa is complicated by the fact that most borders are porous and it is difficult to monitor whether goods reach their final destinations without being diverted into transit countries. Smuggling of goods also makes it difficult to facilitate transit trade. The other problem hindering transit trade is that officials at borders sometimes do not have the authority to make certain decisions resulting in truck drivers having to return to the capital. Due to lack of adequate banking infrastructure and guarantee schemes, drivers often carry a lot of cash because of sudden changes in transit charges. To avoid this problem, it is important to establish guarantees at regional levels and to promote mutual recognition of insurance companies. COMESA Members already have the Customs Guarantee Bond Scheme; what is needed is to speed up the ratification and implementation process.

The absence of a guarantee system in Africa and lack of implementation of this system where it has been proposed is mainly due to the poor development of banking and insurance sectors. International financial institutions are also unwilling to guarantee transit in Africa. The tendency by carriers to undervalue invoices in order to limit the value of guarantee or deposits makes it difficult for customs officials to calculate the guarantee or deposits and, in cases of fraudulent undervaluation, the

[60] The size of truck axles or truck length and axle load regulations varies between Member States. For example, Cameroon's limit is 18 metres and Nigeria's is 22 metres. There are also three different sizes of rail gauges in Africa.
[61] This scheme allows pre-purchase of insurance in local currency at the point of origin and this is respected by all participants. For example, a driver from Zimbabwe to Uganda via Zambia, Tanzania and Kenya does not need to stop at each border post to purchase insurance but uses the Yellow Card.
[62] This requires ratification by other countries before it enters into force.

carrier will be willing to forfeit the security and there will be no deterrent effect to fraudsters.

The other problem in Africa is that guarantees are not accessible to average operators and many transporters, especially small operators, have vehicles that do not meet the customs requirements for secure transit. In such cases, customs authorities normally require convoys to accompany transit vehicles during the trip and this increases transit costs. In certain cases where the truck cannot be sealed, transit traffic may be limited to specific corridors, or the time for transit can be limited from customs office of departure to where the goods will exit the transit country. Such traffic is subjected to further customs patrols during transit. In order to solve some of these problems, Africa needs to adopt measures which are based on the TIR convention[63] as this system saves costs and facilitates the smooth transit of goods. This system is updated regularly and has devices to combat smuggling and fraud. It dispenses with the need to make customs guarantee or deposits at the transit border.

However, for agreements based on the TIR system to work, there must be an efficient guarantee system and a well organised private sector, especially the transport and financial sectors. Countries which use such a system must be politically stable because political tension between countries makes mutual recognition of carnets or transit documents difficult.

There is also the problem of separate working hours. This makes it difficult to facilitate transit. After being cleared on one border one may find the next border gates closed, making it necessary to wait for hours until the border is reopened.

Transport and development corridors are long-term projects that must be considered to solve the problem of transit. Transit corridors address transit problems in a comprehensive manner, as was seen above in the Trans-Kalahari Corridor. Another good example of a development corridor is the Spatial Development Initiative (SDI) launched in the 1990s by Mozambique and South Africa and the Maputo corridor

[63] The Customs Convention on the International Transport of Goods under cover of TIR Carnets (TIR Convention), Geneva, 14 November 1975 and the Customs Convention on the ATA Carnet for the Temporary Admission of Goods (ATA Convention), Brussels, 6 December 1961 and the Convention on Temporary Admission (done at Istanbul, 26 June 1990) Annex A which deals with ATA Carnets. The TIR Carnet is a road transport document which allows containerised and bulk cargo to move through simplified and harmonised administrative formalities. The ATA Carnet is designed to facilitate the importation, irrespective of the means of transport, of goods, which are granted duty-free admission including transit.

which links the two countries. Harmonising, simplifying and standardising transit procedures and documentation are necessary measures that regional organisations in Africa must take to improve transit.

The plight of landlocked countries requires urgent attention. Practical solutions for these countries, which include transit corridors, regional integration, legal and regulatory reforms, and improvement in transport infrastructure must be accelerated. As was highlighted above, Africa already has various measures to facilitate transit. What is needed is to strengthen these measures and to ensure that they are implemented. Improving Article V will go a long way in strengthening the right of landlocked countries to transit and this may give the necessary impetus at the regional level to implement this Article fully.

6.8 Negotiating history of GATT Article V

Article V was mainly influenced by the Barcelona Convention[64] which regulates the conditions that a Member could apply to goods of another Member passing through its territory to a third destination.[65] To fully understand the negotiating history of Article V, one must look at the corresponding Article 33 of the draft Havana Charter which sought to establish the International Trade Organisation. Article 33 underwent several modifications. However, when Members negotiated the 1948 protocols that amended some of the GATT provisions in order to bring it in harmony with the Havana Charter, these modifications were not incorporated into the original 1947 version of Article V. Therefore, several differences between the Havana Charter and the GATT exist.

An example of a clause which is not found in GATT is Article 33(6) of the Havana Charter which calls on the organisation to 'undertake studies, make recommendations and promote international agreements relating to the simplification of customs regulations concerning traffic in transit, the equitable use of facilities required for such transit and other measures designed to promote the objective of the Article. Members shall cooperate with each other directly through the organisation to this end'. This clause was added by countries that do not have direct access to the sea. Despite major differences between the GATT and the Havana Charter, the

[64] The Convention and Statute on Freedom of Transit, Barcelona, 29 April 1921.
[65] For further information see WTO (2005c).

preparatory work on the Havana Charter can be useful in understanding Article V. Even though the need to simplify transit procedures was identified long ago, real freedom of transit is not being granted.

6.9 The text of GATT Article V

The thrust of Article V is to allow freedom of transit through the territory of each Member for transport to or from the territory of other Members. Traffic in transit is defined in Paragraph 1, and only goods, vessels and other means of transport constitute traffic in this context. Transit of persons and grazing livestock is excluded.

Paragraph 2 provides that transit must be granted 'via the routes most convenient for international transit'. This means that Members cannot use all routes but are limited to the most convenient one. Members are also not allowed to distinguish traffic on the basis of the flag of vessels, place of origin, departure, entry, exit, destination or any circumstances relating to the ownership of goods, vessels or other means of transport.

According to Paragraph 3, a Member has the right to require traffic in transit through its territory to enter at the proper customs house. Unless there is failure to comply with relevant customs laws, traffic in transit shall not be subjected to unnecessary delays or restrictions. Such traffic shall be exempt from customs duties and all transit duties or charges imposed in respect of transit save for charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered. All the charges[66] and regulations imposed by a Member on traffic in transit must be reasonable and nondiscriminatory. The golden rule is that transit traffic charges must not be used to raise fiscal revenue.

With respect to all charges, regulations and formalities imposed on transit traffic, Paragraph 5 requires Most Favoured Nation treatment (nondiscrimination) to be given. In the context of transportation charges, the MFN principle applies to like products being transported on the same route under like conditions.

[66] The report of the Technical Sub-Committee opined that the word 'charges' include charges for transportation by government-owned railroads or government-owned modes of transportation (UN Document, E/PC/T/C.II/54/Rev.1:10).

6.10 Proposals on GATT Article V

The EC (TN/TF/W/35) wants Article V to be modified to make transit procedures simple, transparent and to correspond to new commercial realities such as just-in-time production and delivery. It argues that since 1947 this Article has never been modified and real freedom of transit is not being granted. The EC identified as major transit problems: lack of transparency on transit requirements; the changing of national rules and their application without prior notice and with retroactive effect; high, discriminatory and unwarranted transit charges and illegal roadblocks which are used to levy fees. Some of the problems, such as illegal roadblocks and lack of transparency, can be implemented easily without significant costs. Other problems concern excessive, burdensome and non-standardised documentation, data requirements and procedures which result in documents becoming invalid due to delays in transit or within an unreasonably short period.

The other problem cited by the EU is that traders are required to post disproportionate guarantees and face difficulties in getting the guarantee at exit points. It proposes rules on the level, nature and management of guarantees required from transit operators, including rules to ensure that they are not used as an instrument to raise revenue. As discussed above, there is no doubt that the issue of guarantees is the lynchpin of any successful transit system. African countries must establish guarantee systems and those Members with such a framework system, such as COMESA, must implement effective guarantee systems without further delay.

The EC also cited the problem of unjustifiable restrictions on means of transport, on drivers and goods in transit including the requirement for goods to be transported under escort. Lack of coordination between different agencies involved in transit and lack of cooperation with exporting or importing countries, non-application of international, regional or bilateral instruments for transit and lack of resources in terms of personnel and infrastructure have a serious impact on freedom of transit.

To resolve the problems cited above, the EC proposes that Members should adopt some of the measures that have been proposed on Article X and VIII as these are also relevant here. Furthermore, the EC proposes that some of the problems can be

solved in the services negotiations and that the question of infrastructure should be addressed in the context of long-term development strategies involving multilateral and bilateral development cooperation and investment bodies. Some delegates from developing countries also want issues of infrastructure like roads and ports to be addressed in the context of trade facilitation negotiations. However, there is nothing in the Doha Declaration or the July Package which expressly mandates developed countries to provide assistance to develop infrastructure of this nature. The scope of negotiations is limited to the three Articles and developed countries argue that their assistance in the context of the negotiations is limited to these three Articles. The issue is further complicated by the fact that the WTO is not a donor agency as such and does not have adequate resources of its own to assist in the development of infrastructure. The only feasible way to address the problem of infrastructure is through cooperation with other international organisations.

The EC also makes it clear that exceptions in Article XX and XXI dealing with national security, health, and the environment are fully applicable to the proposals. The implication of this is that the TBT, SPS and the exception on national security can be used in a way that affects trade of developing countries.[67]

The EC proposes that there should be non-discrimination between the means of transport, carriers, and types of consignment in relation to transit procedures, including pipelines.[68] It proposes that any restrictions must pursue a legitimate public policy objective, be proportionate and be applied uniformly. At present, Members are not required to treat different modes of transport the same as long as they are origin neutral. They can treat different modes of transport differently, for example, hazardous goods and heavy vehicles may require different treatment.

Members should be careful about the EC proposal as it seeks to extend disciplines beyond what Article V provides and may impose onerous obligations on Members. On the issue of non-discrimination between modes of transport, it is also important to

[67] The TBT and SPS have been major non-tariff barriers hindering the trade of developing countries. The new security measures being taken by developed countries to combat terrorism have the potential to wipe out trade of developing countries. Not only are more resources required to assist African countries to meet the TBT, SPS and security standards, but also disciplines to ensure that these measures are not used for protectionist purposes must be developed.

[68] Bolivia, Mongolia and Paraguay (TN/TF/W/28) also propose that there should be non-discrimination between modes of transport, origin and destination, carriers, routes and goods. They also encourage transit Members to provide landlocked developing Members with national treatment.

analyse the relationship between this proposal and the General Agreement on Trade in Services (GATS).

The EC also proposes that there should be cooperation and coordination between all concerned agencies in each WTO Member and across borders. Regional cooperation and use of international instruments[69] when establishing regional and bilateral standards are strongly recommended. Some African countries through COMESA and SADC have already used international instruments in drawing regional standards.

