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by

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Addressing Systemic Issues in the WTO: Lessons from the Singapore Issues

Erick Duchesne*

Introduction

In 2001, the World Trade Organization (WTO) launched an ambitious round of global trade talks named after Doha, the city where the Round got under way. The major aims of the Doha Development Agenda are to advance the “built-in agenda” left over from the Uruguay Round, namely to liberalize trade in services and agricultural products; to further reduce tariffs on industrial goods; to address institutional governance and systemic issues facing the WTO; and most importantly, to address pervasive development-related features of trade. As part of this

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agenda, the Doha WTO Ministerial meeting made a so-called “soft launch” of the Singapore issues:¹ a formal work program and expanded consultations on trade facilitation, transparency in government procurement, the relationship between trade and investment, and the relationship between trade and competition policy, with the final decision on the inclusion of these issues in the negotiations to have been made at the 5th WTO Ministerial meeting in Cancún in September 2003. This latter objective proved to be too ambitious: The stock-taking at Cancún ended when a group of developing countries led by India, Brazil, and South Africa and including China (the so-called G20) walked out of the negotiations in protest over proposed investment rules. Although the main divide was in the farm subsidy negotiations, the Singapore issues became the “official” culprits for the untimely termination of the Ministerial.²

However, the breakdown at Cancún does not necessarily signal derailment of the WTO negotiations. Some progress was made at Cancún, including the first indication of preparedness to deal with the Singapore issues individually rather than as a package. Moreover, work goes on in Geneva and capitals to forge consensus on the framework for the negotiations (target date: end-July 2004) and there are indications in the flurry of “mini-Ministerials” that WTO members are primed to politically jumpstart the trade talks following the 2004 American presidential elections and changes in the EU Commission, if not before. The present hiatus in negotiations thus provides opportunity to reflect on the “bien fondé” of the Singapore issues.

This chapter evaluates the pros and cons of keeping the Singapore issues on the Doha Round negotiating agenda, not in terms of trade theory, which focuses on the economic welfare

¹ The Singapore issues take their name from the first WTO Ministerial meeting in Singapore in 1996 at which working groups on these issues were mandated

² For early reactions to the Cancún collapse, see *The Economist*, “The WTO Under Fire”, September 20, 2003. Chapter 1 of this volume surveys the state of play post-Cancun with the benefit of further reflection.

gains from trade, but through the lens of International Regime Theory (IRT), which emphasizes the gains from cooperation.

International regimes enhance cooperation among sovereign nations in various ways, including by: "lengthening the shadow of the future", altering the payoffs of a game, institutionalizing the rules of cooperation and defection, providing information to members, reducing transaction costs, facilitating issue linkages, and deflecting domestic lobby pressures. With the gradual, on-going change in emphasis of the WTO from trade liberalization to more contentious rule making, IRT suggests three specific questions about the inclusion of the Singapore issues in the negotiations:

- (a) Does the WTO, as a by now fairly well established, successful international regime facilitate the development of international cooperation in these issue areas?
- (b) Looking at the flip side of this coin, would keeping these issues on the negotiating agenda constitute a potential stumbling block for the Doha Development Agenda? Or do they enhance the chances of a successful deal by expanding the feasible set of win-win outcomes (taking into account technical assistance and capacity building to help developing countries implement and benefit from these rules)?
- (c) Is the effective "unbundling" of these issues and differentiation in their individual timetables that was signalled at Cancún for the better or for the worse?

This chapter next reviews the negotiating history of the Singapore issues. It then discusses the WTO's evolution as an international regime in terms of the major functions of such regimes as identified in the IRT literature before turning to a consideration of whether bringing these issues into the WTO regime enhances the possibility of increasing international cooperation in these issue areas. The final section interprets the developments at Cancún in light of the preceding analysis.

Background & Negotiating History of the Singapore Issues

Traditional trade theories are ill equipped to shed light on what occurred at the Cancún WTO Ministerial meeting since the discussions were less about liberalization of trade than about the rules of the international trade and investment game.³ A trade agreement appeals to governments if it offers greater welfare than would be realized in the absence of such agreement.⁴ But the general consensus amongst economists that trade liberalization has an overall net positive impact on welfare (albeit with unclear implications for income distribution) might not apply seamlessly to rule making.

For almost fifty years following the Second World War, the focus of trade liberalization was the reduction or elimination of discrimination against foreign products. The process was straightforward: members of the General Agreement on Tariffs and Trade (GATT), which subsequently evolved into the WTO, agreed not to take trade-restricting actions against their trade partners in exchange for reciprocal undertakings from their trade partners. By and large, the undertakings (a) were framed in terms of policy instruments (tariffs) that could be measured (i.e., they applied to transparent forms of trade protection); (b) were limited to border measures (giving rise to the characterization of deepening of trade relations in this era as "shallow integration"); and (c) involved restrictions on public policies (i.e., they specified what governments would *not* do), as opposed to commitments to implement specific public policies (i.e., specifying what governments *must* do).

³ Truth be told, multilateral trade negotiations began to touch on domestic regulatory policies in the Kennedy Round. The Tokyo Round is just as much known for the various codes that it introduced as for the tariff cuts it agreed. Nevertheless, until the Uruguay Round, negotiations on non-tariff issues represented a few items out of a larger agenda. In the Doha Round—agriculture excepted—the focus has been on intrusive regulatory issues.

⁴ Kyle Bagwell and Robert W. Staiger, 1999, "An Economic Theory of the GATT," *American Economic Review*, Vol. 89, No 1. pp. 215-48.

The commitments that underpin shallow integration still form the bedrock of the international trade system, but the new areas of negotiations involve undertakings that would demand reforms of domestic economic regulation, including in the case of the Singapore issues, competition law, rules governing foreign direct investment (FDI), government procurement policies and approaches, and customs and related procedures for processing imports. Reaching consensus on these regulatory issues is more difficult because it involves (in some cases far-reaching) commitments to restructure domestic laws and regulations—that is to say, "deep integration". Moreover, the change in negotiating issues also involves a radical change in negotiating approach from an exchange of *comparable reductions in protection* (which left economic regulatory frameworks different) to *different degrees of change towards a common regulatory regime* (e.g., adopting the same regime for intellectual property rights involved little or no change for the US and the EU but radical changes for developing countries).

Writing well before Cancún, Hoekman and Kostecki provided a clairvoyant outlook on the difficulties that the evolution of the WTO agenda portended for the Doha Round:

Multilateral negotiations on non-border policies, administrative procedures and legal regimes have proven to be much more complex than traditional trade policy talks. It is much more difficult, if not impossible, to trade 'concessions' – instead the focus revolves around the identification of specific rules that should be adopted. The disciplines that are proposed by some countries may not be in the interest of others. Given disparities in power and resources, to a large extent negotiations on rules can be expected to reflect the agenda of high-income countries (and specific interest groups in these countries). In contrast to traditional trade liberalization, the rules that emerge in a given area may not be consistent with the development priorities of low-income countries. No longer is it the case that 'one size fits all' is necessarily a good rule.

With the gradual demise of tariffs and the ever greater prominence of non-tariff, domestic regulatory policies – standards, investment regulations, environmental, social, or competition norms – there is a danger of moving away from positive sum ('win-win') games towards zero sum situations.⁵

The growing reaction to this shift in international economic policy-making has sparked what some have termed a crisis in global governance.⁶ There are two focal points for this sense of crisis: the friction caused by the intrusion of international rules into domestic policy-making, which is manifest in the grass-roots anti-globalization movement;⁷ and the splintering of international cooperation, which is manifest in the collapse of the negotiations at Cancún and the parallel surge of activity in ne-

⁵ Bernard M. Hoekman and Michel M. Kostecki, 2001, *The Political Economy of the World Trading System*, 2nd ed., New York, Oxford University Press, p. 482.

⁶ See for example, Daniel Drache and Sylvia Ostry, "From Doha to Kananaskis: The Future of the World Trading System and the Crisis of Governance", in John M. Curtis and Dan Ciuriak (eds.), *Trade Policy Research 2002* (Department of Foreign Affairs and International Trade: Ottawa, 2003): 1-31.

⁷ Critics of globalization argue that domestic regulatory power is being constrained by international agreements and/or decisions of international bodies (such as the WTO's dispute settlement body) that are not elected or otherwise lack democratic legitimacy. They are alarmed about growing lobbying power of corporations as globalization drives consolidation of businesses and thus greater industrial concentration, with particular concerns being voiced about the ability of multinational firms to lobby for favourable tax or regulatory treatment/changes. Others reply that the system is not broken; community and consumer interest groups can effectively use domestic advocacy and consultative processes to get their views reflected at the global level. They urge activists to work "within the system". They note that a growing number of countries are exercising influence on the tenor or the multilateral negotiations, thus giving an increasing voice to their constituents. As Sylvia Ostry has argued, such pluralism in global governance "is not only *desirable*, it is *essential* to sustaining and extending the rules-based system." (Ostry's emphasis). See, Sylvia Ostry, 1997, *The Post-Cold War Trading System: Who's on First?* Chicago, University of Chicago Press, p. 239.

gotiating bilateral preferential (i.e., discriminatory) agreements. While the Singapore issues have helped to sail the WTO into the eye of both storms, it is the latter that is of interest here.

