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Trade Liberalization and Dangerous Political Games

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Jorge B. Riaboi

Abstract

I will start this Essay by saying that it is fundamentally misleading to assume that the disagreement over the shape and content of the agenda for the World Trade Organization's ("WTO") negotiations that broke-up the Seattle's Conference is either the only or the real stumbling block to maintain the pace of trade liberalization. It also is misleading to assume that the present business as usual look that has prevailed since February 2000 in Geneva, means that the substantive problems are over and that everything is just fine. In my view, we face other kinds of conflicts. The first is the strong competitive reforms that should be implemented in an important number of Members of the System. The second is the existing political obstacles to putting together an acceptable comprehensive agenda of negotiations. The third is the lack of political will to rethink the present state of play to overcome these fundamental problems without weakening or neglecting WTO's genuine role.

TRADE LIBERALIZATION AND DANGEROUS POLITICAL GAMES

*Jorge B. Riaboi**

Men and nations will act rationally (only) when all other possibilities have been exhausted.

—Murphy's Law

INTRODUCTION

In May 1999, while entering the U.S. Congress to deliver a speech, I was caught off-guard by an unexpected remark that came from behind. "Hey Jorge, are you still fighting for agriculture's trade liberalization?" The voice belonged to Richard Schroeter, an excellent friend and a former outstanding U.S. Department of Agriculture negotiator during the Uruguay Round. "Yes Rich," was my instinctive, perhaps defensive reaction after greeting him, "I am still underground."

Our comments were, indeed, both a bitter and a serious assessment of the state of play in the multilateral trading system ("MTS"). In my view, they also reflected the skeptical mood prevailing in most World Trade Organization¹ ("WTO") Members, in particular the vast majority of the countries in the Organisation for Economic Cooperation and Development ("OECD"), on the extent and possibility of furthering the multilateral trade liberalization process. This sentiment has gone beyond the limited concept of lost momentum that would only have supposed a temporary crisis over an issue or a negotiation. We had these kinds of setbacks before and the system emerged stronger every time.

Today the picture looks different and this Essay is an invitation to review some facts from a broader and pragmatic perspective. In some ways, the allergy to liberalization has been flourish-

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1. Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

ing over the last few years and certainly it was there long before Seattle's WTO Ministerial Conference (or "Conference"). It affected the reactions of most governments attending that Conference, regardless of their national export interests and import sensitivities. At the meeting itself, the sentiment of lost momentum was clear in the actual decisions and body language expressed by some key WTO partners, actions that were in notorious contrast to official statements about their support for trade liberalization.

Therefore, I will start this Essay by saying that it is fundamentally misleading to assume that the disagreement over the shape and content of the agenda for the WTO's negotiations that broke-up the Seattle's Conference is either the only or the real stumbling block to maintain the pace of trade liberalization. Otherwise the solution would have been a rather simple management issue and a compromise might have been reached very quickly.

It also is misleading to assume that the present business as usual look that has prevailed since February 2000 in Geneva, means that the substantive problems are over and that everything is just fine. There is a big difference between shuffling papers and making progress. In my view, we face other kinds of conflicts. The first is the strong competitive reforms that should be implemented in an important number of Members of the System. Many of them have not made the necessary structural adjustments to address the threat posed by low-cost foreign suppliers that are exporting in full compliance with the present WTO rules. While the relevant economic sectors could be considered competitive under the set of relative prices and other market conditions prevailing in the majority of OECD members and some emerging economies, they are completely unable to meet the challenges posed by low-cost producing suppliers from the rest of the world. This fundamental contradiction between socio-economic realities, the ability to compete and the multilateral obligations could explain many of the trade and economic distorting proposals tabled by main partners of the MTS and also the public or silent backing of others.

The second is the existing political obstacles to putting together an acceptable comprehensive agenda of negotiations. The third is the lack of political will to rethink the present state of play to overcome these fundamental problems without weak-

ening or neglecting WTO's genuine role. Governments are yielding to domestic pressures that are requesting a non-trade agenda that is alien to the system and also may destroy its effectiveness. So, in fact we are witnessing a not very orderly effort to provide an acceptable political reply to some of these and other controversial questions.