The EC also proposed that Article V should be operationalised by allowing freedom of transit via the 'routes most convenient for international transit' and leave the choice of route and means of transport to the operator. It also suggests that legitimate reasons like health and environment may be used to limit the choice of the operators. However, some developing countries want the authorities to choose the 'most convenient route'. It is submitted that the parties involved in transit should have the flexibility and freedom to negotiate and agree on the most convenient route. Binding WTO rules on this issue may not be desirable.

The EC also suggested that the terminology on the definition of goods (including 'baggage') in Paragraph 1 of Article V should also be clarified to avoid uncertainty and loopholes. This is important because some overzealous customs officials do not recognise the drivers' goods as transit goods.

Like the EC, Korea (TN/TF/W/34) argues that its proposals on Article X and VIII also apply *mutatis mutandis* to Article V. It proposes differentiation in the treatment of transit goods which are trans-shipped (moved from one form of transport to another) and those which are not. The idea in the Korean proposal is to have more simplified transit procedures for non-trans-shipment goods compared to trans-shipment goods. Korea wants Members to review their transit procedures and minimise border transit requirements as far as possible and accord transit goods that do not require trans-shipment less burdensome treatment than those that require trans-shipment. For the former, there is less risk that goods may be released into the transit country;

[69] The most important ones are the Customs Convention on the International Transport of Goods under cover of TIR Carnets (TIR Convention), Geneva, 14 November 1975 and the Customs Convention on the ATA Carnet for the Temporary Admission of Goods (ATA Convention), Brussels, 6 December 1961 and the Convention on Temporary Admission (done at Istanbul, 26 June 1990), Annex A which deals with ATA Carnets.

therefore the services provided should be small. However, the latter may require additional inspection and security measures to prevent smuggling of goods into the transit country or other illegal activities. This proposal is reasonable and African countries must consider it positively.

With regard to minimisation of border requirements, Korea proposes that Members reduce data and documentation requirements for transit goods by using a commercial or transport document like a commercial invoice or packing list as the descriptive part of the goods declaration, and even accept this as the goods declaration for the consignment concerned as recommended by the Revised Kyoto Convention. This is also a sound proposal but the decision to accept a packing list or a commercial invoice as a declaration should be left up to the Members. It may be accepted on a best endeavour basis.

Bolivia, Mongolia and Paraguay (TN/TF/W/28) submitted a proposal aimed at addressing issues that are relevant to landlocked countries. Their proposal supports most of the proposals submitted by the *demandeurs.* They also propose the use of international standards to the extent possible[70]. With regard to perishable goods in transit, they call for simplified and preferential clearance treatment. On technical assistance, they call for various organisations to assist with implementing measures in force, improving border cooperation to fight illicit trade, exchange experiences on techniques to improve the control of bulk cargoes, conduct studies on transit-related conditions with a view to finding ways to minimise transit costs and transferring technology and information to reduce costs. Most of the suggestions submitted by these countries are sound and can go a long way in facilitating the smooth transit of goods.

Paraguay, Rwanda and Switzerland (TN/TF/W/39) submitted a proposal on how to improve and clarify Article V with particular focus on landlocked countries. They have identified a number of common features that are vital in facilitating transit trade[71] and

[70] Peru (TN/TF/W/30) also proposes the use of international instruments and acceding to such instruments where applicable, and has made proposals similar to the above.

[71] Some of these features include: (a) Separate procedures for transit that consist of separate physical lines for border crossing and simplified border formalities, distinct requirements according to the risk involved and the special characteristics of goods. This requires making a distinction between 'normal goods', 'dangerous goods', 'perishable goods' and 'sensitive goods' (that show particular risks to fraud like tobacco and alcohol). (b) Limiting physical inspection and controls based on mutual trust and

also support most of the proposals above on use of international instruments in drafting regional transit agreements. The proposal also contains some elements on SDT for those Members that do not have adequate IT and a sound banking system and want the modalities on funding and technical assistance to be explored further.[72]

The proposals to simplify and standardise formalities and document requirements for transit in line with international standards are sound. However, since many African countries did not participate in the development of most of these international standards, adopting these international standards may be burdensome at this stage as they may not be commensurate with their level of development. At best, they can base their own regional transit laws on these standards and not accept them as binding obligations. As pointed out above, the best solution to transit problems is regional cooperation, and Africa is already in the process of implementing some of these measures. What it needs now are more resources to develop infrastructure. It is prudent for Africa to adopt most of the measures proposed above at regional level first before committing to binding WTO rules.

7. Cross-cutting issues

Technical assistance and capacity building

The EC (TN/TF/W/37) provides an overview of its technical assistance and support for capacity building activities. It argues that the costs of implementing reforms tend to be limited and where there are significant costs, these have been recouped quickly through higher revenue collection and greater operational efficiency. The EC acknowledged that with resource constraints in developing countries, there is a need for technical assistance and capacity building in taking forward trade facilitation reforms. It indicated that it will give technical assistance during the negotiations and the implementation phase.

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cooperation. This helps to avoid repeated controls over the same shipment and sanitary, quality, veterinary, medicosanitary or phytosanitary inspections should not be imposed for transit goods unless there is risk of contamination. (c) Identification of transit goods by sealing, especially electronic seals which can detect and track trucks thereby minimising fraud.

[72] Some of the elements for technical assistance identified include training on the procedures of a transit arrangement, upgrading of systems such as ASYCUDA and others with transit modules introducing a certain degree of automation to transit procedures. Others include technical assistance to install computerised risk assessment and support customs authorities and national financial institutions to institute procedures for a functioning guarantee system.

The EC negotiates multi-annual programmes with each partner country or region which sets the priorities for the allocation of aid resources. Trade facilitation is included in a broad range of needs and priorities of developing countries. The EC provides trade facilitation support on a multilateral basis to relevant international organisations and individual EC Member states also provide funding directly to developing countries. A number of current EC projects relate directly to trade facilitation negotiating modalities. The EC makes it clear that broader infrastructure projects relating to port facilities and transit corridors are not part of the WTO agenda. However, it indicated that it may consider such assistance under its larger trade-related assistance programmes and it has planned more projects in anticipation of the WTO outcome and has also included trade facilitation and customs reforms in bilateral or regional agreements.[73]

[73] The EC uses three main implementation mechanisms. The first is the provision of assistance through or in cooperation with international institutions with relevant expertise and relevant regional or national bodies. The second mechanism is the provision of assistance through consultancy. The third mechanism is the twinning arrangements between relevant agencies, including customs in conjunction with training programmes, including those with specialised institutions.

Identifying trade facilitation needs and priorities

China and Pakistan (TN/TF/W/29) propose that, based on the work done by international organisations, Members must develop a general tool to assess their needs and priorities as well as their current levels of trade facilitation. They suggest that the results of the assessment can be used to establish trade facilitation rules, to draft provisions on special and differential treatment and to provide technical and capacity building support. The proposal by China and Pakistan is worth considering in order to find the best way of effectively identifying trade facilitation needs and priorities and ensuring that the resulting rules reflect these needs and priorities.

The African group proposal

The African group proposal (TN/TF/W/33) makes it clear that the negotiations must be limited to the three Articles and that SDT, technical assistance, support for capacity building and implementation assistance are critical components of the negotiations. Furthermore, the group wants the right to select policy options and exercise policy flexibility to remain sacrosanct.

The African group calls for assistance in identifying trade facilitation needs and priorities and argues that the objective of such an exercise must aim at providing solutions on how to reduce high transport and communication costs, how to enhance the capacity of customs administration, including automation, reduction of delays and maximisation of revenue collection. It also wants assistance in improving the integration of African enterprises or economies into the international payments and insurance systems. Even though the international payments and insurance systems play a vital role in trade facilitation, they do not fall within the three articles and the African proposal in this respect goes well beyond the scope of the negotiations.

The African proposal also calls for the examination of the cost implication of new commitments of developing and least developed countries. They propose that any cost implications related to the development of necessary public works infrastructure, information and communication technology infrastructure, administrative re-engineering and human resources should be linked to the provision of adequate technical and financial assistance and support for capacity building. They also make

it clear that the implementation of new commitments depends on the provision of technical and financial support for capacity building.

With regard to assistance during the negotiations, the group proposed that an appropriate mechanism be established as soon as possible but to date no such mechanism has been put in place. This assistance includes trade facilitation oriented research and capacity building projects identified and proposed by developing and least developed countries, the conduct of trade facilitation needs assessment and prioritisation exercises to assist them in formulating negotiating positions and specific travel support for capital based experts to participate in negotiations.

On SDT, the group argues that this should go beyond longer implementation periods. Africa wants SDT to be reflected in legally binding provisions that are precise, effective and operational while providing policy space and flexibility. The African group proposes that it should be free to determine (based on its own assessment of its implementation capacity) when, how and the extent to which such new commitments are to be implemented. Furthermore, the African group wants the implementation of such new commitments to be conditional to the provision by developed countries of effective, adequate, long-term and sustainable technical and financial assistance and support for capacity building with respect to national structural or sector-specific trade facilitation-related projects or programmes identified by developing and least developed countries.

With regard to inter-agency cooperation, they propose that a number of organisations including the ECA should assist with technical assistance, capacity building and the identification of Africa’s needs and priorities.

On the proposals that have been submitted so far, the group correctly argues that a number of the proposals go beyond the mandate of the negotiations because they espouse additional commitments in the exercise to clarify, improve and review the three Articles. They do not provide for adequate SDT, and technical assistance is couched in hortatory or best endeavour language. The African group also observed that no new resources have been provided but developed countries seek to divert resources in existing development assistance programmes. These are real problems

that need to be addressed for Africa to derive maximum benefits from the negotiations.

An inventory of trade facilitation measures

Peru (TN/TF/W/30) proposed that Members must adopt a practical approach to improvement and clarification of the three Articles. It proposed that there should be an inventory stating the facilitation measure applied, the beneficiaries, the sectors involved in its implementation, the regulations governing it and the economic or trade impact of its application. The inventory will provide an overview of measures relating to the three Articles and on this basis, Members will decide which measures currently applied by Members need to be endorsed in WTO provisions and encouraged by technical and financial cooperation activities. It will also help Members to decide which new measures need to be adopted in the WTO and need to be backed by technical and financial assistance and cooperation.

8. Concerns of developing countries

As shown above, some proposals go beyond the scope of Article X, VIII and V. This may pose serious problems for poor African countries in terms of implementation costs. It is important to bear in mind that costs are not only limited to initial costs of investing in infrastructure but there are also long-term costs and, in some cases, recurring costs may prove to be burdensome to poor African countries. This becomes truer when viewed against the fact that commitments by developed countries to give assistance are not open-ended.

The most pertinent question that has to be asked is whether Africa needs new binding rules and to what extent will these rules facilitate African trade. The issue of whether new commitments will be subjected to the dispute settlement procedures has been left for later. However, it must be noted that the rift between *demandeurs* and some developing countries on this issue has developed into a Grand Canyon. *Demandeurs* want binding rules on trade facilitation. They argue that binding rules will lock in commitments and ensure predictability. They seem to condition technical assistance on the acceptance of binding rules by developing countries but many developing countries are cautious about this kind of approach.