Box 1 summarizes the substantive aspects of these issues in the WTO negotiations.⁸

Box 1: Substantive aspects of the Singapore Issues in WTO negotiations

Trade and investment. Key negotiating subjects and principles include:

- Negotiating modality: similar to commitments on services trade under the General Agreement on Trade in Services (GATS), commitments on investment would be for specified matters ("positive list" approach), rather than in terms of broad commitments subject to listed exceptions.
- The balance between the interest of exporters of investments with those of importers of investments.
- Countries' rights to regulate investment.
- Development-related issues, including technical cooperation with international organizations such as the UN Conference on Trade and Development (UNCTAD).
- The public interest and individual countries' specific circumstances.
- The scope and definition of various issues namely: transparency, non-discrimination, exceptions, and balance-of-payments provisions.

Trade and competition policy. The Doha Declaration instructed the working group to clarify the following:

- Core principles, including transparency, non-discrimination and procedural fairness
- Provisions with respect to "hardcore cartels" (i.e. those formally set up).
- Modalities for voluntary cooperation on competition policy among WTO member governments
- Support for progressive reinforcement of competition institutions in developing countries through capacity building, including through cooperation with organizations such as UNCTAD.

Trade facilitation. The Doha Declaration identifies the following issues:

- Ways to expedite the movement, release and clearance of goods in transit.
- Technical assistance and capacity building to assist developing countries

⁸ For more information, see WTO, "The Doha Declaration explained", http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm.

to implement an agreement on trade facilitation.

Transparency in government procurement. Separate from the plurilateral Government Procurement Agreement (GPA).

- Negotiations are to be limited to the transparency aspects and therefore the scope for countries to give preferences to domestic supplies and suppliers will not be restricted.
- Development issues such as technical assistance and capacity building.

Why, it might be asked, did the WTO take on these issues? In the first place, they drill down into domestic regulatory space and thus raise governance issues. Moreover, being non-tariff measures (NTMs), they tend to be far more complex than reciprocal tariff reduction.⁹

The first of these issues is at the heart of the longstanding divide on the status of the Singapore issues in negotiations that is reflected in the annual reports of the working groups submitted to the General Council of the WTO. The European Union and, to a lesser extent, the United States have been proponents of opening formal negotiations; they have received significant support from partners within the Organization for Economic Cooperation and Development (OECD). At the other end of the

⁹ For example, there is no true and tested way to determine whether a non-tariff measure genuinely constitutes a protectionist barrier to international commerce versus a necessary element of domestic economic regulation in any given developmental context. Second, the lack of a simple metric to quantify the value of concessions further reduces the chances of reaching an agreement on a reciprocal package involving NTMs. Third, unlike tariffs, NTMs are often "lumpy" (e.g., a measure might either be in place or not, with no in-between); this makes it difficult to calibrate concessions to match reciprocal offers and complicates a process of incremental liberalization. Fourth, unlike tariff cuts, the liberalization of NTMs may require reforms to domestic institutions, which can challenge the implementation capacity of developing countries. Tariff negotiations have also become complex. Early GATT/WTO rounds involved item-by-item concessions. Across-the-board cuts were introduced in the Kennedy Round, based on a simple linear 50 percent tariff cut. More complex formulae have since been introduced (e.g., the "Swiss" formula currently in vogue) as have and zero-for-zero negotiations. For a full discussion of reciprocal tariff reduction formulae, see Hoekman and Kostecki, 2001, pp. 122-35.

spectrum, some WTO members, typically developing and least developed countries¹⁰, maintain that the case has not been made clearly as to the benefits of introducing such rules into the multilateral system at this time.

To complicate matters, India and some others argue that there is no clear indication in the Singapore Declaration that the Singapore issues fall under the single undertaking prescription. This latter principle, first introduced in the Uruguay Round agreement, stipulates that virtually every item of the negotiation is part of a whole and indivisible package. Some argue that discussion of the status of Singapore issues under the single undertaking requirement should only be addressed in the context of formal negotiations thereon.

Considering the difficult task of defining the contours of the Singapore issues for negotiation purposes, it came as no surprise to most observers of the WTO that the Cancún Ministerial meeting failed to reach consensus on whether to initiate formal negotiations on them. However, there were important developments at Cancún: the Singapore issues were effectively "unbundled" in view of the first sign of flexibility from the EU and other key players.¹¹ Each issue must now be considered on its

¹⁰ While this chapter distinguishes between developing and least-developed countries, it should be acknowledged that there are no WTO definitions of "developed" and "developing" countries. The designation of developing country is derived from a process of self-selection by certain WTO member states and this is not automatically accepted in all WTO bodies. The WTO recognizes the designation of least-developed countries for some of its members in accordance with the United Nations' classification. Unless a clear distinction between "least developed" and "developing" countries is essential, this study will often use the term "developing countries" to refer to both of these latter categories.

¹¹ On the last morning at Cancún, Pascal Lamy, the EU's chief negotiator, offered to give up the two most controversial Singapore issues, competition policy and investment, but by then it was too late to salvage the remaining two issues. On this aspect of the negotiating dynamic at Cancún see Pierre Sauvé, "Decrypting Cancún", paper prepared for an "Ad Hoc Expert Group Meeting on the Post-Cancún Agenda for WTO Trade Liberalization and Its Implications for Developing Economies", United Nations' Economic

own merits.¹² Some indication of the chances for movement on the individual issues can be inferred from a compromise proposal made by the facilitator for these issues at Cancún, Canada's then-Minister for International Trade, Pierre Pettigrew. Under this proposal, trade facilitation and transparency in government procurement would form part of the Doha Round, implying optimism about the chances for early forward movement. Investment rules would be handled in parallel negotiations with no terminal date, suggesting a possibly slower time path. Competition policy would be subject to "the Doha Round".

As efforts to revive and advance the Doha Round proceed, the shape of the negotiating package—what is to be on the table and what is not—remains uncertain. Against this background, we now consider what political science theories of international regimes say about how well placed the WTO is to address these issues.

The WTO through the lens of International Regime Theory

Multilateral cooperation among sovereign nations in the absence of a central authority is explained by political scientists in terms of the concept of an "international regime" which, in Krasner's classic definition, is "a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of interna-

and Social Commission for Asia and the Pacific, Bangkok, 18-19 November 2003, manuscript, at section (ii) "The Singapore issues: convenient culprits?"

¹² The modified EU position is expressed in European Commission, "Singapore issues – Options post-Cancún," Ref. 514/03, Brussels, 30 October 2003. [<http://www.ictsd.org/ministerial/Cancún/docs/EC-Sing-Issues-Post-Cancún.pdf>]. The desirability of addressing the Singapore issues on their individual merits is strongly supported by several developing countries. See World Trade Organization, Trade Negotiations Committee "The Doha Agenda: Towards Cancún", Communication from Argentina, Botswana, Brazil, China, Columbia, Ecuador, El Salvador, Gabon, Guatemala, Honduras, India, Malaysia, Mexico, Morocco, Paraguay, Peru, Uruguay, TN/C/W/13, 6 June 2003, p. 3.

tional relations.”¹³ How does the WTO stack up in terms of the features that make an international regime useful?

Lengthening the Shadow of the Future.

A regime lengthens the shadow of the future by creating an expectation among the players that they will interact with each other over an indefinite time horizon.¹⁴ This allows for a “give-and-take” process where the players make incremental concessions and evaluate the behaviour of their counterparts over the long run. This feature of an international regime suggests the utility of a “go slow” approach in the implementation of new rules to allow all parties to test the willingness (and/or ability) of member states to follow up on any agreements.

The history of the multilateral trading system illustrates well this aspect of an international regime. The series of multilateral negotiations under the GATT/WTO since 1947 furnished learning and reputation-building processes that allowed nation-states to discriminate between “cooperators” and “defectors” and to adjust their concessions accordingly. The results speak for themselves: eight rounds of trade liberalization have been successfully completed, lowering the average tariff from 40 percent at the beginning of the process to about 4 percent with full implementation of the Uruguay Round cuts; trade has

¹³ Stephen D. Krasner, 1983, “Structural Causes and Regime Consequences: Regimes as Intervening Variables” in Stephen D. Krasner ed., *International Regimes*, Ithaca, Cornell University Press, p. 2.