I. *IMPORTANT QUESTIONS*

Is the WTO a useful tool or a problem for the richest countries of the world? If it is a problem, how far and for how long are those countries going to pretend that they have a real interest in retaining the present version of the MTS with or without the enlarged non-trade agenda conceived to appease their protectionist constituencies?

A. *Some Core Problems of the WTO's Main Partners*

Leaving aside, for arguments sake, the political issues involved, which will be taken-up below, it is self-evident that the WTO's main partners and other high-cost producers are facing at least three core problems for which they do not have clear and efficient answers.

1. *New Negotiations and Obsolete Protectionist Policies*

First, it is evident that the new negotiations must deal with sensitive issues like the deepening of the agricultural reform process, a requirement for freer competition, which brings into question the validity of the traditional model adopted by societies that claim the right to preserve their domestic sectors isolated from the conditions prevailing in the international markets. The results of the Uruguay Round did not touch, up to now, any structural feature of that model, but this coffee break could be over in the next negotiations. For these countries or regions, the WTO's contractual obligations to reduce protection and subsidies that might arise from future disciplines and the simultaneous participation of more and new unpredictable competitive players in this sector is a problem, a risky straitjacket, not a promising trend. How can they fulfill its mainly political pledge of being good citizens of the world and the System and, at the same time, retain their current policies as they are stated

in the Agenda 2000² or in Japan's new agricultural policy for example?

2. Incompatible Economies

Second, the existing relative prices, intellectual resources and economic organizations of rich societies are not, at this juncture, efficient tools to face the real competition posed by non-agricultural goods and services that come from low-cost producing countries and non-market economies (Economies in Transition) of Asia, Eastern Europe, and potentially other regions of the world. Under the stringent rules of the MTS, there are no efficient trade remedies to keep these products out of their markets, much less if this has to be done under improved new rules a few years from now.

In addition, there is also a neglected problem of incompatible economic systems and trade organizations (like the prevailing influence and incidence of State Trading Enterprises, their rules and practices) that will obviously survive for a medium and crucial term yet to come, which poses important questions that require immediate and non-rhetorical answers. The dimension of the problems involved can be observed in the case of the United States. Despite its dramatic increase in productivity over the last ten years, it has not been able to solve, fortunately for the rest of the world and its economic growth, the dramatic and constant increase of its trade deficit. The sudden shock of awareness and concern became evident in the WTO, very late in the process, while discussing competition rules to be applied to China. The arbitrary way of reacting by many Members of the System to the low-price imports coming from Russia and other prospective WTO Members confirms that there is a big unsettling issue before us.

3. Lack of Consensus

Third, the WTO has not even been able to reach consensus to cover key traditional and new high technology sectors, such as electronic commerce, air and water transportation, or to find good solutions for large economic activities like government procurement. These are sectors able to mobilize strong lobby

2. Berlin European Council, *Presidency Conclusions* (Mar. 24-25, 1999), available at http://www.europarl.eu.int/summits/ber1_en.ntm.

efforts in developed countries and yet face some hesitation and doubts in some developing nations.

B. *Need for Change?*

What changes and decisions are needed, if any, to incorporate the high profile and politically influential acceding countries with non-market economies to the actual WTO chain of command and its decision-making process once they become Members? Is it realistic to assume that they will accept as a mandatory reference most of the outcome of Quad³ meetings in the corridors, like the rest of the present WTO membership?

1. Domestic Social Concerns

Can the WTO survive as a useful tool if domestically unresolved social conflicts are exported to Geneva? Some of these issues are tailor made for international marketing purposes such as the discussions on environment, labor standards, civil society participation, transparency, and human rights or incredible intellectual creations (or should I say provocations) such as rules on animal welfare and food quality. To be precise, does anyone think that the actual competition problems that are being faced and hidden by key OECD members, can be overcome by using these issues to distort the traditional main goals of the MTS?⁴

2. Anti-WTO Demonstrations

How can the regular Ministerial Conferences be held constructively, at least every two years, as it is presently mandatory under the Marrakesh Agreement, if the attention will be artificially diverted towards what happens in the streets rather than to striking compromises in the negotiating rooms? How many Members will offer their cities to host this display of high-tech,

3. Canada, Japan, European Union, and the United States.

4. This does not imply a wish to ignore the need of dynamic adjustments of the agenda, including the introduction of new issues in the WTO that are compatible with the goal of consolidating the disciplines and market access concessions that represent the main assets of the system.