Since trade facilitation is an issue that requires heavy investments to improve infrastructure especially in Africa, it is submitted that the best way to achieve the goals of trade facilitation in Africa will not be reform under the threat of sanctions. Members must concentrate on cooperation with other international organisations, particularly the IMF and the World Bank, and provide technical and financial assistance to develop trade facilitation-related infrastructure in Africa.

At the APEC/WTO Round Table Conference on Trade Facilitation which was held at the WTO on 10 February, Ambassador Ransford Smith of Jamaica made it clear that the desirability of facilitating trade is not an issue, but developing countries have been resisting binding global rules, including the attendant legal processes, and the possibility of sanctions. He said that this is not the optimum way of building capacity and of strengthening institutional development in this area.

The other concern raised by Ambassador Smith, as the worst possible outcome for developing countries, would be to assume new obligations on trade facilitation and be held to implement those obligations with regards to imports (mainly from developed countries) while their exports to developed countries are subjected inordinately to other measures that delay the movement of goods, such as sanitary and phytosanitary measures, technical regulations and complex rules of origin. Furthermore, in light of security threats, developing countries may be required to develop and implement security measures that can drive up costs and impede trade. The situation is aggravated by the fact that security measures are not subjected to multilateral disciplines.

During the Conference, the Core Group on Trade Facilitation[74] made it clear that trade facilitation reform should not be compelled by sanctions as this will not succeed and can be counterproductive. They made reference to the World Bank Trade Note (Shweta, B., Newfarmer, R. and Wilson, J.S., 2004) which states that improving trade facilitation institutions is a continual process and that there is no single recipe for design and organisation of good institutions. The option suggested by the World Bank is to ask countries to develop a trade facilitation programme that would

[74] This group is composed of Bangladesh, Botswana, Cuba, Egypt, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Nigeria, Philippines, Rwanda, Trinidad and Tobago, Uganda, Venezuela, Zambia and Zimbabwe. This group played a vital role in the drafting of the July package.

subsume an action plan for institutional requirements and Members will be required to report on progress as part of the Trade Policy Review Mechanism.

The representative of the African Union also argues that the agreement should be voluntary and that there should be proper sequencing. Capacity must be built first before compelling implementation. The issue of variable geometry can also be explored and those Members with full capacity can take commitments and have the dispute settlement applicable, while those without capacity will be exempted. Members can make some commitments less binding initially and the possibility of phasing in dispute settlement can be considered.

It is important to note that the APEC principles on trade facilitation are voluntary but the approach of developed countries in the WTO is the very opposite. They want binding rules and this causes developing countries to have reservations. After all, African countries have already embarked on various trade facilitation initiatives. What they need is more technical and financial assistance and not more rules.

9. Concluding remarks

The benefits of trade facilitation are clear and even the Africa group has confirmed this in various fora including the WTO. So the polemic and often sterile debate on whether trade facilitation is important or not or whether the WTO is the right forum or not is no longer desirable. The focus should now be on how to facilitate trade, especially in Africa. Efforts must be made to cut the red tape that is hindering African trade. Of all continents, Africa is the one that should be working very hard to facilitate trade because it already faces high transportation costs and costly delays at borders due to cumbersome clearance procedures. This is tantamount to shooting itself in the foot and renders the continent uncompetitive.

The main problem in Africa is the lack of adequate infrastructure necessary to expedite the movement, clearance and release of goods. This means that roads must be built and railway lines must be erected. Regulatory barriers in the transport sector must be removed; air and sea transport must be reformed. Financial institutions need to be strengthened and information and communication technology must be installed. Customs authorities must reform root, stem and branch, and customs procedures, formalities and document requirements must be rationalised,

standardised or even harmonised at the regional level. Likewise, the spaghetti bowl of regional organisations which results in different documents, formalities and procedures should also be addressed urgently and harmonised, where possible.

Regional organisations, such as COMESA, SADC, ECOWAS, EAC and others must accelerate their trade facilitation programmes. The Economic Partnership Agreements (EPAs) that are being negotiated between the EU and these various groupings must be designed in a way that promotes the afore-mentioned goals. Africa should put trade facilitation high on the agenda and take positive steps to remove barriers to trade facilitation that are imposed among African countries as these can be more damaging in some cases than other barriers imposed by developed countries. Africa should learn from the biblical principle and take the log out of its own eye first before it tries to remove the log in the eyes of developed countries. For example, it can take unilateral measures to publish trade rules and regulations in a transparent manner, fight corruption and eliminate illegal road checkpoints. Developed countries in cooperation with the World, Bank, IMF, WCO, UNECE, UNECA, ITC, and other institutions need to assist with technical and financial assistance needed to build trade facilitation infrastructure.

There is also a need to increase awareness of trade facilitation in capitals at all levels, especially at the highest political level. Trade facilitation is not only a technical issue but should be integrated in the broad trade policy framework of a country. When it comes to reform, political will is necessary to overcome resistance to beneficial changes. As was highlighted by Senegal, there are challenges in terms of social and cultural attitudes. People fear losing jobs and authority, so issues must be clearly explained to them and ways of preventing job losses must be found. More importantly, reforms must not further debilitate already weak and porous African borders as this may have serious effects on revenue collection.

Trade facilitation is an important development issue and must be tackled in this context since the Doha Round is about development. Thus, for Africa, the outcome in the negotiations on trade facilitation must represent the trade facilitation needs and priorities of African countries. Trade facilitation has potential benefits for all. It can be a win-win-win situation because it has the potential to bring benefits to the government, traders and consumers.

For Hong Kong to be a success, the concerns of developing countries must be taken seriously. It should be noted that this is the only Singapore issue that developing countries finally agreed to negotiate and their fears and concerns must be taken into account. If this issue and other issues affecting Africa and other developing countries like non-tariff barriers, agriculture (all the three pillars), services (modes of interest to African countries including mode four and rules) and NAMA (market access and preference erosion) are not addressed, there will be another 'Cancun failure' in Hong Kong. Overall, balance in negotiations is important. African countries should stick to the principle that nothing is agreed until everything is agreed and must avoid an early harvest in trade facilitation. Developed countries must walk their talk and put their pro-development foot forward to ensure a successful conclusion of this round.

References

APEC. 2002. *Principles on Trade Facilitation*, 2002.

Commission for Africa. 2005. *Report of the Commission for Africa*. London: The Secretariat to the Commission for Africa, 257.

Cosgrove-Sacks, Carol. 2005. Trade Facilitation: Facilitating Trade for Development. Commonwealth Trade Hot Topics Issue No. 41.

ECA. 2004. *Trade Facilitation. African Trade Policy Centre Briefing No 1.* Geneva: Economic Commission for Africa.

Hausmann, Ricardo. 2001. *Prisoners of Geography. 'Foreign Policy'*.

OECD. 2005. *Special Issue on Trade Facilitation.* Paris: Organization for Economic Co-operation and Development. TD/TC/WP (2003)12/FINAL.

OECD. 2002. *Business Benefits of Trade Facilitation*. Paris: Organization for Economic Cooperation and Development. TD/TC/WP /2001/ 21.

OECD. 2003. *Trade Facilitation: The Benefits of Simpler more Transparent Border Procedures-What is Trade Facilitation? Policy Brief*.

OECD. 2005. *Analysis of Non-Tariff Measures: Customs Fees and Charges on Imports.* Paris. Organization for Economic Co-operation and Development. TD/TC/WP (2004) 46/FINAL.

Panichpakdi, S. 2005. *Why trade matter for improving food security?* Geneva: World Trade Organization.

Sachs, J.D., Millinger, A.D., Gallup, J.L. 2001. *The Geography of Poverty and Wealth.* Center for International Development at Harvard University. Scientific American Magazine.

UNCTAD. 2001. *E-commerce and Development Report 2001.* p.180.

UNECE. 2003. *Trade Facilitation: The Challenges for Growth and Development*. Geneva: United Nations, 41.

UNECE. 2003. *Trade Facilitation: The Challenges for Growth and Development*. Geneva. United Nations Commission for Europe. p. 81.

Wilson, John S and Yuen Pau Woo. 2000. *Cutting through Red Tape: New Directions for APEC's Trade Facilitation Agenda.*

World Bank. 2004. *Trade Facilitation: Using WTO Disciplines to Promote Development. Trade Note 15.* Washington DC: World Bank.

World Bank. 2005. *Customs modernization handbook: transit and the special case of landlocked countries*. Washington DC: World Bank.

WTO. 1996. *Singapore Ministerial Declaration 13 December 1996*. Geneva: World Trade Organization.

WTO. 1998. *World Trade Facilitation Symposium.* Geneva: World Trade Organization. G/C/W/115.

WTO. 2000. *Trade Facilitation*. Geneva: World Trade Organization. 24 October. G/C/W/237.

WTO. 2001. *Doha Ministerial Declaration 13 November 2001*. Geneva: World Trade Organization.

WTO. 2002. *Trade Facilitation: Strengthening WTO Rules on GATT Article V on Freedom of Transit.* Geneva: World Trade Organization. 30 September. G/C/W/422.

WTO. 2002. *Trade Facilitation: Article V of GATT 1994*. Geneva: World Trade Organization 1 October. G/C/W/424.

WTO. 2002. *Trade Facilitation: GATT Article V.* Geneva: World Trade Organization. 1 October. G/C/W/423.

WTO. 2004. *Decision Adopted By the General Council on 1 August 2004*. Geneva: World Trade Organization. WT/L/579.

WTO. 2005. *Communication from Bolivia, Mongolia and Paraguay. Trade Facilitation: Improvement of Certain Elements Contained in GATT* WTO. 2005a. *Article X of GATT 1994-Scope and Application.* Geneva: World Trade Organization. 12 January. TN/TF/W/4.

WTO. 2005b. *Article VIII of GATT 1994-Scope and Application*. Geneva: World Trade Organization. 12 January. TN/TF/W/3.

WTO. 2005c. *Article V of GATT 1994-Scope and Application*. Geneva: World Trade Organization. TN/TF/W/2.

WTO. 2005d. *The Future of the WTO: Addressing institutional challenges in the new millennium.* Geneva: World Trade Organization.

WTO. 2005. *Clarification and Improvements to GATT Article X (Publication and Administration of Trade Regulations):* Geneva: World Trade Organization. 28 January. TN/TF/W/ 6.

WTO. 2005. *Clarification and Improvement of the GATT: Publication and Availability of Information and Prior Commenting Period on Core Measures.* Geneva: World Trade Organization. TN/TF/W/7.

WTO. 2005. *Trade Facilitation: Proposals to Clarify and Improve GATT Article X.* Geneva: World Trade Organization. 28 January. TN/TF/W/8.

WTO. 2005. *Possible Commitments on Advance Rulings.* Geneva: World Trade Organization. 31 January. TN/TF/W/9.