¹⁴ Readers who are familiar with the Prisoners’ Dilemma situation in game theory will recognize that an outcome of mutual cooperation is more likely in a repeated game than in a “one-shot” game, where mutual defection is the rational outcome (i.e., a unique Nash equilibrium) under the usually specified decision rule of risk aversion. The emergence of cooperation in an iterated trade and investment game under the aegis of an international regime follows the same logic. For more discussion on the Prisoners’ Dilemma, especially in its iterated version, see among others Robert Axelrod, 1984, *The Evolution of Cooperation*, New York, Basic Books.

expanded much faster than global economic activity, more than tripling the share of trade in global GDP. While there are many exceptions to its rules and many remaining examples of protectionism in the world, the current international system is, compared to other historical periods, in many respects the freest by far.¹⁵

An incremental approach where tractable issues are addressed first, paving the way for initiatives to address ever more difficult matters, is also a trademark of the GATT/WTO. Such an approach provides an opportunity to observe the consequences of liberalization and to adjust gradually to the new demands of the international economic regime. The GATT/WTO experience adds support to neofunctional theorists who argue that establishing some degree of cooperation as a foothold, however limited, is critically important for long run cooperation.

By lengthening the shadow of the future, an international regime such as the WTO facilitates a gradual breakdown of the resistance to multilateral disciplines in new issue areas.

Altering the Payoffs of a Game.

An international regime can make cooperation or conflict more or less likely by altering the payoffs of a game through "side payments" to participants. In the multilateral trade context, technical assistance to help developing countries to implement and take advantage of trade agreements constitutes such a form of payoff alteration. Such side payments were in fact central to the launch of the Doha Development Agenda.

In economic terms, these side payments are made feasible by the gains from trade realized by the major trading nations that provide or finance the assistance. Their interest in expanding the game leads them to "prime the pump", as it were, to induce wider participation. The role of the international regime is

¹⁵ For extensive details on trade openness and structure of trade, see Hoekman and Kostecki, 2001, pp. 9-18.

to help overcome the problem of "collective action" implicit in trade-related technical assistance. Any single trading nation cannot capture the benefits from technical assistance that expands the multilateral trade of another country; accordingly, it has no interest in providing such assistance alone. The international regime, however, allows it to capture a share of the overall gain that is, in principle, commensurate with its contribution.

Institutionalizing the Rules of Cooperation and Defection.

International regimes institutionalize rules and norms. This increases the probability of cooperation in two ways. First, participants in a system tend to "internalize" norms; this is in fact a central tenet of legal theory, which holds that most people, most of the time, observe the law, even in circumstances where the threat of punishment is absent. Second, a regime can supplement such internalization by making clear what is a defection and prescribing commensurate remedies/penalties.

The history of the GATT/WTO dispute settlement mechanism serves to illustrate both aspects. If a member of the WTO believes that another is illegally raising barriers to trade, it can lodge a complaint under the WTO's Dispute Settlement Understanding (DSU), which contains explicit rules for determining if a defection has occurred. If fault is found, the complainant is authorized to retaliate to an extent that a WTO panel judges to be commensurate with the injury. In WTO parlance, "retaliation" is a "withdrawal of concessions"; typically, this involves the raising of tariffs on a specific quantum of imports as authorized by the WTO.

The current WTO DSU builds on earlier, and by general reputation much weaker, versions of dispute settlement during the GATT era. The GATT system allowed, until 1989, the appellant to block the formation of a panel to review the case. After "improvements" to the system in 1989, an appellant could no longer block the formation of a panel but could still block the adoption of the panel's report, meaning the system still lacked real teeth. The WTO DSU removed the ability of the appellant

to block adoption of a panel report since a blocking motion required "negative consensus"—i.e., all members of the WTO had to agree not to adopt. Thus, as Busch and Reinhardt put it:

The conventional wisdom is that the GATT's diplomatic norms have been supplanted by the WTO's more legalistic architecture, resulting in a system in which "right perseveres over might."¹⁶

Yet, as Busch and Reinhardt go on to show, the GATT-era dispute settlement mechanism was, surprisingly, very "efficacious", yielding concessions to the complainant in two-thirds of the cases brought.¹⁷ Since many of these cases involved powerful rich countries making concessions to poor countries that lacked the market power and institutional capacity to impose effective sanctions, compliance with the GATT rules appears to reflect the normative power of the regime itself.

At the same time, the progressive strengthening of GATT/WTO dispute settlement in terms of enforceability testifies to the importance of a "stick" to ensure compliance when internalization of norms is insufficient. The rapid expansion of the case load of the WTO's DSB since its introduction is seen as having been induced by the increased assurance that a victory at the panel stage would lead to concrete enforcement action.

This principle of international regimes suggests that ideally the dispute settlement mechanism would have a role with respect to each new article of the WTO charter.

¹⁶ See Marc L. Busch and Eric Reinhardt, "The Evolution of GATT/WTO Dispute Settlement" in John M. Curtis and Dan Ciuriak (Eds.), *Trade Policy Research 2003* (Ottawa: Department of Foreign Affairs and International Trade, 2003): 143-183; at p. 143.

¹⁷ *Ibid.* at p.154.

Providing Information to Members

One of the most important functions of a regime (perhaps surprisingly so) is to provide information about the behaviour of members covered by the regime as well as about their national policy objectives. This information reduces the costs for individual members of monitoring each other's compliance and, by regularly confirming continued cooperation of others, fosters cooperation by all. Information also reduces uncertainty; this is important because uncertainty often causes cooperation to break down unnecessarily.

The WTO fulfils this function of an international regime in a number of ways.

First, it provides a forum for continual communication between member states. For example, WTO members gather regularly in specialized committees, working parties, working groups, and Councils, at various levels of government, including officials and formal Ministerial meetings, to exchange information and views. This regular interaction is an efficient mechanism to promote cooperation and to avoid potential conflicts.

In addition, under WTO transparency rules (which are featured in most of the agreements)¹⁸, members are required to make public their domestic trade regulation. Further, the Trade Policy Review Mechanism (TPRM) provides for regular monitoring of the behaviour of WTO members; importantly, the highly detailed TPRM reports on member compliance with the rules of the regime enable small and relatively poor countries to determine whether others are cooperating or defecting, something they could ill afford to do independently.¹⁹

¹⁸ The GATS, the GATT, the Agreement on Rules of Origin, the Agreement on Import Licensing, the Agreement on Customs Valuation, and the Agreement of Trade-Related Aspects of Intellectual Property Rights all contain provisions related to the transparency of domestic procedures.

¹⁹ The need for transparency during the Doha negotiations is a recurring theme for developing countries. See for instance “The Doha Agenda: Towards Cancún”, p. 1.

Reducing Transaction Costs

Regimes increase the probability of cooperation by reducing transaction costs. For example, in order to reach an agreement, many procedural issues have to be resolved: a location has to be selected; a list of invitees must be determined; various protocols (e.g., where people sit) must be established; decision rules for choosing policies must be agreed upon. All these choices or decisions, which must be dealt with prior to broaching substantive talks, represent overhead costs of doing business in the cooperation game. By establishing rules and decision procedures at the start, regimes reduce the cost of all subsequent agreements. In other words, regimes deliver cooperation on the cheap.

In addition, there are major cost savings through the "network externalities" offered by a successful institution. For example, between N countries, there are $N(N-1)/2$ bilateral relationships. While these costs are distributed (no single country has more than $N-1$ relationships to tend), the cumulative costs across the system grow rapidly as N rises, increasing the overall benefits of a multilateral agreement that covers all at once.

The GATT/WTO's history of repeated negotiations and steady expansion of membership speak for themselves in illustrating the first aspect of this function of an international regime. The established modalities/protocols for negotiations/accessions combined with the acquired institutional memory of the practical aspects of these processes facilitate progress. Moreover when a new problem is encountered (e.g., how to include Hong Kong as a customs territory), the solution can be repeated (e.g., for Chinese Taipei).

As for the network externalities, these have become significant. Amongst the 147 WTO members²⁰, there are 10,731 bilat-

²⁰ As of April 23, 2004 with Nepal's accession. See World Trade Organization, "WTO membership rises to 147", WTO News, 23 April 2004, http://www.wto.org/english/news_e/news04_e/wto_147members_23apr04_e.htm

eral relationships. Adding the 30 current observers (a country must begin accession negotiations within five years of becoming an observer) would expand that number by nearly 5,000. The more members, the greater the efficiency gains from transacting business through the regime compared to outside it, as shown by the rise in the ratio of the number of bilaterals to the number of members as the latter number expands.

	Number of Members	Total number of bilaterals	Ratio: Bilaterals to members
Original GATT	23	253	11
Current WTO	147	10,731	73
Current WTO + observers	177	15,576	88

In view of the powerful incentives to forge agreements at the multilateral level, a comment is required on the proliferation of regional and bilateral negotiations.