It goes without saying, that these intended rhetorical questions are not a tricky attempt to oversimplify or ignore the genuine problems of unrest or existing domestic social pressures. The idea is just to underline the weak political will that exists to deal with these problems in their real domestic perspective and the remarkable favorite option adopted by many Governments of sending these society debates to the outside world.

highly funded, and “officially tolerated” or “sympathetically treated” set of disturbances? Which are the ideas that could provide a methodological approach to get a constructive negotiating agenda and the simultaneous consolidation of the MTS?

II. *POLITICIZATION AND EFFECTIVENESS OF THE SYSTEM*

The liberalization allergy has many origins and also has been with us for some time now. Not being able to openly admit in the international arena the extensive support given to their political domestic movements, the preachers of this doctrine came to realize that after many years and efforts invested in a strong defense of unsound trade technical arguments the mere repetition of that strategy based in hiding things under the carpet would not easily fly in the framework of WTO's mandatory new negotiations. Added to it, they also have noted that real competition problems reflected in the structural unemployment faced by some European OECD countries, notably neither the United States nor Canada in the last years, generated extra complications to the new strategy envisaged at the time of the discussions held on the Agenda 2000 in the European Union.⁵ Similar discussions and decisions were adopted in Japan, Korea, Norway, Switzerland, and other countries, many of them linked to ancient cultural perceptions or prejudices. Except the United States, most other OECD countries do not have a persistent trade deficit. On the contrary, some of them are enjoying enormous trade “wins” in the last five years or so.

No wonder then, long before the timing of my Washington lecture it was possible to witness a combination of fear and political pressures on the mandatory negotiations that resulted in a creative spree of “new concepts.” They included protectionist-friendly ideas such as “globalphobia,” the Millennium Round, the rephrasing of the concept of agriculture's multifunctionality already present in Environmental Agreements and FAO declarations, animal welfare, food-quality, the toying with confusing or confused proposals on rules of origin, competition rules for agriculture, a big push on selected rules for environment, everything added late in the process to the mostly invented non-trade concerns, a horizontal push for incorporating everywhere, the pre-

5. A picture that will become even more complicated by the incorporation of 13 to 15 new Eastern European members.

cautionary principle (as part of the policies to “take care of consumer concerns”), and other similar pieces of “modern art.”

This puzzle was aimed at aborting, or at least smoothing, any serious attempt at lowering import protection and subsidies in agriculture and, in a way, reducing selectively the speed of liberalization in many other sensitive sectors of the System as well. Deliberations held at WTO’s Committee on Agriculture in the context of the process of Analysis and Information Exchange on many of these issues only confirmed previous impressions about the actual goals and architecture of this approach.

Recently, in September 2000, Commissioner Pascal Lamy went conceptually farther in presenting this European extravaganza, when he was trying to sell the idea that tariff protection in the European Union is not that bad or high⁶

Deliberately, for the reasons expressed below, I am not going to invest time or space discussing the actual technical content of proposals that might give a constructive first impression (this must be left for the negotiating process itself), because they should be partly identified, in my view, with the same approach that derailed Seattle and could have similar effects in future decisions. For example, while it is very positive to see the European Union’s decision binding—the WTO tariff-free concessions granted to its former African, Caribbean, and Pacific (“ACP”) colonies (considered to be least developed countries) as a token of good will in the context of a dynamic broad market access approach—a second reading could indicate that the net effect of that move is relatively symbolic.⁷ Most of this package only represents a legal reaffirmation of the existing trade status originated in political commitments acquired a long time ago by some of the Communities Member States. An equivalent decision taken by other WTO Members could mean, in turn, the

6. For a regional agreement that has, according to an inaccurate OECD estimation, elaborated not taking into account the implication of its entry price regulations, an average level of protection for its main 600 trade agriculture sectors which oscillates between 50%-60%, depending on if we are discussing plain Most Favored Nation tariffs or in quotas tariffs, in which there are several key tariffs peaks exceeding *ad valorem* equivalents of more than 100% or 200%, that comment represents a curious understatement about the Community’s “achievements” in the area of trade protection. See OECD, Review of Tariffs and Non-Tariff Barriers Tariff Regimes of the Quad Countries, TD/TC(97)11/REV1 (2-11-98).