WTO. 2005. *Trade Facilitation: Some Possible Measures to Improve GATT Articles VIII and X.* Geneva: World Trade Organization. 1 February. TN/TF/W/10.

WTO. 2005. *Advance Binding Rulings*. Geneva: World Trade Organization. 4 February. TN/TF/W/12.

WTO. 2005. *Proposal on Transparency and Publication*. Geneva: World Trade Organization. 4 February. TN/TF/W/13.

WTO. 2005. *Fees. Geneva*. World Trade Organization. 04 February. TN/TF/W/14.

WTO. 2005. *Express Shipments*. Geneva: World Trade Organizations. 4 February. TN/TF/W/15.

WTO. 2005. *Trade Facilitation: Proposals to Clarify and Improve GATT Article VIII.* Geneva: World Trade Organization. 11 March. TN/TF/W/17.

WTO. 2005. *Clarification and Improvement of Article VIII of the GATT: Reducing Administrative Burdens*. Geneva: World Trade Organization. 16 March. TN/TF/W/18.

WTO. 2005. *Possible Commitments of Enhanced Clearance Procedures-Provisions For Collateral Security.* Geneva: World Trade Organization. 18 March. TN/TF/W/19.

WTO. 2005. *Possible Commitments on Border Agency Coordination.* Geneva: World Trade Organization. 18 March. TN/TF/W/20.

WTO. 2005. *Consularization*. Geneva: World Trade Organization. 21 March. TN/TF/W/22.

WTO. 2005. *Clarification and Improvements to GATT Article VIII: Provisions on Fees and Charges.* Geneva. World Trade Organization. TN/TF/W/23.

WTO. 2005. *Proposals to Clarify and Improve Articles VIII and X. Geneva.* World Trade Organization: 21 March. TN/TF/W/24.

WTO. 2005. *Trade Facilitation: Possible Measures to Improve GATT Article VIII on Fees.* Geneva: World Trade Organization. 21 March. TN/TF/W/25.

WTO. 2005. *Proposal on Clarification and Improvement of GATT Article X.* Geneva: World Trade Organization. 21 March. TN/TF/W/26.

WTO. 2005. *Communication from Bolivia, Mongolia and Paraguay. Trade Facilitation: Improvement of Certain Elements Contained in GATT Article V.* Geneva: World Trade Organization. 22 April TN/TF/W/28.

WTO. 2005. *Communication from Peru. Geneva: World Trade Organisation*. 27 April. TN/TF/W/30.

WTO. 2005. *Communication from the Republic of China and Pakistan.* Geneva: World Trade Organization. 29 April TN/TF/W/29.

WTO. 2005. *Communication from Hong Kong China. Proposal for Improving Article VIII.* Geneva: World Trade Organization. 27 April. TN/TF/W/31.

WTO. 2005. *Communication from Hong Kong China. Proposal for Improving Article X. Geneva: World Trade Organization*. 28 April. TN/TF/W/32.

WTO. 2005. *Communication from the African group: Trade Facilitation. Geneva: World Trade Organisation*. 28 April. TN/TF/W/33.

WTO. 2005. *Communication from Korea. Improvement of GATT Article V: Minimization of Burden on Cargo in Transit and Differentiation of Cargo Undergoing Transhipment*. Geneva: World Trade Organization. 28 April.TN/TF/W/34.

WTO. 2005. *Communication From the European Communities. Freedom of Transit.* Geneva: World Trade Organization. 29 April TN/TF/W/35.

WTO. 2005. *Communication from New Zealand, Norway and Switzerland. Clarifications and Improvements in GATT Article VIII (Fees and Formalities Connected with Importation and Exportation).* Geneva: World Trade Organization. 29 April. TN/TF/W/36.

WTO. 2005. *Communication from the European Communities: Technical Assistance and Support for Capacity Building.* Geneva. World Trade Organization. 29 April TN/TF/W/37.

WTO. 2005. *Communication from Singapore. Procedural elements for Advance Rulings.* Geneva: World Trade Organization. 2 May. TN/TF/W/38.

WTO. 2005. *Communication from Paraguay, Rwanda and Switzerland. Trade Facilitation: Improvement of Elements to Transit.* Geneva: World Trade Organization. 2 May TN/TF/W/39.

Cases

Appellate Body Report. 1998. *European Communities –Measures Affecting the Importation of Certain Poultry Products, (EC-Poultry).* WT/DS69/AB/R, adopted 23 July 1998, par.115.

Panel Report. 1997. *United States-Restrictions on Imports of Cotton and Man-Made Fibre Underwear, (US-Underwear).* WT/DS24/R, adopted 25 February 1997, as modified by the Appellate Body Report, WT/DS24/AB/R, and par.21.

Panel Report. 1997. *European Communities-Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III).* WT/DS27/R/GTM, adopted 25 September 1997, as modified by the Appellate Body Report WT/DS27/AB/R, par.7.206.

Panel Report. 1992*. Canada-Import, Distribution, and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, (Canada-Alcoholic Drinks.),* adopted on 18 February 1992, BISD 39S/27, 85-86, par.5.34.

Panel Report. 1988*. United States-Customs User Fee (US-Customs User Fee*), adopted 2 February 1988, BISD 35S/245.

Panel Report. 1978. *EEC-Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables (EEC-Minimum Import Prices),* adopted 18 October 1978 BISD 25S/68, par.4.3.

Panel Report. 1998. *Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and other Items (Argentina –Textiles and Apparel),* WT/DS56/R, adopted 22 April 1998 as modified by the Appellate Body Report, WT/DS56/AB/R and Corr.1 DSR 1998; III, 1033, par.120.

Treaties and recommendations

League of Nations Treaty Series, Vol.30, p.372 (1925).

League of Nations Document C.356.M.129. 1927. II, par.5 (1).

The Convention and Statute on Freedom of Transit, Barcelona, 29 April 1921.

The Customs Convention on the International Transport of Goods under cover of TIR Carnets (TIR Convention), Geneva, 14 November 1975.

The Customs Convention on the ATA Carnet for the Temporary Admission of Goods (ATA Convention), Brussels, 6 December 1961.

The Convention on Temporary Admission (done at Istanbul, 26 June 1990) annex A which deals with ATA Carnets.

United Nations Convention on the Law of the Sea, of 1982.

The United Nations Convention on the transit Trade of Landlocked countries of 1965. UNECE draft document 2002/03/13.

UN/CEFACT .2001. Recommendation 18.

Chapter 9

WTO and the Singapore Issues

by Ron Sandrey[1]

1. Introduction

A feature of the World Trade Organization (WTO) has been the impact of the so-called Singapore issues of investment, competition, government procurement and trade facilitation. The name association arises because WTO Members decided at the 1996 Singapore Ministerial Conference to set up three new working groups on trade and investment, trade and competition policy, and transparency in government procurement. They also instructed the WTO Council for Trade in Goods to look at possible ways of simplifying trade procedures, or, as it became known, 'trade facilitation'. These four issues were also included on the Doha Development Agenda (DDA), with negotiations to start after the 2003 Cancun Ministerial Conference, 'on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations'. However, following the infamous 'train wreck' of Cancun, a wreck induced in part by the acrimonious debate on the same Singapore issues, WTO Members agreed on 1 August 2004 (the so-called July Framework) to proceed with negotiations in only one Singapore Issue, trade facilitation. The other three were dropped from the DDA. Thus, the impact of the Singapore Issues has been not through negotiating new disciplines *per se*, but rather due to their pivotal role in contributing to the failure of recent Ministerial conferences in the WTO[2].

These Singapore issues were a priority for the European Union (EU) in particular, and were pushed ahead until the final days of the Cancun Ministerial Conference. Developing countries had consistently opposed their inclusion in the negotiating agenda, arguing that the subject and scope of these issues were unclear and that

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[2] For example, the insistence of the European Communities' delegation on commencing negotiations for a plurilateral agreement relating to trade and investment, despite the lack of explicit consensus from the WTO Members to do so is largely blamed for the failure of the Cancun Ministerial Conference. See Ismail (2005: 396–398).

they lacked the technical capacity to implement them. The EU's desire to prioritise these issues at Cancun delayed discussions on the core agenda of the conference, namely agriculture and non-agricultural market access (NAMA). It also contributed to the polarisation of discussions, as many developing countries felt that they could not show flexibility on the Singapore Issues without knowing what they would otherwise obtain in the core areas of agriculture and NAMA. The Singapore issues were clearly 'a bridge too far' for the WTO at such a crucial point in the negotiations, and in particular they fuelled the developed-developing country schism. Investment, competition policy and government procurement were seen as areas where the developed countries were imposing their standards upon developing countries in a one-way manner (one-way in that, conversely, the developing countries cannot be expected to have any influence at all on developed country markets). Consequently, many developing countries objected to both the manner in which they were advocated and indeed the question whether they even had a genuine role in the WTO at such a delicate stage of its negotiating mandate. Along with the cotton issue, they became a flash point of the meetings.

The fourth issue, that of trade facilitation, found common ground: developing members saw it as an opportunity to leverage aid for a chronic internal domestic problem, and developed members saw reduced transaction costs as enabling their exporters to gain advantage in these markets. Ironically, as a development tool, trade facilitation is only part of the basket of inefficiencies in developing countries that adds to their inabilities to access markets in developed countries — other factors such as internal distribution networks, worker productivity, standards and the whole raft of infrastructural and supply constraints are equally important. Consequently, it alone has specifically stayed on the DDA with the Negotiating Group on Trade Facilitation formally established at the meeting of the Trade Negotiating Committee held on 12 October 2004.

The objective of this paper is to review the issues in the context of the WTO and assess to what extent they legitimately belong in this WTO forum, or alternatively, to what extent they belong within regional and bilateral agreements and how they may be treated within these types of agreements. An essential question related to the latter is the extent to which the EU and the US in particular are attempting to re-introduce these Singapore issues 'through the back door' of African bilateral and

regional trade agreements where they are perceived to have a more asymmetrical negotiating position than in the WTO.

2. The WTO and the Singapore Issues

2.1 Historical context

The WTO emerged from the old General Agreement on Tariffs and Trade (GATT) as a component of the Uruguay Round, and perhaps, flush with that achievement, members may have overlooked that the GATT's success had been limited to bringing industrial tariffs down dramatically over its history since World War II. Its success has not been in bringing agricultural tariffs and other support down to the same extent and, despite best endeavours, many subsidies remain in manufacturing sectors such as automobiles, fisheries, and iron and steel. Perhaps it would be better to examine and reduce these remaining obstacles to trade in agricultural and industrial goods and services prior to attempting to embrace too many new issues that, while important to trade, are not 'frontline' issues. Importantly, in agriculture the WTO is 'one round away' from placing agriculture on a similar basis to the set of rules governing non-agricultural production and trade. Conversely, behind-the-border issues are becoming more important as tariffs and the visible protection are reducing. Such are the general views of the developing and developed Members respectively, with the former resentful of rich country protection in agriculture in particular and the latter anxious to leverage advantage for their international business conglomerates in general.