The answer lies partly in the realities of economic geography: most nations transact most of their international commerce with their immediate neighbours—that is why regional agreements are in fact regional. The advantages offered by regional agreements have been well documented.²¹

²¹ Regional trade agreements (RTAs) allow the participating countries to extract a good portion of the potential gains from trade in terms of production and distributional efficiencies. Negotiating results can be achieved faster than is typically possible multilaterally and integration can be deeper. Speed can be of the essence in some cases where governments seek to “lock-in” domestic economic reform. RTAs have other advantages as well. They can serve as a testing ground, pioneering the approaches later adopted multilaterally; this was the case with dispute settlement procedures developed in the Canada-US free trade agreement that were later incorporated in the dispute settlement framework adopted in the Uruguay Round. By the same token, experience gained in negotiating RTAs can prepare countries (especially developing countries) for the multilateral stage. And by creating broader zones of harmonized rules at the regional level, RTAs can speed-up subsequent progress at the multilateral level. Finally, a thought-provoking recent article provides an empirical test of rent seeking, in which the author demonstrates under which conditions state leaders might logically prefer to negotiate regional rather than multilateral trade agreements. See Kerry Chase, 2003, “Economic Interests and Regional Trading Arrangements: The Case of NAFTA,” *International Organization*, Vol. 57, No. 1, pp. 137-74. At the

The answer also lies partly in the governance-related diseconomies of scale faced by organizations. These diseconomies appear to become significant once the membership of an organization much exceeds the number of an ideal dinner party—as the Geneva tradition of restaurants lending their names to particular negotiating alliances or "like-minded" groups attests. The discontent that has surfaced within the WTO about the "green room" and "mini-Ministerial" processes²² both highlights the difficulties of negotiating amongst 147 members at a time, which inevitably cause the action to shift to smaller groups, and the governance issues thereby raised.

Finally, the perspective on cost-benefits is quite different for a major economy such as the US or the EU versus for a small economy negotiating with one of these two, each of which accounts for a considerable share of the world economy. There are clear advantages for the US to deal one-on-one with smaller trading partners for whom access to the huge US market is a major factor; these advantages are manifest in the US' ability to obtain greater concessions in terms of trade-related intellectual

same time, they have costs. Proliferation of RTAs creates a complex web of preferential tariff rates and rules of origin that divert trade, reducing the overall gains from trade. Empirically, the benefits from such arrangements in terms of trade creation and acceleration of liberalization are considered to outweigh the costs; at the same time, the proliferation of RTAs has made multilateral liberalization, which tends to narrow the margin of preferences, all the more important. For a recent survey, see John M. Curtis, "The Importance of Being Multilateral (especially in a regionalizing world)" in John M. Curtis and Dan Ciuriak (eds.) *Trade Policy Research 2003* (Department of Foreign Affairs and International Trade: Ottawa, 2003): 43-71.

²² Some delegates from developing nations openly lament the lack of democracy within the WTO itself. They remark that the 'green room' process, where a small invited group of members meets informally behind closed doors to work out areas of agreement which are then presented to the rest of the membership as a *fait accompli*, and the use of 'invitation only' mini-ministerial meetings relegate plenary sessions to 'mere sideshows' where most important decisions are already endorsed by powerful delegations. See Mark Lynas, "Playing Dirty at the WTO," *The Ecologist*, June 2003 [http://www.theecologist.org/archive_article.html?article=411&category=55].

property and capital movement in bilateral agreements with Singapore and Chile than has proved possible in the WTO.

The outcome of this interplay between the regional and multilateral trade regimes is unclear.

Facilitating Issue Linkages

Regimes facilitate issue linkage. Sometimes cooperation on one issue is difficult but linking the issue with another increases the possibility of cooperation. For example, if a game is essentially zero sum, there is no basis for cooperation, only rivalry. However, if two zero sum games are linked, it becomes possible to trade losses in one game for wins in the other. Depending on the valuation of the respective gains and losses in the two issue areas, the linked games can yield positive sums for both players. In other words, linkage can create a zone of mutual benefits where none exist when the issues are handled separately.

The WTO illustrates this property of a regime particularly well. For example, in the Uruguay Round, linkage between the negotiations on trade-related intellectual property rights (TRIPs), agriculture and textiles helped create a package outcome that satisfied all parties. Linkage has in fact become an essential feature of trade liberalization: following the mandated launch of negotiations on agriculture and services as per the "built-in agenda" agreed in the Uruguay Round, it was generally agreed that a new round would have to be launched to sufficiently broaden the set of trade-offs to create the basis for final agreements in these two issue areas.

Linkage is clearly an important consideration with respect to the Singapore issues—they were after all linked as a group from the time of their entry onto the WTO agenda at the 1996 Singapore Ministerial until the meetings at Cancún. How they will fit into the negotiating agenda post-Cancún—if at all—remains to be seen. Developing countries had insisted on sub-

stantial progress on issues within the “development agenda”²³ in order to consider movement on the Singapore issues, insofar as they were willing to countenance them at all.

Linking issues can also complicate matters—indeed, the “poison pill” is an example of the use of linkage as a tactic to block progress. Insofar as the constituency for the Singapore issues remains hard to identify (e.g., why was Japan adamant on their inclusion in the round to the point of risking collapse of the talks?), a good case could be made for “de-linking” the Singapore issues from the Doha Round.

The future of the Singapore issues on the Doha agenda will depend on the concessions that the developing economies might be ready to make to keep some or all of these issues off the table—or alternatively, the concessions that the developed economies might consider to keep them on the table.

Deflecting domestic lobby pressure

An interesting and controversial feature of international regimes is the way governments use them to deflect unwelcome pressure from their domestic lobbies. Domestic reforms that have distributional consequences—e.g., removal of a subsidy—are notoriously difficult to make in the face of spirited opposition from vested interests. Nothing is more convenient than to have such a subsidy made illegal under an international agreement to which the nation is party. By the same token, the intrusiveness of international rule-making into domestic governance has become a persistent source of controversy surrounding interna-

²³ If we were to define the development agenda as issues where developing countries hope to make particular gains, a non-exclusive list would include concessions under the TRIPs agreement for particular health issues (especially HIV), expanded trade-related technical assistance, special and differential treatment in specific circumstances, and addressing concerns related to implementation of the Uruguay Round agreements. This would be course in addition to basic market access objectives for agriculture, industrial goods and services as well as strengthened disciplines on subsidies and the use of anti-dumping and countervailing duties.

tional institutions under the general rubric of the so-called "democratic deficit". Accordingly, use of this feature of an international regime increasingly risks attracting as much pressure as it might deflect.

Hoekman and Kostecki eloquently describe this feature of the WTO as an international regime: "The WTO is somewhat analogous to a mast to which governments can tie themselves so as to escape the siren-like calls of various pressure-groups."²⁴ In most countries, diverse groups exhibit dissimilar trade preferences. The configuration of protection at any given time is the product of the interplay between demand for protection expressed by various interest groups and the supply offered by responsive governments, which itself is influenced by the lobby pressure from export-intensive industries that stand to benefit from reciprocal liberalization. While governments might objectively prefer welfare-enhancing trade liberalization policies over sustaining the rents of protection-seekers, political calculation might dictate otherwise. The GATT/WTO can help solve the political economy problem by "empowering the exporters"²⁵ while allowing national governments to "tie their hands" through binding multilateral agreements to reduce the effective supply of protection. Insofar as the WTO enhances trade among nations, few analysts would find fault with this—indeed, Hoekman and Kostecki present this feature in a very favourable light. But would this judgement be carried over to the WTO's involvement in rule making?

There is no easy answer. To the extent that the rules enshrined in WTO agreements represent good practice, irrespective of circumstances, the multilateral trade regime represents both a good model to build towards and a useful support to lean on while getting there. Unfortunately, there are no guarantees that negotiated rules are welfare-enhancing for all, as the WTO

²⁴ Hoekman and Kostecki, 2001, p. 29.

²⁵ To borrow a term popularized by Michael J. Gilligan, 1997, *Empowering Exporters: Reciprocity, Delegation, and Collective Action in American Trade Policy*, Ann Arbor, Michigan University Press.

agreement on trade-related intellectual property (TRIPs) has served to illustrate.

It is also more complicated to understand and deal with the dynamics of interest groups on rules issues. When it comes to investment and competition, it is apparent that multinational corporations favour a seamless web of rules, but the lobbies on the other side of the equation are not necessarily the traditional protection-seekers. The structure of trade consultations thus is forced to evolve to reflect the broader interests involved.²⁶

Here we have to carefully distinguish between the situation where governments lean on the WTO agreements to push through reforms they believe are in the interests of their own country and cases where the rules are more or less "forced" on them. Modern China is often cited as an example where the government is said to be purposefully using the WTO agreements to overcome domestic opposition to the market-based regulatory framework that it is putting in place. Developing countries committed to putting in place regulatory regimes to enforce intellectual property rights are often cited as an example of the latter, where the rules are not self-evidently in the country's interests and were adopted under pressure, as the lesser evil to being outside the WTO and exposed to unilateral trade sanctions with no procedural protection from the WTO's dispute settlement mechanism. Unfortunately, it is not possible from the public record to know which circumstance prevails--in both instances, the government claims that its hand was forced!