7. This is contained in the E.U.’s “Everything but Arms Proposal” tabled at the WTO.

need for dealing with possible sensitive issues (of the kind already raised by some developing countries highly dependent of their trade relations with the European Union).

The Millennium Round proposal also was seen, at the beginning, as a flawless initiative to assure active participation by all WTO Members in the new negotiations. Before assessing Sir Leon Brittan's approach and the elements attached to it along the way, his proposal attracted rather firm support of key Members except the United States and Canada. Some Members were so enthusiastic about it that they even created an informal supporting group called Friends of the Round.

They shared the idea of pushing for a comprehensive approach aimed at having food to feed all of the WTO's trade appetites in order to achieve a constructive and sincere involvement of its whole membership. However, this group did not want to associate itself with a tactical instrument aimed at introducing a little bit more than horizontal cosmetic progress on every single issue regardless of its trade value or effects or to avoid making actual headway in particular sectors. At a certain point in time they read the European strategy as a way to mitigate the impact, as much as possible, of the differential liberalization efforts needed in economic activities that were lagging behind in the System (such as agriculture and textiles). Most Friends of the Round did not want to use this approach as a political instrument to corner further the United States and others that retreated from its expected liberalization push in Geneva. There was no advantage for the System in singling out that the United States has decided to preserve itself as an aggressive leading trader, but it was, and still seems to be, not so excited in preserving its role as a trade leader. I also still do believe, however, that a comprehensive, relatively short and realistic agenda of negotiations is a way to regain the strength of the System.

In the last few years, the so-called "globalphobia" sentiment also has been employed by some parties as a politically tinted excuse to pollute the substance of the entire WTO negotiations. It is true, that so far the globalization process has not yielded even results, or a sense of progress to all countries and regions of the world. But nobody could expect that the increasingly interconnected global village called the world would become anything more than the factual data of a new trade setting that brought different opportunities and some severe problems. The

real answers to this challenge are found in instrumenting a balance, comprehensive and deep liberalization process as a whole, a vision that clashes with the notion of just having a selective, self-centered choice of sectors that favor the economic growth model of some societies and close the reasonable options for the economic models of other societies. Only a rational convergence of the two, based on a market-oriented approach and applicable disciplines, will do the trick.

“Is globalization a good thing?” asked Commissioner Lamy.⁸ “Yes, if steered in the right direction,” he answered himself. “This is becoming ever more important: unfettered, unharassed, unsteered globalization could become a high speed, heavily loaded truck careening down a slippery mountain road.” And he added, “[E]ven within the comfortable western society, globalization risks fuelling the sense of powerlessness and insecurity, the disenchantment with the world that is becoming so evident.”

The message sent by this preaching has been, “yes we believe in the virtues of trade liberalization and abstinence, but abstinence (as trade liberalization) could be regarded as a virtue only if practiced in moderation.” (And when practiced by others, perhaps?)

So, this feeling and some other unclear artificial confrontations disguised as new demands of particular constituencies rejected by the majority of Members of the MTS were used as devices that might have the effect of freezing the System’s efficiency. Readers not familiarized with the WTO should remember that a majority is seldom a useful instrument, since voting is not well regarded in a System accustomed, for good reasons, to take its decisions by consensus.

The possibility of having a *de facto* freezing of the MTS through an inappropriate agenda is a danger that has to be carefully considered. For politicians living in the WTO’s main partner’s capitals, it may be difficult to grasp the enormous gap that exists between the needs and the perceptions of their societies, and those prevailing in the rest of the membership, in respect of having a strong and efficient System. For the two lesser influen-

8. Pascal Lamy, *Challenges Confronting the World Trade System Today*, First Annual Lecture of the European Affairs Review (Nov. 8, 2000), available at http://europa.eu.int/comm/trade/speeches_articles/spla36_en.htm.

tial Quad members (Japan and Canada), the economic middle powers and the developing constituency, it would become extremely difficult to face the need of dealing in a world deprived from enforceable rules to conduct trade. A world without a strong MTS might host multiple trade, economic, employment, and other conflicts of unknown but extremely important size. Some of those conflicts are already present and expressed in a revival of racist and other social and economic isolationist tendencies.