This is not to say that the linkage between merchandise trade and both investment and competition policy are not important; rather, quite the reverse, as perhaps around one-third of global trade in both goods and services takes place between companies and their subsidiaries in different countries. Even at its inception in the mid-1940s GATT supporters endeavoured to introduce rules in investment and competition policy to co-exist alongside the trade rules in the Havana Trade Organization Charter. However, these attempts failed as the Charter was not endorsed by the US or UK parliamentary constituencies, although investment and competition policy have always been an indirect component of the GATT and WTO. For example, GATT and GATS contain rules on monopolies and exclusive service

suppliers, and the principles have been elaborated considerably in the rules and commitments on telecommunications, for example. The agreements on intellectual property and services both recognise governments' rights to act against anti-competitive practices and their rights to work together to limit these practices. And the WTO already has a limited Agreement on Trade Related Investment Measures (TRIMs) and an Agreement on Government Procurement that cover such issues as transparency and non-discrimination, although, with respect to the Agreement on Government Procurement, only some WTO members have signed it.

It is legitimate, however, to suggest that there may be better vehicles for advancing such issues and their related concerns than the WTO. This is an issue that will be developed further in the concluding sections of this paper.

2.2 The role of the Singapore Issues in the collapse of the 2003 Cancun Ministerial Conference.

While, of course, the Singapore issues were not the only reason for the collapse of Cancun, they were certainly a major contributor and possibly even the main reason (although, in the absence of the Singapore issues, agriculture and to a lesser extent non-agricultural market access may well have led to a collapse in any event). So, how did apparent agreement in Singapore on these issues translate into a bitter rejection of three of the four some seven years later at Cancun?

At Singapore, the working groups on trade and competition policy and trade and investment were not given the mandate to negotiate new rules or commitments, as ministers made it clear that no decision had been reached on whether there would be negotiations in the future. These negotiations would only proceed following a clear consensus decision to do so. The working group on transparency in government procurement was different, as the WTO already had an Agreement on Government Procurement in place – the plurilateral agreement discussed earlier. At Singapore, the WTO: (a) set up a multilateral working group that included all WTO Members; and (b) focused the work on transparency in government procurement practices. In this way the seeds were sown, but it was made clear that agreement was necessary before the next step of actual negotiating could take place. This later became the divisive issue at Cancun.

This was where the mixed signals probably started. The developed country Members, especially the US (on investment) and the EU (on the rest), were satisfied because they had the issues firmly on the agenda. In contrast, the mostly reluctant and potentially disgruntled developing countries had the side exit firmly marked, as a decision to proceed would be taken only on the basis of 'explicit consensus' (in other words, any one of the 140 members at the time could veto the whole process). This meant that the stage was set for failure at Cancun – and that failure should have come as less of a surprise.

Tensions were based around the degree to which the WTO should intrude into domestic policy space rather than remain essentially a trade organisation[3]. While these battle lines were by no means north-south ones, in general the developing countries saw these issues as a further step towards the globalisation dominance of the north and also resented the final implied insistence of the developed countries that they get their way on the Singapore issues before discussing concessions on agriculture. Faced with these perceived 'bullying' tactics, many of the developing countries felt that they did not have the resources to implement the obligations, and coupled with their mistrust of the north, the stage was set for a train wreck. It was becoming apparent that the 'explicit consensus' wording was a bargaining chip for developing members: they would not be pressured as they thought they had previously been during the Uruguay Round negotiations despite conditions that may be potentially imposed upon them by the Singapore issues being somewhat less than onerous than those potentially imposed through individual bilateral agreements. In addition, there was the emphasis placed on the implementation of existing rules as a priority by some of the developing countries that presented this as a reason for not considering new issues.

Perhaps Cancun was as much a failure both in negotiating tactics and in the decision of the Chairman to abruptly end the meetings as soon as it appeared that a deadlock on the Singapore issues was imminent, even before other aspects of the draft text had been reasonably addressed. Should agriculture have been addressed first? And

[3] tralac colleague Robert Wilson suggests that in focusing on the 'policy space' issue, the developing countries may have lost sight of the opportunity to negotiate rules imposing conditions (and responsibilities) on the hegemony powers that were promoting the issues while using the 'special and differential' concepts underlying the WTO to limit the influence of these same hegemony powers in this so-called developing country 'policy space'.

would some sort of 'light at the end of the tunnel' have altered the stances of the developing countries on the Singapore issues? After all, the issue was whether or not to start talking on these issues and not to reach any form of consensus past that point.

While these are conjectural points, it is clear that there were negotiating failures on the Singapore issues. Although the EU agreeing to drop or de-link two of the four issues (investment and competition), the timing of this concession only fuelled the belief by many that the EU did indeed want the Ministerial to fail in order to place the blame on others before their agricultural positions could be pointed out as the real cause of the failure. This position in dropping two of the four issues was also not to the liking of some other members such as Japan and Korea, perhaps for the same reason that they did not want to be exposed on agriculture. And should the developing countries have been less belligerent in order to at least test a possible agricultural outcome? These points are pursued by Steve Woolcock (undated).

Just before the end of the Cancun Ministerial, WTO Facilitator for the Singapore Issues, Pierre Pettigrew, described three positions in his group's meeting on day three, 12 September 2003. These were that:

- A substantial number of countries stated that there was no explicit consensus on any of the four Singapore issues and that they should be referred back to the Working Groups in Geneva.
- A second group wanted to launch negotiations on all four Singapore issues in Cancun, as some claimed that the Doha Declaration already mandated the launch of negotiations in Cancun.
- A number of countries were prepared to explore possible solutions between these two options[4].

Unless the Facilitator was misreading signals, there does not seem to be enough acrimony in this situation to scuttle the entire process. But scuttled it was as talks broke down on the last day of the Conference. The immediate cause was claimed to

[4] See the WTO website at: http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_12sept_e.htm.

be the failure to agree about whether to commence negotiations on the four Singapore issues. This left the Mexican Chair of the Conference, Foreign Minister Derbez, with little other choice but to conclude the Conference without agreement. But the push for agricultural reform remains at the centre of the interests of most members in the Doha Round. Was the failure a conspiracy theory or, in polite terminology, just plain confusion? Or was the deep-seated dissatisfaction on the part of developing countries, especially the African Group, about their lack of involvement in the discussion and the non-transparent method of negotiating through the Green Room a major factor?

Did the retreat from three of the four Singapore issues weaken the WTO?[5] Certainly, the institution recovered from the Cancun meetings, but of course, agreement evaded the subsequent Hong Kong Ministerial Meeting, although the blame for this cannot be laid at the feet of the Singapore issues, just as the July–August 2006 'time out' for the DDA cannot be blamed on the Singapore issues. And the continuation of the trade facilitation agenda goes some way in giving legitimacy to the second D for development in the DDA, but just how far is debatable. The remaining three issues are important considerations for global trade, but obviously the timing was not right for making the WTO their permanent home at this stage.

3 The individual Singapore issues examined

3.1 Trade facilitation

Traders from both developing and developed countries have long pointed at the vast amount of red tape that still exists in moving goods across borders. Documentation requirements often lack transparency and are often duplicated, a problem compounded by a lack of cooperation between traders and official agencies. Despite advances in information technology, automatic data submission is still not universal. As tariff barriers are reduced, the non-tariff costs assume more importance. These trade clearance (facilitation) costs, or rather, the excessive and unnecessary components of these costs, are a classic non-tariff measure.

[5] Perhaps, conversely, it could be argued that the nature of the process at Cancun strengthened the WTO, as the new power-bloc of the so-called G20 emerged with enough negotiating power to ensure that the EU-US were not able to exercise the degree of influence that had been possible in the past. The Singapore issues were a clear indication of this sea change.

Operational aspects of trade clearance in most[6] developing countries (and more specifically, least developed countries) have not kept pace with advances in technologies such as the electronic data entry and transfer. The United Nations Conference on Trade and Development (UNCTAD) (2005a) estimated that the average customs transaction involved 20–30 different parties, 40 documents, 200 data elements (30 of which are repeated at least 30 times) and the rekeying of 60%–70% of all data at least once. With the lowering of tariffs across the globe, the cost of complying with customs formalities has been reported to exceed in many instances the cost of duties to be paid, and especially so on the so-called 'nuisance tariffs' of perhaps 2% or less. However, it must be recognised that trade records need to be maintained for several purposes, with tariff collection but one reason. But in a modern business environment, traders need fast and predictable release of goods. An Asian-Pacific Economic Cooperation (APEC) study estimated that trade facilitation programmes would generate gains of about 0.26% of real GDP to APEC, almost double the expected gains from tariff liberalisation, and that the savings in import prices would be between 1% to 2% of import prices for developing countries in the region. The Organization for Economic and Cooperation Development (OECD) (2006) found that improved and simplified customs procedures would have a significant positive impact on trade flows (the hidden costs may be as much as 15% in some cases), and that a large number of mostly developing countries have managed to boost government revenue by implementing customs modernisation programmes that result in more efficient collection of trade taxes.

Analysts point out that the reason why many small and medium-sized enterprises are not active players in international trade has more to do with costs of compliance with trade clearance regimes rather than tariff barriers, as these compliance costs are often simply too high for small transactions. Sometimes viewed as non-tariff barriers (NTBs), they are only NTBs to the extent that they cannot be justified by the importing country. For developing-country economies, inefficiencies in areas such as their customs and transport are, literally, roadblocks to their integration into the global

[6] The qualification 'most' is used here with respect to Singapore in particular, a developing country in WTO terms that sets the international benchmark in trade facilitation. A significant part of its success as a nation has derived from its renowned efficiency as a trade hub.

economy. This is all part of global export competitiveness, the key to the associated inflow of foreign direct investment.

The WTO has always dealt with issues related to the facilitation of trade, and WTO rules include a variety of provisions that aim at enhancing transparency and setting minimum procedural standards. Among them are GATT Articles V (the basic principles allowing for freedom of transit through the territory of each Member, but providing no guidelines on how these principles should be applied), VIII (recognising the need for simplifying import and export formalities and documentation, but again no mandatory requirements) and X (freedom of transit for goods, fees and formalities connected with importation and exportation, and publication and administration of trade regulations). Thus, the WTO legal framework lacks specific provisions in some areas, particularly on customs procedures and documentation, and transparency. The spectacular increase in the amount of goods traded worldwide in the last few years and the advances in technology and the computerisation of business transactions have added a sense of urgency to the need to make progress in these areas of trade facilitation.

The so-called July package of the WTO that was adopted by the General Council on 1 August 2004 sets out the Trade Facilitation component of the DDA in Annex D. This states that negotiations should aim to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with the view to further expediting the movement, release and clearance of goods, including goods in transit. The principle of special and differential treatment for developing and least-developed countries is an essential element of this negotiating process, and the provision of technical assistance and capacity building for them is vital (although it is recognised that commitments by developed countries to provide such support is not open-ended).