Insofar as the framework of rules enshrined in the WTO agreements do not represent optimal policies for all—and the risk of this would most likely be highest for countries at an early stage of industrialization—this aspect of the WTO as an international regime could potentially have some negative con-

²⁶ The evolution of Canada's system of trade consultations is described in Dan Ciuriak, "Canadian Trade Policy Development: Stakeholder Consultations and Public Policy Research", Chapter 6, in John Curtis and an Ciuriak, 2005, *Trade Policy Research 2004*, Ottawa, Minister of Public Works and Government Services Canada.

sequences. Accordingly, even if the WTO were deemed to be a successful regime according to the other six criteria discussed above, it might still meet with legitimate criticism on this score.

This issue is likely to play a prominent role in the case of the Singapore issues, which are not seen as high priority items for the poor countries. Insofar as they remain on the agenda and are part of the final Doha Round agreement, there will be much ex post analysis of the pros and cons of this role of the WTO.

Summary and future considerations

On the basis of the foregoing, one could safely argue that the GATT/WTO has so far been a successful international regime.

In textbook fashion, it has "lengthened the shadow of the future" by creating stable expectations about the conditions under which trade will take place; it has altered the payoffs to the trade and investment game in a positive direction; it has institutionalized the rules of cooperation and defection, thereby promoting compliance with its rules; it has provided extensive information to its members to enable them to monitor the behaviour of their fellow members, reducing uncertainty about compliance and thereby fostering greater compliance by all; it has reduced transaction costs of negotiating treaties on international commerce; it has facilitated issue linkage, thereby expanding the feasible set of cooperative deals; and it has provided a credible international framework that governments have been able to use to deflect domestic lobby pressures to push through desired reforms.

Measures of its success abound: the vast expansion of the activity which it oversees; the seven-fold expansion of its membership; the growth in stature and power of its institutions; the large number of treaties concluded under its umbrella (including the eight rounds with their various component agreements as well as the telecommunications and financial services agreements); the many hundreds of disputes that have been brought to it for settlement, the majority of which have resulted in set-

tlement with concessions being made; and the growth of its reputation to actually larger than life status.

The pragmatism and flexibility which the multilateral system has shown in accommodating political pressures are arguably responsible for the long life of the GATT/WTO, which started as a provisional regime that, in the eyes of its founders, would last at most a year or two.

But while the foregoing has emphasized the GATT/WTO's successes as an international regime, there is also a liability column in the GATT/WTO ledger.

Most importantly from a forward-looking perspective, there has been no clear record on its watch of success in integrating developing countries into the global economy or "putting trade into development": the rhetoric of the day holds that the problem with globalization for the poor countries is that they are excluded from it—yet many have long been GATT/WTO members. The perception of lack of benefits from the Uruguay Round, the occasion on which many poor developing countries joined the club, was in fact a contributing factor to the collapse of the Cancún Ministerial as it conditioned their unwillingness to enter into negotiations in new rules areas. While it may be unfair to lay the burden of the blame entirely on the GATT/WTO,²⁷ it has been a factor in creating a separate trading context for developing countries since the 1970s when it introduced systematic discrimination into the trading system through the Generalized System of Preferences (GSP),²⁸ has long been

²⁷ If we consider the fact that several least developed countries, mainly from Sub-Saharan Africa, have no resident representatives in Geneva, it is hard to believe that they could have had an informed grasp of the intricacies of their WTO obligations when they signed on. The creation of the Advisory Centre on WTO Law (ACWL) at the Seattle ministerial meeting was a step in the right direction, but even taking resource constraints into account part of the responsibility for engaged participation in the Doha Round must come from the members themselves. International NGOs have tried to step into the breach and offered advisory services to the poor countries, but their tactical advice at Cancun has been criticised by some trade professionals.

²⁸ The GATT Contracting Parties first authorized a GSP scheme in 1971 through a 10-year waiver to Article I (most-favoured-nation clause) of

involved with technical assistance to developing countries to help them take advantage of the trading system, and has played an advocacy role on behalf of trade liberalization. Whatever it has done in these regards has not obviously consistently borne fruit.

Notably, it is the small poor developing countries, which in theory should be the major beneficiaries of the rules-based framework provided by the WTO, that account for most of the disappointments in taking advantage of globalization through trade.

Equally notably, the two major trade and development success stories of the past decade or so—China in light manufacturing and India in services—forged their successes either entirely outside the framework of the WTO (China joined only in 2001, long after it had become a major trading nation) or through openings driven by commercial innovation rather than negotiated reduction of protection (India's exports of services through outsourcing did not spring into life due to GATS-driven liberalization and thus are in fact vulnerable to protectionist measures as the backlash against outsourcing builds).

Meanwhile, the expansion of its membership is both testament to the GATT/WTO's success and a complication of its life going forward. According to Hoekman and Kostecki, the governance issues posed by the expanded membership might be among the WTO's greatest challenges: "How the members manage to shift from a 'traders club' to a multilateral organization in which 141-plus countries express their views and defend

the Agreement, in response to a 1968 recommendation made by the United Nations Conference on Trade and Development (UNCTAD). A subsequent decision of the Contracting Parties on 28 November 1979 (26S/203) titled "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", created a permanent waiver. For further background see UNCTAD website. Many analysts today have come to blame the plight of developing countries on the special and differential measures afforded by the multilateral rules, arguing that accepting the full disciplines of GATT/WTO rules would have promoted better performance.

their interest will determine the relevance of the WTO to its poorer countries.”²⁹

Furthermore, past negotiations have left a substantial implementation “overhang” that burdens the current round of negotiations. Developing countries still struggling to comply with obligations undertaken in the Uruguay Round would rather clear the overhang and deal with the simple core issue of market access before embarking on new rules negotiations; this militates against new rules issues making it onto the Doha agenda.

The innovation of the Single Undertaking to close the Uruguay Round has had the probably unanticipated consequence of making the launch of negotiations on new issues more difficult: without an “opt-out” option, members are much more cautious about agreeing to have an issue put on the WTO negotiating table than they were under the previous regime. By the same token, members also need to pay close attention to internal political considerations at an early stage of the bargaining game.

Finally, as some observers have pointed out, the change in form of the regime from an “agreement” in the GATT era to an “organization” in the WTO era—and one tagged with a name that many find distant, opaque and connoting power, and thus ominous—may have something to do with the fact that the WTO has been a lightning rod for protest where the GATT was not. As is often the case, the WTO may in some ways be the victim of its own success. Bearing that thought in mind, we now turn to a more detailed consideration of the pros and cons of including the Singapore four in the Doha Round.

The “Singapore issues” under International Regime Theory

In this section we consider the four issues on an individual basis, in order of probability of advancing in the near term. Handicapped this way, we look at trade facilitation, government procurement, trade and investment and trade competition policy in turn.

²⁹ Hoekman and Kostecki, 2001, p. 385.

In terms of the seven functions of international regime theory discussed above, two are primarily relevant at the level of the overall regime: namely, "lengthening the shadow of the future" and institutionalizing the rules of cooperation and defec-tion. These pertain to the negotiating framework and the en-forcement of rules. The remaining five functions, however, ap-ply at the specific issue level.

Trade Facilitation

Trade facilitation is the least complicated of the Singapore is-sues to fit into an international regime framework.

The preparatory work for negotiations has centred on arti-cles V (Freedom of Transit), VIII (Fees and Formalities Con-nected with Importation and Exportation), and X (Publications and Administration of Trade Regulations) of the 1994 GATT, which address transparency requirements and reducing transac-tions costs by expediting the movement, release and clearance of goods. These are classic roles for an international regime.

In terms of deflecting pressures, the WTO as an interna-tional regime would at best play a minor role on this issue. While an inefficient border does provide some protection for domestic import-competing industries, it is an inefficient form of protection: it simply generates a dead-weight loss on society by raising the costs of trade, as opposed to tariffs that generate revenues for government or quantitative restrictions that create specific rents for particular domestic interests.³⁰ To be sure,

³⁰ Allan Sykes has addressed the issue of "efficient protection" in his paper "*Promoting Efficiency through WTO Rule-making*", presented at the conference *Efficiency, Equity and Legitimacy: The Multilateral Trading Sys-tem at the Millennium*, Center for Business and Government, Harvard Uni-versity, June 1-2, 2000. The idea is that the WTO removes "distortions" from the multilateral system through its preference for fewer instruments of greater transparency and predictability, and for instruments that have fewer and less deleterious welfare effects -- i.e., non-discriminatory tariffs and sub-sidies (which create transfer payments) in lieu of quotas or regulatory restric-tions, which raise rivals' costs and create dead-weight losses through expen-sive compliance procedures.

border controls can be manipulated to provide specific protection (e.g., slowdown of seasonal goods through arbitrary inspections) and thus can generate rents; however, there are no domestic constituencies in favour of the general form of inefficiency.