While the United States and the European Union could manage to survive, not very smartly (how would they create more market space for new technologies in a planet composed of several trade fortresses having the shape of closed individual nations or regional trade agreements?), but comparatively easier in the hypothetical absence of an efficient MTS, basing their expansion and protection trade needs on the simple enforcement of its domestic legislation, this option is a non-starter for the rest of the world. This cannot become the case for nations that do not have that power. For them, the WTO is not an option, but rather the only option to conduct their business without falling into the risk of being injured by the consequences of unilateral trade misconduct or hard slaps in their economic faces.

The sharp difference in trade participation and retaliation power, also marks the different survival capacities at the international market beyond those trade territories that might remain in place and alive within regional trade agreements. It does not require a lot of imagination to understand that the unilateral trade retaliation power of a developing country based on a domestic trade law to defend its interests is a toothless instrument, because its measures could not possibly or earnestly hurt the interests of international offenders. One can only retaliate when prohibiting or punishing trade actions from another party could mean real damage to it. In that sense, international law to conduct trade has no possible substitutes.

Under these circumstances, the frequent informal discussions held between the United States and the European Union after Seattle on the possibility of deciding, both in their individual capacity and on the "involuntary" behalf of the WTO's remaining membership, the incorporation or exclusion of trade interests that belong, in their own right, to any constructive and intelligent agenda that might help launch something similar to a

comprehensive round, has come to be, in practice, a minor point. Until it is clear that the System will get reasonable political backing to stay alive and move ahead, which is very far from what it is, at present, an unquestionable certainty. Only then will the importance of fighting for incorporating these "minor points" to the negotiating agenda be recaptured, since they draw the line between more prosperity and inevitable marginalization of countries which do not influence the numbers of a global table and have scarce possibilities of adjusting at the needed speed their present basket of trade interests.

It must be recalled that the political climate created at the WTO's preparatory work handled in Geneva and the subsequent failure to launch the new negotiations at Seattle were neither a surprise nor an accident. They reflected a tacit understanding that there was no collective interest in making a real effort to overcome an expected collapse. The Third WTO Ministerial Conference also showed, despite most biased guesses, that the result was not linked to one of the usual suspected deal-breakers. While it was possible to strike a very imperfect agreement on terms of reference ("TOR") for the agriculture chapter in the Green Room, that option was not available at the time of discussing the size and TOR for the remaining negotiating package. For once, agriculture could not be blamed for being the brake of the System.

Everybody knew that the proposed Draft Declaration was loaded with implementation issues and several new issues that were bracketed. Most of them were dead on arrival. The level of conflict and the non-existence of momentum were translated into unattainable proposals and counterproposals that merely expressed the political unreadiness of the critical mass of the WTO's membership to strike a deal.

A confirmation that we did not arrive in Seattle under the influence of mysterious or unannounced ghosts is that many of the previously informal discussions showed that the U.S. government, and through it the rest of the System, knew well in advance that Seattle would be neither a celebration party at the Conference rooms nor in the streets. So, no surprises there.

Worse, when Seattle was being prepared, everybody had fresh memories on what went wrong in the previous and Second Ministerial Conference held at WTO's headquarter in Geneva.

Convened under the assumption that it would be a leisurely event, a mere housekeeping meeting and “a photo-opportunity of heads of States and Governments,” the innocent gathering turned to be a messy European style *intifada*. There, the local authorities also knew many months before the meeting that aggressive non-governmental organizations (“NGO”) supporters would invade the city.

By now, there are few doubts on the existence of this standard cycle of “political accidents.” They have become a usual feature in every main international encounter sponsored by leading multilateral institutions dealing with financial, trade, and related matters (WTO, International Monetary Fund, World Bank, etc). To my knowledge it remains unclear how we are going to proceed in searching for a practical solution to deal with those standard “accidents” is unclear.