Between November 2004 and October 2005, the Negotiating Group on Trade Facilitation met seven times. Members submitted around 50 contributions to the work of the Group concerning many different aspects of the negotiations, such as publication and administration of trade regulations, advance rulings, express shipments, border agency cooperation, release of goods, consular fees, cargo in transit, technical assistance, capacity building, risk assessment and management, pre-arrival examination, post-clearance audit, and so forth. The World Customs

Organization and the World Bank have also made written contributions to the negotiations, and the WTO Secretariat has produced seven technical or compilation papers. The WTO Membership considered in late 2005 that 'negotiations on Trade Facilitation appear to be proceeding satisfactorily, and the work of the Negotiating Group needs to continue to advance at a measured pace'[7].

Kamahungye (2006) updates this position to the 24 July 2006 indefinite suspension of the DDA. He reports that at that date more than 80 proposals were tabled, with at least 20 tabled since the Hong Kong Ministerial. There was still uncertainty as to where the different proposals would fit within the scope of the relevant GATT Articles For the developing countries especially there was a need to ascertain whether the implementation of the proposed measures was consistent with their trade, development and financial needs, or administration and institutional capacities. He also cautions that developing countries need to assess the linkages between implementation of proposals and the support from developed partners for adequate technical support and assistance. At the time of the DDA suspension, progress had been made to the extent that serious consideration was being given to a regime whereby members would implement a multistage process that would identify individual needs, develop a plan for necessary technical support and capacity building, receive such support and then become responsible for following this regime. Thus, although many questions remain unresolved (including the need for a dedicated and separate funding base and the need for flexibility in a sort of 'special and differential' treatment for the least-developed countries in meeting their side of the bargain), much progress was made and this particular Singapore Issue appears to be firmly embedded into the WTO ten years on.

Trade facilitation can mean different things to different people, but in the strict sense of the WTO agenda, it is focused upon customs and border operational procedures. In a wider sense, the OECD views it as helping the institutions, negotiators and processes that shape trade policy and the rules of international commerce, while in its extreme but still accurate form it can be viewed as the complete infrastructural package that leads to international competitiveness in global trade. The latter is an

[7] Report by the Chairman of the Trade Negotiating Committee. [Online]. Available: http://docsonline.wto.org/DDFDocuments/t/tn/TF/2.doc.

area in which Africa is notoriously lagging, but this wider picture is outside the scope of this paper although it is acknowledged regionally through such projects as the Integrated Framework[8]. Even at the micro-level there are suggestions that parties are talking past each other at times. Trade negotiations focus on the role of trade facilitation in reducing what are effectively tariffs in another form, while Customs officials, the ones at the 'coal face' on this issue, see it as a capacity-building and ultimately streamlining exercise. Perhaps both are right, but from a different perspective. Perhaps also the more neutral discussions that took place within the so-called Colorado Group of both developed and developing countries were a catalyst in getting trade facilitation on the negotiating agenda. In any event, the promise of additional resources to assist in implementation was new to the WTO, and this seems to have been one of the keys in getting this particular issue onto the agenda.

The African regional dimension

There is no question that general trading costs, including the trade facilitation costs as defined here, are very high in Africa. This has repeatedly been pointed out in reports such as the WTO Trade Policy Review Mechanism (TPRM) examinations on the trade policies of African WTO Members in particular and the Integrated Framework reports. Furthermore, as an important and related component of trade facilitation problems in the region, the lack of reliable trade data within the Southern African Customs Union (SACU) becomes a serious problem when the regional tariff pool allocation is being made on the basis of intra-SACU imports. However, this problem is being addressed through the integration of procedures between South Africa and the respective SACU partners.

The Trade, Development and Cooperation Agreement (TDCA) was concluded between the EU and South Africa in 1999, and has been in force since January 2000. Although the TDCA is, on the whole, a wide-ranging agreement, the provisions on trade facilitation (Article 48) are not very detailed. The Article contains few explicit

[8] The Integrated Framework for Trade-related Technical assistance is a multi-agency, multi-donor programme that assists the least-developed countries to expand their participation in the global economy. It was first mandated by the WTO Singaporean Ministerial Meeting in December 1996, and its participants are the IMF, ITC, UNCTAD, UNDP, World Bank and the WTO (see www.integratedframework.org).

provisions on trade facilitation measures. Article 48.1 simply states: 'The Parties shall promote and facilitate cooperation between their customs services in order to ensure that the provisions on trade are observed and to guarantee fair trade'. The provisions on trade facilitation relate largely to customs duties rather than to specific trade facilitation measures. Cooperation between the two customs services 'shall give rise, among other things, to the exchange of information and training schemes'. A comprehensive trade facilitation approach may be implied by the inclusive phrase 'among other things', but this can not be taken for granted in such a legal document.

Article 48.2 requires the administrative authorities of the EU and South Africa to provide mutual assistance in accordance with the provisions of Protocol 2 of the TDCA. The provisions of this Protocol on 'mutual administrative assistance in customs matters' are similar in all material respects to those considered above.

The provisions of the trade facilitation section of the TDCA are not very detailed, and are similar in some respects to the agreements between the EU and its Mediterranean partners. Yet, unlike these agreements, the TDCA lacks any provision that requires the Contracting Parties to implement any specific trade facilitation measures, such as the introduction of a single administrative document. One possible conclusion is that the agreement implies a whole range of trade facilitation measures. Another more probable conclusion is that the two parties did not attach great importance to imposing specific trade facilitation obligations on each other[9].

Unresolved is the role of trade facilitation in the forthcoming Economic Partnership Agreements (EPA) negotiations with the EU. More widely, Commissioner Mandelson of the EU considers that development funds in general are an integral part of the negotiations: 'While development funding is not a specific part of the EPA negotiations, the EU has been clear that EPA-related assistance will be a central priority for the European Development Fund'[10].

[9] See the ECDPM website, available: http://www.capacity.org/en/cd_networks/european_centre_for_development_policy_management_ecdpm. http://www.ecdpm.org/Web_ECDPM/Web/Content/Navigation.nsf/index2?readform&http://www.ecdpm.org/Web_ECDPM/Web/Content/Content.nsf/vwDocID/961144449C018863C1256EE6002FAD2A?OpenDocument.

[10] Speech, 3 August 2006, Nairobi, Kenya, as reported in *The Nation*. [Online]. Available: http://allafrica.com/stories/200608030320.html.

3.2 Government procurement

The role of government in its procurement of goods and services typically accounts for 10–15 percent of GDP for developed countries, and up to as much as 20 percent of GDP for developing countries. In an attempt to open this significant portion of the international economy to international competition, WTO members signed the plurilateral (only binding on WTO members who choose to sign) Agreement on Government Procurement (GPA) at the Uruguay Round in 1994, an agreement based on the 1979 Tokyo Round government procurement agreement. Currently, there are 26 signatories, including Canada, the EU, the United Kingdom and the United States, with most of the rest being developed countries (with Cameroon – an Observer government – the only African representative). The intention of the GPA is to ensure that government decisions regarding government purchases of goods and services do not depend upon where the good is produced or the service rendered, nor upon the supplier's foreign affiliations. This initial step led to the establishment of the working group at the 1996 Ministerial Conference in Singapore to investigate government procurement transparency – in this way becoming one of the so-called Singapore issues.

The Working Group on Transparency in Government Procurement examines questions such as: Does a particular government publish the criteria upon which it bases its procurement decisions? Does it publish the opportunities for procurement so that all suppliers know about them? Does it encourage competition among potential suppliers? After investigating these questions and others, the working group will then try to create policies to open competition for government contracts.

Many countries, for a variety of reasons, place restrictions on government procurement of both goods and services. Some will do so to encourage domestic industry, though many developing countries have limited domestic service industries and turn to foreign providers as a result. Several developed countries would like to see the GPA become a multilateral agreement. This would increase market opportunities for their own firms, allowing them to bid for foreign government purchases on a level playing field. The strongest advocates of the multilateral GPA are, unsurprisingly, the US and EU. Supporters of the GPA as they see it is part of ‘good governance’ in the developing world in introducing a more transparent and

competitive procurement process to reduce opportunity for corruption and rent-seeking by domestic governments and suppliers. Opposition comes from many developing countries that realise that they will be disadvantaged by established foreign companies, this in turn leading to local problems of employment and balance of payments as well as running counter to possible industrial policy and infant industry, labour, environmental and racial empowerment policies. But in reality they have far less capacity to bid for tenders in the developed countries.

A reflection upon the linkages of government procurement and other aspects of the WTO disciplines may be appropriate, as procurement relates, by definition, to either goods or services, and market access for these are covered by the fundamental WTO principles. While government procurement is probably more important because of the scope of the issue, given the role of the state in many economies, the basic principles of market access and domestic subsidies remain the same. On a similar note we could mention that the concept of 'buy local' patriotic campaigns are widespread but they do not seem to attract censure and condemnation to the same extent. Should these campaigns be placed under some disciplines? Perhaps a WTO challenge would answer this, and perhaps some procurement may also be open to challenges within the current WTO rules.

The African regional dimension

In recent years the South African government has taken measures to implement a reformed government procurement practice. It is the vehicle through which many of the government's policies and strategies will be realised, and the vision is to give effect to positive discrimination enshrined in the Constitution, which, in turn, will boost local businesses and create much-needed wealth for previously disadvantaged people. In South Africa, the government procurement policy and the related strategies have a very specific economic, social and political aim.

These socio-economic dimensions are the reason that many developing countries, including South Africa, refuse to enter into negotiations in government procurement. An examination of the TDCA shows that pursuant to Article 45, the parties agreed that government procurement be 'governed by a system that is fair, equitable and transparent', which implies that government still has the autonomy to procure in line

with the government's policies. It was further agreed in Article 45(2) that progress would be periodically reviewed, which may be a clear indication that the EC will be pushing hard to include government procurement in the TDCA review. At the same time, any such proposal will be vigorously resisted by South Africa.

Should the SACU/US Free Trade Agreement (FTA) proceed, an examination of the Australian/US FTA gives some idea of the US 'negotiating' template on government procurement with a country that is arguably closer to South Africa than some of the other recent partners of the US FTA. Chapter 15 of the Australian/US FTA agreement requires changes to government procurement process, documentation and reporting at both federal and state levels. In general terms, the goal has been to make government procurement more transparent, and governments are now required to treat Australian and US vendors equally. Agencies are now required to publish annual notices of their procurement plans, and tender response times must give vendors adequate time to prepare bids; and reporting on tenders and contracts has been made more complex. As with the TDCA comments above, in any SACU/US FTA agreement, many aspects contained in the Australian/US FTA will be vigorously resisted given the asymmetrical development levels of the US on one hand and SACU members on the other. Similarly, it is unlikely that a SACU trade agreement with either China or India will include articles on government procurement, even more so as neither is likely to go past the general limited preferential trade agreement stage.