Conversely, business is exerting substantial pressure on the WTO to act in this area. Organizational and technological advances over the last decades have led to greater specialization and geographic fragmentation of supply chains in production. As a result production inputs can sometimes cross a border several times at different stages of production before reaching their final destination. Delays in crossing national boundaries impose costs on businesses that are part of such integrated production networks,³¹ especially those relying on “just in time” delivery in the post “September 11” era.

Consequently, any agreement leading to improved customs clearance procedures, harmonized tariff nomenclatures, mutual recognition of product standards and/or certification procedures would represent an efficient step in reducing transaction costs. Because of the generally non-controversial nature of improved efficiency at the border, one would not expect governments to have to lean on the WTO in order to push through reforms.

At first blush, accordingly, trade facilitation seems to constitute a “win-win” situation. Yet, current talks on this topic are not sailing as smoothly as one might expect. The perceived inability by developing countries to implement a WTO customs valuation agreement constitutes an impediment to a successful negotiation. Developing countries also “have doubts about the

³¹ M. Doran (1999, “The Simpler Trade Procedures Board” quoted by World Trade Agenda, Geneva) reports that customs-related transaction costs can represent between 2 and 10 percent of a shipment’s value. Case studies in a number of developing countries and transition economies suggest that unofficial payments may raise the marginal tax rate on imported products by more than 25 percent (M. Kostecki, 2000, “DHL Worldwide Express: Providing Just-in-time Services Across Borders in Central and Eastern Europe,” in Y. Aharoni and L Nachum, eds., *The Globalization of Services: Some Implications for Theory and Practice*, New York, Routledge). Both studies cited in Hoekman and Kostecki, 2001, p. 435.

value of accepting additional mandatory obligations on trade facilitation given weak institutional structures, lack of modern communication and information systems, inadequately trained staff, and so forth.”³² At the same time, development advocates question the allocation of scarce public resources to trade facilitation given competing urgent requirements in health, education and social services.

These factors create an opportunity for the WTO as an international regime to play a positive role in moving liberalization forward in the sense that gains to be made from cooperation on regulatory issues create the basis for side payments in the form of technical and capacity building assistance for least-developed countries which face practical implementation problems.

Transparency in Government Procurement

There is little disagreement that transparency in public procurement conveys benefits.³³ Yet, some question the value and the necessity for a multilateral agreement in this rules area.³⁴

³² Hoekman and Kostecki, 2001, p. 440.

³³ Benefits that have identified from a future multilateral agreement on transparency in government procurement: (a) innovation amongst bidders stimulated by enhanced competition; (b) better value-for-money for governments and budget savings from more competitive bidding; (c) stimulus for formation of partnerships between local and foreign suppliers (especially important for developing countries trying to develop their markets); (d) reduced corruption as a welcome side-effect for all; (e) entrenchment of good governance which is essential to economic development; (e) establishment of a minimum set of rules applicable world-wide that would have the effect of introducing legal certainty to existing procurement procedures (f) attraction of more international bidders and foreign investment. See Report (2003) of the Working Group on Transparency in Government Procurement to the General Council. http://docsonline.wto.org/GEN_searchResult.asp

³⁴ Colombia, Peru, Cuba and the Philippines have raised questions in this regard. See World Trade Organization, Working Group on Transparency and Government Procurement – Report on the Meeting of 18 June 2003 – Note by the Secretariat, 7 July 2003 (WT/WGTGP/M/18 para. 20 and para. 22).

The WTO already has a plurilateral agreement involving 28 members on government procurement.³⁵ It contains disciplines on discrimination against foreign products or suppliers in government procurement involving purchases above threshold levels that vary by level of government (with lower thresholds in the case of central governments.). Key provisions concern transparency of laws and tendering procedures, and provisions for challenge of procurement decisions by aggrieved private bidders seeking redress for decisions they believe were made in a manner inconsistent with the rules of the agreement.

The process launched at Doha is quite separate from the GPA. Its scope is limited to transparency, together with development-related objectives, including technical assistance and capacity building; it does not contemplate restrictions on preferential treatment to local suppliers in allocating government acquisitions. However, unlike the GPA, it is to be part of the single undertaking.

There are also questions about how well prepared the ground is on this issue. For example, agreement has yet to be reached on the definition of transparency;³⁶ and views are also divided on the scope of the agreement (goods only or including services and concessions) as well as on its relationship to other WTO agreements and procedures (e.g., several developing

³⁵ The first Agreement on Government Procurement (GPA) was negotiated during the Tokyo Round and entered into force on 1 January 1981. The present GPA, negotiated in the Uruguay Round and taking effect 1 January 1996, expanded coverage 10-fold expansion, including to services (e.g., construction), and to procurement by sub-national government and public agencies (including public utilities). See: World Trade Organization, "Understanding The WTO: The Agreements; Plurilaterals: Government procurement", http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm, accessed April 24, 2004.

³⁶ This is a valid argument considering that many WTO members are hesitant to enter into negotiations without understanding all of its significance. Many of them are still uncertain in regards to the obligations they have negotiated during the Uruguay Round.

countries contend that the agreement should not be subject to domestic review procedures or dispute settlement³⁷).

Considered from the perspective of international regime theory, if the majority view is correct that the benefits would far outweigh the outlays associated with the introduction of transparency regulations for countries that do not have a procurement system,³⁸ negotiations on this issue would set up the possibility of side-payments to change the payoffs of the game: this could be accomplished, for example, through a richer technical assistance and capacity building package. A sufficiently rich offer of side-payments might induce agreement to legally binding provisions which would hasten the realization of benefits in this area.³⁹

However, given the practical implementation concerns of developing countries, international regime theory further suggests that “less” might turn out to be “more” in this negotiation. Given the long-term success of the GATT/WTO as an international regime, and taking account of the neo-structural view of the long-term importance of establishing an initial level of cooperation, however minimal, an initial multilateral agreement of limited scope (e.g., goods only, central governments only, higher threshold values for developing countries) would pave the way for deeper cooperation as time goes on.

³⁷ World Trade Organization, Working Group on Transparency in Government Procurement – Report of the Meeting of 18 June 2003 – Note by the Secretariat, 7 July 2003 (WT/WGTP/M/18 para. 12 and para. 13).

³⁸ This view has been expressed by Canada. See World Trade Organization, Working Group on Transparency in Government Procurement – Report of the Meeting of 18 June 2003 – Note by the Secretariat, 7 July 2003 (WT/WGTP/M/18 para. 32).

³⁹ This is a view expressed succinctly by the Japanese delegation. See World Trade Organization, Working Group on Transparency in Government Procurement – Japan’s View on Transparency in Government Procurement – Communication from Japan, 14 October 2002 (WT/WGTP/W/37).

Trade and Investment

International regime theory confirms the most obvious argument in support of formal discussions on the interface between trade and investment. The large number of bilateral investment treaties that already exist constitute an intricate, uneven and still incomplete set of regulations for international investors. A multilateral agreement (presumably one that goes beyond the minimalist Trade-Related Investment Measures, or TRIMs, agreement reached in the Uruguay Round) could therefore, in principle, reduce transaction costs, both for governments in establishing a seamless set of rules and for businesses in navigating in the resulting environment.⁴⁰

As well, consistent with the function of an international regime to provide information to its members to reduce monitoring and other transaction costs, a fundamental principle of any agreement would presumably be transparency. This in itself does not appear to pose problems of a sort not already encountered and overcome in other fields by the GATT/WTO. For example, the TRIMs agreement already requires mandatory notification of all non-conforming trade-related investment measures and establishes a Committee to monitor the implementation of commitments under the agreement.⁴¹

Nor would there appear to be any particular issues raised by extending the fundamental disciplines of the WTO—national treatment and most favoured nation (MFN) commitments, to-

⁴⁰ The TRIMs agreement provides that no contracting party shall apply any TRIM inconsistent with Articles III (national treatment) and XI (prohibition of quantitative restrictions) of the GATT, and requires elimination of all non-conforming TRIMs within two years for developed countries, within five years for developing and within seven years for least-developed. Included is an illustrative list of TRIMs agreed to be inconsistent with these articles including local content requirements and trade balancing requirements. See World Trade Organization, *Legal texts: the WTO agreements*, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#gproc, accessed April 24, 2004.

⁴¹ Ibid.

gether with binding of policies. The TRIMs agreement and the hundreds of bilateral investment treaties (BITs) that have been signed which typically provide for national treatment are testimony that the basic elements of the GATT/WTO regime can be extended with little or no resistance. Going even just this far and no further with a multilateral agreement might serve the useful purpose of reducing investor uncertainty and thereby reducing risk premia.⁴²

But going any further seems to raise any number of issues.