Aside from this apparent weak political interest in a speedy recovery of momentum to carry forward WTO negotiations and to give a convincing evidence of backing to the MTS, there are other elements that should be added to this concern. I am sure that when the wise Cordell-Hull suggested more than half a century ago the need of having “rules for the road” to conduct world trade, he would not have dreamt of a setting where trade liberalization was to be perceived, more and more, as a growing political and economic burden by a considerable number of governments, including main stream forces of his own country. Nowadays it has become fashionable to say, without blushing, that open markets are not more than a desirable “theory.” We are far away from the days when trade liberalization was seen as a bright opening to expanding economic growth and jobs and one of the useful instruments to preserve the environment.

It doesn't matter if these fashionable assertions could not resist any serious analysis. What has happened in the real world is that in order to fight back the line of thinking or political marketing adopted by people such as Patrick Buchanan, Ross Perot, and other influential trade isolationist minority voices, the leaders of the main political parties in key OECD nations are taking over their groundless approach. So, highly eligible political leaders keep winning electoral battles, but what the societies regard as electoral fiascoes are in fact winning the ideology war. Then, the main casualties of this political game are the world trade liberalization process, economic growth and jobs, the

scope of people's welfare options, and, if history has any meaning, the necessary setting to preserve long-term peace.

It does not matter whether you classify this dangerous political game as half lies or half truths, since this increasingly popular line of thinking reflects the notion of interpreting the "wishes" of national constituencies adopted by political leading classes of those WTO Members in the last six years or so. Such a trend means that, in fact, they are borrowing some of their core positions and selling arguments from NGO consultancy and lobby networks and installing them in Geneva as new preconditions to comply with the existing international trade commitments or to deal with initiatives on further liberalization. Of course, in affluent societies it is irrelevant if these proposals are not consistent with their proclaimed goals and that, in fact, they are only an excuse to artificially protect the competitiveness of rich countries, instead of reflecting an authentic concern for the well being of the real poor, the environment, and for getting real civil society participation around the world. Financial tycoon George Soros has joined that ideological club by proclaiming what he has defined as "The Capitalist Threat."

When applied to agriculture trade liberalization the non-trade concern recipes and other equivalent recipes conceived for stopping the so-called globalized market threat, you get the impression that the only way of handling matters in this sector is to save the isolationist trade approach, by declaring that it is politically sensitive and subject to unavoidable market failures. In fact, when dealing with agriculture, developed countries, not the developing poorest countries, are the ones that in practice apply for the special and differential treatment status (special geographical conditions, developing areas and so-called other historic non-trade concerns, most of them already covered by the generosity by the loopholes permitted by the present "green box" or Annex 2 of the WTO's Agreement on Agriculture).

Any serious economist can easily probe that there is no activity more market-oriented and able to meet the classic requirements of demand and supply laws than agriculture (including due reactions to price signals, almost complete transparency, reasonable atomization of trade entities, standards for food security, etc.). There is no need or factual reason to treat this sector as a black sheep.

During the tactical maneuvering prior to the Third Ministerial Conference, the smartness of the protectionist quarters relied on in creating again an axiomatic framework of sensitivity around agriculture and claiming its role as a main problem in the way of launching a round. They presented the above-mentioned set of “new” ideas, in the form of proposals aimed at twisting the interpretation of straight economic and social facts.

The insistence on pushing for the merger of the multilateral trade disciplines and arbitrary expressions of social demands, under the assumption that the System will only survive if it meets the test of civil society acceptance proposed by developed countries’ NGOs, had no real basis or meaning, but did have an enormous appeal among groups that were not educated in the importance of keeping the WTO alive and strong. Who would be reactionary enough, or politically suicidal, as to challenge that “fair” linkage? “Free trade should not mean a ‘race to the bottom’ whereby investment goes where the environment and labor have little or no protection,” said U.S. Assistant Secretary of State Peter Romero.⁹

A. *Political Support for Linking Trade Liberalization With Social Problems*

As a first element, it should be recognized that this state of play has a high level of support among some world leaders. In Seattle, President Bill Clinton expressed his sympathy for the rioters’ demands before 135 world foreign and trade ministers, but—he clarified—not for their methods. The President of the European Union Commission, Romano Prodi, spoke recently (September, 2000) about the Communities’ four main goals: liberalization, better rules, sustainable development, and “responsiveness to the concerns of civil society.”¹⁰ European Union neighbors like Iceland, Norway, and some Eastern European¹¹ and Asian protectionist countries also align themselves with this position.