Investment[11]

In recent years, attracting Foreign Direct Investment (FDI) has assumed a prominent place in economic development strategies as a key to financing development in African countries, without adding further to their indebtedness. In addition, expectations have been raised that by creating jobs, transferring new technologies and building linkages with the rest of the economy, FDI will directly address the continent's poverty challenge. Thus, policy reforms aimed at improving the investment climate in African countries have increasingly been

[11] Investment in this context means FDI only. At this stage it was not explicitly envisaged that the WTO would have a role in regimes related to portfolio investments such as current oil revenues and the Chinese (and other countries) trade surpluses that are reinvested in the US and elsewhere.

centred on attracting FDI without the desired results, either in increasing FDI flows in productive sectors or in ensuring more rapid growth and poverty reduction. The continent at present accounts for just 2 to 3 percent of global flows, down from a peak of 6 percent in the mid-1970s. Even on a per capita basis, the gap between Africa and other developing regions widened significantly in the 1990s and remains very large. (UNCTAD, 2005a).

The lessons over the last three or four decades from the dynamic regions of Asia in particular show that the preconditions for growth are putting domestic structures in place to foster investment and export-oriented trade. The problem lies in extracting the policy lessons from the Asian examples as there is no 'one size fits all' policy set, and the causality directions are somewhat opaque. Despite the views of the radical free-marketers, interventionist policies (including strong protectionist trade policies on the home front) played a large part in this success, as did the ability of the US market to absorb vast quantities of imports. The above citation from UNCTAD shows that such policies have not worked in Africa despite a degree of investment and direct aid monies. Thus, investment is a necessary but certainly not sufficient condition for export-led growth. While there is correlation between the two, the main foundation is getting the basics or that over-used term, 'good governance', right. This latter is very much under the control of a country's own government, and it is unclear why domestic legislation and regimes need external control to maximise a country's own welfare.

The Singapore issue with respect to investment focused on issues such as transparency, nondiscrimination, ways of preparing negotiated commitments, development provisions, exceptions for balance-of-payments safeguards, consultation and dispute settlement. The original Singapore Declaration also spells out a number of principles such as the need to balance the interests of countries – where foreign investment originates and where it is invested – with countries' rights to regulate investment, development, public interest and individual countries' specific circumstances. It also emphasises support and technical cooperation for developing and least-developed countries; that appropriate account should be taken of existing bilateral and regional arrangements on investment; and coordination with other international organisations such as UNCTAD.

Critics of the proposal considered that the concepts of 'nondiscrimination' and 'national treatment' were developed to facilitate trade in goods and are not applicable to investment – this because it denies the host country a necessary degree of control over foreign investment in their market. Instead they visualised an agenda that was to maximise foreign investors' rights with implications and consequences for economic, industrial and social policy programmes in developing countries.

Additional background to the investment issue exists even in the developed countries, as shown by the May 1995 negotiations during the infamous Multilateral Agreement on Investment (MAI) in the OECD, set in motion to obtain a 'higher standards' agreement than was likely to be produced from the WTO. These negotiations quickly became a focal point for opposition from several NGOs and trade unions in the developed countries, and this sometimes acrimonious opposition caused the MAI to stall in 1997 and collapse in 1998. Probably this testing of the weapons and tactics against an investment agreement gave both armament and support to opposition groups within the WTO process leading to the vigorous opposition at Cancun.

Following the (aborted) Singapore investment approach, the WTO has only been peripherally involved with investment through the Agreement on Trade-Related Investment Measures (TRIMs) which deals with some investment measures taken by governments that impact adversely on trade (for example, local content requirements). It has also been involved in a relatively minor way insofar as one of the four distinct types of supply of services in the General Agreement on Trade in Services (GATS) is a commercial presence, or a firm establishing a physical presence in another territory to provide services – a presence that may include services-related foreign direct investment.

The African regional dimension

Investment issues are an essential component of the modern FTA, as partners seek to benefit from an increase in bilateral investment as well as from the exchange and transfer of knowledge, technology, ideas and export opportunities that would flow from it. Intra-industry investment can be particularly beneficial in countries' export

sectors, as companies are able to share international market information and strategies, which leads to improved competitiveness in the global market place.

Ways in which an FTA could contribute to these aims include:

- greater transparency of regulations or laws that affect foreign investments;
- more liberalised regimes which will facilitate the foreign investment;
- improvements that can make it easier for investors to resolve any disputes that they may have; and
- promoting bilateral or regional investment by strengthening investor confidence and thereby encouraging current partnerships into new areas of manufacturing and service industries through joint ventures and strategic alliances.

For South Africa, investment negotiations were at least a component of the TDCA. In Article 5(3), for example, the TDCA guarantees that the coverage will include provisions on investment, and Article 33(1) compels parties to ensure the free movement of capital, relating only to direct investment, before Article 33(2) then qualifies this obligation in much looser terms. Thus, the provisions show an intention of the parties but contain no substantive conditions or deadline for liberalisation. At best the agreement is to encourage cooperation between the parties, and perhaps that is about as far as such an agreement between two dissimilar economies should go.

More widely in Africa, the opening quotation from UNCTAD at the start of this section remains valid. Much of the current FDI into African is driven simply by the need to control the resource extraction sectors and has little in the way of linkage back to desired aspects of FDI such as technology transfer and poverty alleviation. Until regimes more conducive to the latter become the norm in Africa, it is difficult to see how trade agreements will foster much in the way of more desirable FDI.

Competition policy

Typically, competition laws provide remedies to deal with a range of anti-competitive practices, including price fixing and other cartel arrangements, abuses of a dominant position or monopolisation, mergers that limit competition, and agreements between

suppliers and distributors ('vertical agreements') that foreclose markets to new competitors. The concept of competition 'policy' includes competition laws in addition to other measures aimed at promoting competition in the national economy, such as sectoral regulations and privatisation policies (the WTO website[12]).

There is no question that competition provides the basic economic efficiency in a modern trading nation. There is, however, a big question as to the role of the WTO in setting out a basic global rules-based framework for such policies when its 149 members comprise countries at all levels of economic development. Competition policies have aspects of the equivalent of an income-elastic good, that is to say, they only become effective once they are based upon an environment that has sound trade and investment policy regimes and they should be seen as an adjunct to these and not as a substitute for them. Hence, the 'one size fits all' concept does **not** apply to competition policies; indeed, many developing and least-developed countries do not have a competition policy regime at all and their emphasis must be towards implementing one that is appropriate to their level of economic development and trade and industrial policies. The international conflict can roughly be summarised as one between trade officials in exporting countries trying to force open markets set against officials in poorer importing countries trying to ensure economic development in their nations through industrial policy space.

At the heart of a free market leading to economic efficiency is the concept of a system of willing buyer/willing seller where there is not an asymmetrical power advantage to one participant. Extending this to a global scale illustrates the problem facing less developed countries: an asymmetrical power struggle that favours the rich. This led to the desire of the US and the EU at Cancun to champion this particular Singapore issue and the refusal of the developing countries to continue negotiations. Elsewhere in the WTO, 'special and differential' treatment is a specific recognition of this asymmetry, and perhaps clarity on how this asymmetry would play out in competition policies may have drawn some of the sting from the issue (see Nottage, 2003, for example).

[12] [Online]. Available: http://www.wto.org/english/theWTO_e/minist_e/min99_e/english/about_e/16comp_e.htm.

As briefly discussed earlier in the 'historical context' section of the paper, competition policies interact with existing WTO disciplines. One example is the area of trade remedies, including safeguards which operate when imports of a particular product increase unexpectedly to such a point that they cause or threaten serious injury to domestic producers of 'like or directly competitive products'. They give domestic producers a period of grace in which to become more competitive. Similarly, for countervailing measures, special duties may be imposed on imports to offset the benefits of actionable subsidies to producers or exporters in the exporting country, and anti-dumping duties which operate to offset the margins of dumped imports. Two other WTO agreements that interact with competition policies are the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement and the General Agreement on Trade in Services (GATS).

Thus, the questions become: what exactly is needed beyond these measures; is the WTO with its rules and review-based process plus the juridical framework the appropriate home for competition policy as it was mooted in the Singapore issues; and is the timing right? The answer to the last point is an easy no (and the well may be poisoned for a period now following the Cancun experience). The second question is very much a moot point, and will be discussed below. The OECD (2006) found there to be two general 'families' of treatment within FTAs: one is the EU style of substantive rules and the other is the US style of relying upon cooperation.

The first question is another moot point, but is much harder to answer. For some it is not conclusive that anything beyond the American cooperative approach is needed, especially when there is an asymmetry in the respective domestic competition authorities. The other extreme is the position championed by the EU, which wants all countries to mandate at least some form of competition law although probably realising that common laws are inconceivable. As is often the case, the truth may be somewhere in the middle. The WTO plays a strong role in fostering efficiency in trade liberalisation of both goods and services as outlined. But is there a need to go that extra step and provide an enforceable framework for competition policy? Given the current environment, with the DDA in a 'time out' and the residual Cancun bitterness, it is largely a rhetorical question as the issue is unlikely to be addressed again before the next WTO round.

The African regional dimension

Of direct relevance to South Africa, competition policy is dealt with in Article 35 – 42 of the TDCA. The basic objective is to monitor and prevent anti-competitive practices affecting trade between the EC and South Africa, but only in the two areas identified in Articles 35(a) and 35(b). These articles stipulate that restrictions of competition and abuse of dominance in trade between the two territories are incompatible with the TDCA.

However, Article 36, which deals with the implementation of competition policy, can have a potential impact on countries acceding to the TDCA, as it mandates new members to adopt laws and regulations for the implementation of Article 35 within a period of three years. This may have implications for the extension of the TDCA to incorporate all SACU members formally as distinct from the *de facto* relationship they now have with respect to tariffs at the SACU border. This would place considerable pressure on the BLNS (Botswana, Lesotho, Namibia and Swaziland) SACU, as they currently have no competition policy in place.

Article 37(1) provides for 'appropriate measures' to be taken if a particular practice is either incompatible with the agreement and not adequately dealt with under Article 36 or if the practice is harmful to domestic industry. The TDCA recognises the competence of competition authorities and 'measures consistent with their own laws'. If any party believes anti-competitive practices are taking place within the territory of the other, a request for remedial action may be submitted, and an obligation is placed on the parties to engage in effective consultations in order to find an acceptable solution. Effectively, the TDCA emphasises mutual recognition and administrative cooperation rather than including binding provisions on competition policy. The Competition Commission of South Africa supports expansion of competition provisions in the renegotiation of the TDCA, and the same can be expected from the EC.

At the wider global level, Solano and Sennekamp (2006) have reviewed the competition provisions in regional trade agreements. They found that in all EU agreements the EU is clearly reintroducing its Cancun positions through the backdoor of regional agreements. For the US (and generally Canadian) agreements,

the common elements include broad terms to adopt general measures depending upon the level of advancement of the partners' competition policy, but they exclude or partially exclude general dispute settlement procedures in the agreements.

UNCTAD (2005b) arrived at very similar conclusions to those of Solano and Sennekamp, since they concluded that there was consistency in the North-South agreements. Again, Canada and the US emphasise cooperation of the competition authorities while the EU emphasises harmonisation of competition law even to the extent of establishing a supranational agency. While stressing the importance of competition policies for developing countries, UNCTAD notes the asymmetries of both vulnerabilities to anti-competitive behaviour and the associated lack of capacity to invoke enforcement options on the part of many of these same countries. They conclude that this does not seem to dampen their enthusiasm for the agreements and wryly note that they are 'eager to ink but are they ready to act?'