First, investment rules overlap significantly with the GATS Mode 3: commercial presence. Under this mode of services trade, a service is supplied through the establishment of a commercial organization in a consumer's country of residence. Establishing a commercial presence requires investment. The negotiated commitments under investment would accordingly have to parallel those made in services, which specify actual commitments (positive list approach) rather than making broad commitments and listing exceptions. But since foreign direct investment is almost universally sought after for goods sector production,⁴³ this immediately brings into question the value

⁴² See J. Francois, 1997, "External Bindings and the Credibility of Reforms, in A. Galal and B. Hoekman, *Regional Partners in Global Markets*, London, Centre for Economic Policy Research, and R. Fernandez and J. Portes, 1998, "Return to Regionalism: An Analysis of the Nontraditional Gains from Regional Trade Agreements," *World Bank Economic Review*, Vol. 12, pp. 197-220.

⁴³ For example, nations engage in policies such as tax competition to attract foreign direct investments (FDI)—while this can create positive externalities such as technological spillovers for local firms, it can have negative spillovers on other countries and result in excessive payment to the investor leading to an inefficient outcome for the world as a whole. See Theodore Moran, 1998, *Foreign Direct Investment and Development*, Washington, DC, Institute for International Economics. Also see B. Aitken and A. Harrison, 1999, "Do Domestic Firms Benefit from Foreign Direct Investment?" *American Economic Review*, Vol. 89, No 3, pp. 605-18, and K. Saggi, 2000, "Trade, Foreign Direct Investment, and International Technology Transfer: A Survey," Policy Research Working Paper No 2349, Washington, DC, World Bank. The problem here is not prying open markets, but rather establishing disciplines on "beggar thy neighbour" behaviour—i.e., obtaining

added of an investment agreement if the main area where it would have a liberalizing effect is in services, which is already being addressed under the GATS.

Second, to reduce transactions costs significantly, a multi-lateral agreement would have to supplant the current patchy mosaic with, in Sylvia Ostry's words, "a more uniform set of rules with broader application, and particularly rules that will limit the frequent exclusions taken in investment treaties for 'domestic laws, regulations, and policies.'"⁴⁴ And the last bit of that quote represents of course the can of worms that has made an agreement on investment so difficult: investment touches on a plethora of domestic laws, regulations and policies. To drill down beyond national treatment and MFN is to almost immediately hit a nerve—or several. For example, investment touches on property rights: any intrusion of an international rule into domestic law in this area where the status quo invariably reflects a finely tuned balance between individual, corporate and state interests is an intrusion into a minefield, as illustrated by controversies that have been raised in respect of NAFTA Chapter 11 which provides recourse to the courts for changes in government policies unavailable to domestic investors.⁴⁵

agreement on what type of incentives should be permitted and what types constrained. This is a potential minefield for international rules since the harsh realities of economic geography (where the "core" is a privileged recipient of FDI compared to the "fringe") lead to unequal results when equal rules are applied (to paraphrase Amartya Sen). The significance of this issue has been questioned: political stability, labour costs, and a strong infrastructure have been found more likely to attract FDI. See D. Wheeler and A. Mody, 1992, "International Investment Location Decisions: The Case of US Firms," *Journal of International Economics*, Vol. 33, pp. 57-76.

⁴⁴ Ostry, 1997, p. 218.

⁴⁵ This issue has been front and centre for the various non-governmental organizations, largely environment and development-oriented, that have opposed negotiating investment rules going back to the protests against the OECD-sponsored initiative for a multilateral agreement on investment (MAI). These groups worry that an agreement would give "investors too much scope to oppose and circumvent governments' regulation aimed at social or environmental objectives through provisions on investors-

This highlights the risks that would be encountered by having investment as part of an international regime. Regimes facilitate issue linkage, which in this instance would allow concessions in other areas to provide leverage for movement on investment rules.⁴⁶ But unlike the situation with tariff cutting, the trade-offs might not always be between competing commercial interests but between commercial interests and issues that particular societies have chosen to leave outside the commercial realm. Succinctly put, the core concern of those “outside the fences,”⁴⁷ is not that the WTO agreements will open up markets where they already exist, but that they will introduce markets where they do not exist. The remaining feature of an international regime to discuss in this connection, namely its capacity to deflect domestic lobby pressures, may not actually deflect pressures in this type of circumstance but simply arouse a storm of protest aimed at the WTO.

State dispute resolutions." See Hoekman and Kostecki, 2001, p. 424. See also S. Kobrin, 1998, "The MAI and the Clash of Globalization," *Foreign Policy*, Vol. 112, pp. 97-109, and Mark Vallianatos et al., *License to Loot: The MAI and How to Stop It*, Washington, DC, Friends of the Earth. [<http://www.foe.org/res/pubs/pdf/loot.pdf>].

⁴⁶ This is even hinted at in the name of the working group, which is not ‘investment liberalisation,’ but ‘relationship between trade and investment.’ By creating linkages between trade and investment policies, national leaders could promote a liberal agenda by “tying their hands” to an international agreement. Specifically, “an agreement can be a valuable tool for governments that are hostage to local incumbents that oppose foreign entry by being part of a ‘grand bargain’. As FDI and trade are increasingly two sides of the same coin, rules should focus on the full set of policies that affect actors’ decisions – both trade and investment-related regulations." Hoekman and Kostecki, 2001, p. 420.

⁴⁷ To borrow a term popularized by Naomi Klein to depict protesters who advocate an alternative vision of globalization. See Naomi Klein, 2002, *Fences and Windows: Dispatches from the Front Lines of the Globalization Debate*, New York, Picador USA.

Trade and Competition Policy

Competition policy would appear to be the fourth seed amongst the Singapore four, being the least advanced in terms of achieving consensus on scope and having all the intrusiveness of investment without the major offsetting attraction of larger FDI inflows which an investment agreement implicitly promises--the benefits flowing from enhanced competition are with rare exceptions⁴⁸ diffuse, long-term in nature and hard to directly attribute to specific instruments or policy interventions.

Competition policy is far from new to the WTO: several existing agreements already contain related provisions including the Trade-Related Investment Measures (TRIMs), the Trade-Related Intellectual Property Rights (TRIPs), the GATS and the Telecommunications Reference Paper. Under TRIMs and GATS, members are only obligated, on request, to enter into consultations with a view to eliminate business practices that are deemed to restrict trade. There is no requirement to act, only an obligation to provide information.

To go further, an agreement on trade and competition would have to establish some points of commonality without going so far as to attempt harmonization of national laws (which has been categorically rejected as an objective of the exercise⁴⁹). The work has thus aimed to establish "a set of prin-

⁴⁸ For example, one might see immediately lower prices in the wake of the break-up of a cartel.

⁴⁹ As the Working Group put it in its report to the General Council in 2003, "*..because markets and culture were inseparable, and differed from country to country, ... a multilateral framework on competition policy would have to take cognisance of, and accommodate, a substantial degree of pluralism in national competition policies, especially among developing countries, in addition to other, sometimes more interventionist, policies that existed to support development.*" (emphasis added). See World Trade Organization, "Report (2003) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council", WT/WGTCP/7, 17 July 2003; at para 18; also see para 16. This position is buttressed by theoretical considerations: because of differing social preferences, it is not clear that international harmonization of market regulation will increase welfare.

principles that would embody common values and promote cooperative approaches to competition law enforcement that were in the interest of all Members, while respecting the extensive differences that prevailed in economic and legal circumstances and cultures."⁵⁰ And insofar as the implementation of a competition regime mandated by multilateral obligations would present an administrative burden for developing countries, the additional WTO principles of flexibility and progressivity of frameworks would come into play, supported by technical assistance and capacity building pursuant to commitments made at Doha.⁵¹

Assessing prospects for forward movement is difficult. On the one hand, some delegations have pointed out that their competition laws and/or policies are already consistent with the WTO core principles of non-discrimination, transparency, and due process—which in fact have been described as universal principles of sound governance—without in any way compromising their ability to tailor their legislation to address their own particular circumstances. Indeed, in the deliberations of the Working Group, it has been suggested that developed countries should unilaterally commit to the core principles since most would face few compliance issues.⁵² Yet, in the deliberations of the Working Group, there has been much probing into the operational implications and possible broad ramifications of signing onto such obligations. And the concerns here have not only

According to Hoekman and Kostecki (2001, 415-16), “in contrast to trade policy – where there are clear-cut policy recommendations – when it comes to regulation and market structure there are few hard and fast rules of thumb that governments can rely on to ensure that agreements enhance welfare. In part, this is because different interests are affected when it comes to regulation [...]. *Preferences across societies will differ across countries depending on local circumstances, tastes, and conditions.*” (emphasis added).

⁵⁰ World Trade Organization, "Report (2003) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council", op cit.; at para 16.

⁵¹ Ibid, at para 21.