9. U.S. Acting Assistant Secretary of State for Western Hemisphere Affairs, Peter F. Romero, Remarks to the Inter-American Businessmen’s Association (Oct. 27, 2000), available at <http://www.usinfo.state.gov/regional/ar/summit/romer27.htm>.

10. Only one and half, out of the four goals, are fully compatible with the WTO’s main role as stated in Articles II:1 and III:2 of the WTO Agreement.

11. At present, many of those countries are negotiating their accession to the European Union.

On the intellectual front, OECD discussions and public declarations have been following the same focus and pattern. Its most influential governments have been pushing there as well, the flags of high profile NGOs as a priority task of this efficient, officially sponsored, "think-tank." Sustainable development, multifunctionality, novel foods, and similar issues have loaded the agenda of its main bodies and working groups. I do recall attending the drafting discussions of an OECD educational document having as a proposed title, "The Advantages of Trade and Investment Liberalization," approved and released in April, 1998, witnessing, to my utter astonishment, that many members of its Trade Committee would question the "objectivity" and wisdom of implying in the title that there were "Advantages in Liberalization." At the same time, it is a well-known fact that the proportion of work related to the non-trade agenda and related matters in OECD reflect the notorious interest in prioritizing these kinds of issues over most other concerns.

A simple mind like mine also has the tendency of bringing representation into question, because it does not seem to be a fair balance between the level of NGOs influence, including the political respect that they have achieved by introducing in society important concerns, and the actual level of public adherence to their implicit way of thinking (I am not implying that political success or support expressed in numbers means always having better or deserved credit). If NGO popularity had been stronger than it really is, instead of being condemned to be both minority movements and small political parties, then their representatives would have become by themselves part of the actual leadership and establishments running the countries. At least this is the way the concept of democracy, widely accepted in our societies, has worked where consultations of civil groups and some other ways of political participation have been ordinary features of this kind of institutional framework.

This odd relation of force between elected public powers and non-elected civil society representation, supposes that the simultaneous right and obligation of governments to contemplate all interests and to exercise the responsibility of balance (you could call that arbitration power), is impaired, in some democratic societies, when dealing with trade matters. Many decision-makers have chosen to export this national debate to Geneva, where there is a great deal of justified rejection and uneasi-

ness about this trend. This option also might clash with the concept of having a MTS based only on intergovernmental interaction.

B. *Emerging Neoprotectionist Mood*

In addition, a stock-taking exercise would show that, in recent years, especially in 2000, most substantive discussions about items of the trade liberalization agenda held in Geneva and elsewhere followed a protectionist-friendly trend. Coexisting with the actions carried out in the WTO, other related negotiations have shown the same pattern and goals. The content and spirit of the approved Biosafety Protocol¹² and the effort displayed by the protectionist headquarters to sell their agenda on “Multifunctionality” and on the “Precautionary Principle” in the FAO (and other international organizations, like the International Labor Organization, UNCTAD, WIPO, etc.) have been an example of investing valuable energies in the wrong cause.

That work has been carefully complemented by a wave of public relations and tactical maneuvers to sell their present strategy conducted by protectionist preachers in Geneva that covered selected countries and regions around the world. That effort has included a clever political overture aimed at splitting strong alliances (e.g., the Cairns Group), through proposals that pick and choose one flower from each garden. The spread of these actions confirms that they are not related to an individual setting or negotiation, but that there is an explicit, well-crafted horizontal policy targeted to get the same result everywhere.

The only piece of good news in this picture is that the WTO began, probably to comply with the existing contractual inertia, the mandated negotiations on agriculture, services, and implementation. Are we on? While it is fair to take into account the introduction of proposals that are better prepared than expected, it still is obvious that the real negotiating process has not yet started.

III. *POLITICAL GAMES*

As it is known, the questions posed in the introductory part

12. The Cartagena Protocol on Biosafety (Feb. 16, 2000), *available at* <http://www.biodiv.org/biosafe/protocol/signing/ist.asp> [hereinafter Biosafety Protocol].

of this Essay, reflect neither the agenda nor the focus prevailing in most regular informal discussions about updating some of the substantive rules and the future WTO's organizational structure.