4 Conclusions

It becomes increasingly apparent that there are linkages between these Singapore and other related trade issues at the policy level. Examples include the relationship between the competition policy and the WTO TRIPs where South African activists and stakeholders used the Competition Act to reduce the prices of essential medicines (Avafia et al., 2006) and the linkages between competition policies and restrictive practices on government procurement. And, of course, the decisions to invest in a country will be influenced by the legal frameworks in place in areas such as competition policies and government procurement to enable a company to maximise those investments.

Looking ahead, other than trade facilitation there seems no conceivable way in which the Singapore issues will be brought back into the DDA negotiations should they resume. Past that point is merely conjecture, and meanwhile the issues are being 'field tested' in the proliferation of FTAs globally. A 'time out' for the three issues of investment, competition policy and government procurement may well help the DDA to finalisation and implementation, and the remaining Singapore issues can then be reassessed with the benefit of more 'field testing' in the regional agreements. However, it is clear that their removal from the DDA agenda at Cancun possibly did

little to advance that agenda, reinforcing the view that the Singapore issues were merely scapegoats for the entrenched position in agriculture and NAMA.

The extent to which the Singapore issues are being introduced into the African region through bilateral and regional agreements negotiated with the EU and the US becomes an important one. In general, the EU seems to be pursuing them with some vigour and rigour while the US is adopting a more benign approach, but never the less still pursuing them. Early evidence suggests that their rejection at the collective level and subsequent re-emergence at the bilateral and regional level may result in a 'picking off' without the collective protection of the WTO, although outside South Africa's TDCA with the EU, it is too early to provide a definitive answer for the region.

As discussed with respect to competition policies, and notwithstanding the current impasse, this leads to the broader question as to whether these Singapore issues should be part of the WTO or of alternative institutions such as UNCTAD and the APEC group that have more consensual and cooperative approaches and therefore may be better placed to facilitate them, even with the rather limited membership of the latter. Similarly, other institutions such as the OECD, the World Customs Organization and the World Bank may be well placed to analyse and potentially fund coordinated approaches to trade facilitation in particular. While the WTO does have trade focuses and provides a forum for trade-related issues, it judicial function is arguably not one that is readily applicable to the Singapore issues. It is one thing to require a developing country to maintain a bound tariff rate that often has little or no relationship to its applied tariffs; it is another to require that same country to maintain a complex competition policy. In the medium to longer term, cooperation and carrots may give better results for the three rejected issues than the stick, and if not, the stick can be introduced later, once the thorny issue of agriculture in particular has become less confrontational.

4.1 Other 'trade ands' and their treatment in the WTO

Meanwhile there is the interesting question of the role of the other 'trade ands' and why these were not considered for Singapore issues, and how they are faring in the WTO and regional agreements. These 'trade ands' include trade and labour and

trade and environment; and an examination of their treatment within the WTO may provide some insights into the appropriate home for the Singapore issues more generally.

Despite attempts by some of the developed economies, **trade and labour** never became part of the DDA negotiating agenda, although Paragraph 8 of the Doha Ministerial Declaration recognises the importance of core labour standards and the work underway in the International Labour Organisation (ILO) on the social dimensions of globalisation. Grynberg and Qalo (2006) examine the process as it has emerged through regional agreements since its rejection at the Singapore 1996 Ministerial. They found that the US in particular had gradually escalated obligatory labour standards in its bilateral FTAs, and in the most recent (December 2003) US-Central American FTA (CAFTA) they found provisions for dispute settlement through direct referral to a WTO panel on these issues[13]. It is important to note in this regard that in the context of Trade Promotion Authority, any bilateral or plurilateral negotiations on trade in which the US is involved, must include an outcome on trade and labour (and environment) and the prescription for this is broadly clear (including access to binding dispute settlement mechanisms and fines and sanctions for transgressions). While developing countries were vigorously opposed to the introduction of trade and labour as another 'Singapore issue', ironically, some of these same developing countries have now agreed to standards and disciplines (including trade-related measures) on both labour and environment that are significantly more onerous than would have been the case had the matter progressed through the WTO. Similarly, the US has labour standards embodied in its Generalised System of Preferences (GSP) and African Growth and Opportunities Act (AGOA). The EU sought to pursue a similar agenda bilaterally, though its approach has had less emphasis on sanctions and more on cooperative activities, i.e. rather more carrot than stick. Thus, the US is clearly advancing its agenda on trade and labour through the 'back door', while the EU is perhaps more neutral. Grynberg and Qalo (2006) conclude on the topic of trade and labour by posing the question whether developing countries may have been better off negotiating

[13] It is an interesting and open question as to whether the WTO would have jurisdiction on these issues.

collectively rather than just saying ‘no’ to the WTO, yet finishing up being unilaterally picked off by the US.

Also established in 1994 was the WTO Committee on Trade and Environment (CTE). Its mandate was to identify the relationships between these two insofar as they were promoting sustainable development and to make appropriate recommendations for changes to WTO provisions that might help in achieving this aim. It is important to note that the scope of the trade and environment discussions is much more narrowly confined than either the US or the EU in particular had wished. There is, for instance, no discussion about the use of trade measures to effect environmental change (other than obliquely through the negotiation on the WTO-multilateral environmental agreement (MEA) relationship). Negotiations on some aspects of these trade measures were launched at the Doha 2001 Ministerial, thus avoiding being classified as a Singapore issue and embroiled in the resultant controversy. The specific trade and environment negotiations are focused on environmental goods and services and the WTO-MEA relationship. Again, the WTO is not an environmental agency, and care must be taken to obtain a balance in the CTE work between developed and developing members, as there tend to be elements of an income-elastic nature associated with environmental protection (i.e. richer countries can afford protection that is in turn inherently regarded with suspicion as a potential NTB by developing countries). Linkages to some of the other ‘trade ands’ becomes apparent, and the CTE is resolutely continuing its work on monitoring and advising on these and related issues including defining and promoting freer market access for environmental goods and services and the concept of ‘ecolabelling’. The WTO’s philosophy is that trade liberalisation and environmental protection are complementary goals as long as all externalities are recognised. Perhaps the CTE monitoring and advisory role and its quiet but resolute cooperative work close to the mainstream of the WTO sets an example for what might have been for some of the rejected Singapore issues such as competition policies.

A similarly cooperative approach seems to be emerging in the more enlightened regional trade agreements. Reviewing Asian-linked FTAs and their relationships to environmental concerns, Imai and Kamal Gueye (undated) find that while the so-called ‘new-age’ FTAs are expanding in coverage beyond the issues of tariff reductions, this expansion is not towards environment. To date, regional and bilateral

trade agreements have found little room for environmental concerns, whereas environmental agreements barely involve provisions using trade measures as tools for implementation. However, this is changing under the most recent US-Singapore and Japan-Singapore agreements, where environment is a component. They consider that this supports the 'rich country' aspect mentioned in the previous paragraph, and an examination of the wider FTA US template also supports this. In a related development, parallel to the trade agreements, New Zealand-Thailand has an Environment Arrangement, and the New Zealand, Chile, Singapore and Brunei FTA has an Environment Cooperation Agreement whereby each country affirms its commitment to enforce environmental laws and regulations and its sovereign right to set environmental policies and standards[14].

In the final analysis, paradoxically, there may have been more protection for the developing countries to 'house' all of the Singapore issues in the WTO in a similar manner to the CTE, but given the degree of heat generated at Cancun, this is not likely to happen any time soon. Meanwhile, the Singapore (and indeed other) issues remain inter-linked with trade policies, and as tariffs are globally reduced through multilateral, regional and bilateral agreements, these related issues will become more significant regardless of where they are 'housed'.

[14] It is interesting to note that of the 'rich countries', only the US and New Zealand have an explicit policy of having to secure commitments on trade and labour and trade and environment in their FTAs. In the US case, this relates to the requirements of Trade Promotion Authority, and in the case of New Zealand, the Government Frameworks on Labour and Environment standards in Trade Agreements set out expectations in this regard. While other OECD countries (e.g. Canada, Japan, and the EC) may pursue these issues as a desirable component of any FTA, there is no policy requirement for these to be in any final FTA.

References

Avafia, T., Berger, J. and Hartzenberg, T. 2006. *The ability of selected sub-Saharan African countries to utilise TRIPs Flexibilities and Competition Law to ensure a sustainable supply of essential medicines: A case study of producing and importing countries*. tralac Working Paper No 12/2006. Stellenbosch: US Printers.

Dee, P. and Ferrantino, M. (eds). 2005. *Quantitative Methods for Assessing the Effects of Non-Tariff Measures and Trade Facilitation.* ISBN 981-256-051-3, April 2005.

Evenett, S.J. Multilateral Disciplines and Government Procurement. 2002. *In* English, P., Hoekman, B.M. and Mattoo, A. (eds.). *Development, Trade and the WTO.* Geneva: World Trade Organization. p. 423. [Online] Available: http://publications.worldbank.org/catalog/content-download?revision_id=1526178.

Grynberg, R. and Qalo, V. 2006. Labour Standards in US and EU Preferential Trading Arrangements. *Journal of World Trade*, Volume 40, Number 4, August.

Imai, K. and Kamal Gueye, M. Undated. *The Relationship between the WTO and Regional Trade Agreements and Institutions on Trade and Environment in Asia*. Institute for Global Environmental Strategies. [Online]. Available: http://www.gets.org/pages/harmony/IGES.doc.

Ismail, F. 2005. A Development Perspective on the WTO July 2004 Council Decision. 8 *JIEL* 377–404, pp. 396–398.

Kumahungye, E. 2006. *Trade Facilitation: State of Play as at indefinite suspension of 24th July 2006*. Paper presented at East African Community Regional Workshop, Arusha, Tanzania, 21 – 24 August, 2006.

Nottage, H. 2003. Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment. *Journal of International Economic Law* 2003 6(1):23–47; doi:10.1093/jiel/6.1.23 © 2003 by Oxford University Press.

OECD. *The economic Impact of Trade Facilitation*. Trade Policy Working Paper No. 21, October 2005.

Solano, O. and Sennekamp, A. 2006. *Competition Provisions in Regional Trade Agreements*. OECD Trade Policy Working Paper No. 31. Paris: OECD.

UNCTAD. 2005a. *Economic Development in Africa: Rethinking the Role of Foreign Direct Investment*. UNCTAD/GDS/AFRICA/2005/1.

UNCTAD. 2005b. *Competition provisions in regional trade agreements: How to ensure development gains*. UNCTAD. [Online]. Available: http://www.unctad.org/en/docs/ditcclp20051_en.pdf

Woolcock, S. Undated. *The Singapore Issues in Cancun: a failed negotiation ploy or a litmus test for global governance?* London School of Economics. [Online]. Available: http://www.lse.ac.uk/collections/internationalTradePolicyUnit/pdf/theSingaporeIssuesInCancunRev1.pdf.

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