⁵² Ibid. at para 22.

the developing countries cautious of taking on administrative obligations that would be costly or otherwise burdensome. The US, for example, has sought clarification of the meaning of "transparency" in terms of reporting requirements in respect of the hundreds of relevant cases each year at all levels of the federal judiciary.⁵³ Common law countries have questioned the interpretation of the non-discrimination principle in their context where "the 'law' consisted of both statutes written in broad language and judicial decisions interpreting such statutes?"⁵⁴

The difficulty in achieving consensus on this issue, despite every evidence of serious engagement and informed debate within the Working Group (not to mention within the OECD which has been grappling with this issue for many years), would appear to reflect in part the myriad issues raised by the general intrusiveness of international rules (in this area or others) and in part by the complexity of the subject matter in this particular area which in turn reflects the non-specificity of the concept of competition policy.

While the problem of intrusiveness is perhaps best illustrated by the sheer number of detailed concerns raised by different parties, one example suffices to bring out the difficulty of establishing even an apparently universal principle such as "fair and equitable procedure": As the working Group has acknowledged, ".. this was a particularly difficult subject area because notions of fundamental fairness in the context of law enforcement disciplines such as competition law differed across legal systems."⁵⁵ Some of the questions raised in the Working Group about the interpretation of procedural fairness have included the following: Would rights extend solely to those subject to adverse decisions? Would third-parties have rights in some cases? Would a right to appeal administrative decisions by competition authorities include the review of decisions not to pursue complaints?

⁵³ Ibid. at para. 23.

⁵⁴ Ibid. at para. 29.

⁵⁵ Ibid. at para. 35.

In the particular case of competition policy, these problems are compounded by the uncertainty about scope. A narrow interpretation of the relationship between trade and competition policy would limit the focus to competition laws; these typically include provisions against anti-competitive market behaviour (e.g., abuse of dominant market position and collusive practices such as cartels) and anti-trust provisions applying in respect of mergers and acquisitions. A broader interpretation would include “the set of measures and instruments used by governments that determine the conditions of competition that reign on their markets.”⁵⁶ These could, for example, include privatization of state-owned enterprises (SOEs), deregulation of markets, and controls on subsidy programs. Many of the issues raised in the Working Group's deliberations are with the ramifications for areas such as industrial policy (e.g., that the non-discrimination principle not somehow reach into policies to nurture development). The responses in the Working Group to these kind of concerns include pointing to the ability to list exceptions and also to a distinction between *de jure* and *de facto* violations of the non-discrimination principle: only the former would be addressed in the proposed multilateral framework, because, addressing *de facto* instances of discrimination could introduce “a host of problems.”⁵⁷ At the same time, reflecting the usual point of the devil being in the detail, the Working Group noted “As to the concerns expressed regarding how the distinction between *de jure* and *de facto* violations would work in practice, the point was made that it was difficult or impossible to provide definitive answers to the kinds of detailed questions which had been

⁵⁶ Hoekman and Kostecki, 2002, p. 425. In the context of the discussion in the Working Group, it has been pointed out that eschewing to enact a competition *law*, which small, very open economies such as Hong Kong have chosen to do, is not the same as not having a competition *policy*.

⁵⁷ World Trade Organization, “Report (2003) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council”, *op cit.*; at para 26.

posed concerning a prospective legal text before a negotiation had begun."⁵⁸

These sorts of issues are not new, of course, in the WTO, having already been breached in the context of previous agreements (e.g., the GATS) without forcing harmonization of laws. What then might international regime theory have to say about the prospects for progress in this area?

First, it might be noted that the sustained process of discussion of this issue since the formation of the Working Group following the Singapore WTO Ministerial is itself an illustration of the way the WTO as an international regime is promoting cooperation. Discussion and sharing of experiences is after all a preliminary form of cooperation.

Secondly, as the exchange of information within the Working Group has served to highlight, the Nordic countries have recently provided a quintessential example of progressive international cooperation in this subject area. Cooperation among the Nordic competition authorities started in the late 1970s/early 1980s with biannual meetings of the heads of the national competition authorities simply to discuss topics of mutual concern. This led to the establishment in 1998 of a committee to propose ways to deepen cooperation. In 2000 the parties adopted non-binding guidelines regarding the exchange of non-confidential information and co-ordination in carrying out investigations, including making so-called "dawn raids" on each other's behalf. Pursuant to these initiatives, practical cooperation has in fact deepened, with information exchange and co-ordination of investigations having become routine in all impor-

⁵⁸ Ibid. at para 31. It was also pointed out in the Working Group's deliberations that, to the extent compliance with the WTO regime in respect of, say, the hard-core cartel issue were tested under the dispute settlement mechanism, it would be the presence on the statutes of the country of a law against such cartels, not whether the law was being enforced, that could be the basis of a complaint. Insofar as the WTO obligations were enforceable, peer pressure aside, it would be through the DSU.

tant competition cases, with positive results, particularly with respect to hardcore cartel cases.⁵⁹

This experience illustrates the importance that IRT attaches to establishing a minimal extent of cooperation as the basis for deeper cooperation as mutual trust is built through repeated exchanges. The Nordic experience also illustrates the importance of even apparently shallow forms of cooperation (e.g., exchange of non-confidential information) and patience with gradual progress. Considered in this light, and considering the diversity of the WTO's membership compared to the Nordic community, the WTO's progress on this issue since the Singapore Ministerial might well be judged to be very good.

IRT also suggests that the approach being mooted with the Working Group is sound: proactive engagement by developed countries would "entice developing countries to willingly join the multilateral competition structure, and establish the foundation for regional cooperation."⁶⁰ This is but a successful regime expanding by demonstrating its value.

Such gradual accretion of members would be supported by technical assistance and capacity building, illustrating again the capacity of the WTO regime to alter the payoff of a game.

One standard function of an international regime would have to be used carefully since in some cases it would appear to be in distinctly counter-productive, namely the use of the WTO to deflect domestic pressures. Insofar as the WTO were leaned on to take action against injurious anti-competitive practices in the domestic sphere, this would be consistent with the standard benefit of an international regime. However, if the WTO were used to justify introduction of competition laws in the face of competing objectives in the social domain, it would be open to criticism that might be difficult to answer given the difficulty of making tradeoffs between social and economic objectives. As Hoekman and Kostecki note: "while governments may seek to agree on common regulatory principles to govern behavior of

⁵⁹ Ibid. at para 63.

⁶⁰ Ibid. at para 75.

public entities or restrict the use of domestic policies, this is best done directly and should not be made a precondition for trade liberalization.”⁶¹

Overall, the promotion of international cooperation in the field of competition policy can benefit through a WTO initiative to address the interface between trade and competition policy. The caveat is that patience is likely to be especially important in this domain.

Conclusion

Five major conclusions emerge from consideration of the Singapore issues through the lens of international regime theory.

First, the WTO is in many ways the quintessential international regime; the introduction of the Singapore issues onto its agenda is in many ways a reflection of its past success.

Second, the WTO is well placed as an international regime to promote international cooperation in the subject areas addressed by these issues. Many of the functions of an international regime lend themselves well to building cooperation in respect of each.

Third, insofar as IRT emphasizes the importance of small beginnings, patient confidence building through shallow forms of cooperation such as information exchange, and gradual deepening of cooperation, it is premature to declare failure on the Singapore issues because a formal launch was not agreed at Cancún; indeed, to do so would be to completely overlook the cooperation that is already "in the bank" in the form of the deliberations of the Working Groups since their inception following the Singapore Ministerial.

Fourth, insofar as these issues are to be advanced through linkage to other issues, it is not at all evident that being bundled together was an asset; the effective unbundling of these issues at Cancún may therefore represent an important positive develop-

⁶¹ Hoekman and Kostecki, 2001, p. 453.

ment in terms of allowing each to be linked into trade-offs with other issues on its own merits.

Fifth, seen through an IRT lens, the Singapore four are quite different in terms of the problems that must be overcome to build cooperation. There is no good reason to believe that each of these issues has the same "gestation period" in terms of confidence building before being ready to move to the stage of formal obligations. Accordingly, there was no inherent reason to expect that they could be advanced in lockstep. By the same token, the differentiated timetable going forward that was implicit in the compromise proposal put forward at Cancún by the facilitator for the issues represents a positive development in moving towards a process better suited to each.

Launching formal negotiation on some or all of the Singapore issues at the Cancún would have reinforced the WTO regime, held out the promise of early benefits for WTO members individually and the global economy as a whole, and hastened a deepening of multilateral cooperation that is likely to prove inevitable in the longer run. At the same time, inclusion of these issues in an inadequately prepared form on the Doha Development Agenda as a bundled group subject to the single undertaking would have carried its own risk for a timely completion of the round.

So to answer the question in the title of this chapter: should we be cheering for the demise of the Singapore issues? The answer to which the analysis above leads is rather that we should cheer for the liberation of the Singapore four from a bundling that was probably unsustainable and that could have constituted a poison pill for the Doha Development Agenda. Each can now be considered on its own merits and allowed to mature at its own pace. The very real record of international cooperation achieved since the Singapore Ministerial is the main payoff to the 1996 initiative. None of that was lost at Cancún ; it serves as the base from which to move forward.