So far there was no serious attempt to frame these discussions in a long-term view, aimed at evaluating from the perspective of *real politik* what could happen if either the lack of will in consolidating the MTS or, as an equivalent feature, the efforts aimed at seeking to provide an unbalanced weight to the issues contemplated in the non-trade agenda and those that could be labeled as dead wood prevails. This view could affect the previously agreed WTO goals and the negotiating compromises, which have allowed the System to yield excellent results over the last fifty years.

Illustrative examples of dead wood are the proposals on trade and investment that were presented at the WTO after lengthy and detailed negotiations held within the framework of the OECD to approve the Multilateral Agreement on Investing ("MAI"). When the parties involved in that process seemed to be inches apart from striking an important compromise, they decided to call off the whole exercise.¹³

How can anyone expect to reach a sound and timely agreement on investment in a heterogeneous setting like Geneva, when the more homogeneous and smaller membership discussing it in Paris was unable to reach that goal? How can it be acceptable and constructive to include this initiative in the "nothing is agreed until everything is agreed" WTO traditional principle? Only to stretch out the deadline for reaching an agreement in other areas to the end of an eventual comprehensive negotiation? Do Members proposing this initiative ignore this and other facts?¹⁴

13. It should be recalled that both the content of the draft Agreement, and the "telephone book thick" lists of national exceptions, showed that we would not have gotten highly ambitious sectoral disciplines and commitments from some participants in that negotiation.

14. I do give credit though, to members that sincerely believe in the benefits of introducing these kinds of issues. But the point here is not the goals that were submitted, which the main stream of WTO members could sincerely share. The problem is the practical possibility of achieving constructive results without endangering the rest of the negotiating process. A sample of the risks involved are the negligible results obtained from the work done by the *ad hoc* WTO working group, created to deal with this issue after the Singapore's Ministerial Conference, which after four years of effort are still not in a position to show a prospective agreement on terms of reference.

There are several ways of blocking discussions and negotiations under a constructive front. One could be, for example, to declare *urbi et orbi*, the possibility of accepting the elaboration of a comprehensive negotiating agenda without exclusion of issues, when it is evident that some proposals are incompatible with well known and long term records on existing policies and practices already approved by the relevant "constructive" Member or Members.

When observing this pattern of conduct, a trade negotiator usually thinks, with good reason, that those proposals or their standing are not very valuable. They might only have been advanced to play chicken, to shift on to others the responsibility of an expected failure, to reduce from the beginning sectoral ambitions of some Members, or to downgrade the commitments arising from the built in agenda contained in the agreements approved in Marrakesh.

But there is also a risk for the people involved with this type of bargaining tactics. It has been proven by the experience of the General Agreement on Tariffs and Trade¹⁵ ("GATT") and the WTO that there is no agenda item that goes away once incorporated into the main stream of negotiations. Sooner or later there is a price to be paid for that acceptance. Since it looks unrealistic to suppose that the authors of this political bet were irrational, the only reading left is that the present proposals are being tabled with more important second thoughts.

Speaking a little more about tactical matters. One can wonder why some main users of the present antidumping disciplines and charges would be interested in making those provisions more flexible and, therefore, impair its effectiveness as a defense tool against "unfair trade practices." Why would they be interested in approaching the line of proposals submitted by the low-cost and other more competitive producers and exporters on whom their present defensive disciplines are mainly employed? Only to show good systemic behavior? Could be, but it sounds rather unconvincing.

Why some of the main "beneficiaries" of the fading Mul-

15. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

tifibre Arrangement¹⁶ ("MFA") would be interested in discussing an early implementation of the obligations existing in the present Agreement on Textiles and Clothing,¹⁷ when after more than five years of implementation of that agreement they have been rightly and repeatedly accused of doing exactly the opposite by the main exporting countries?

These doubts have never found a coherent answer while consulting the actors of this play. This observation does not obscure the fact that Members can change their views or their situation in the trade scenario. For example, the European Union Commission has the right, these days, to point a finger at the United States as the present top sinner in world agriculture and on several other trade issues. Washington has developed an extended record for (1) its constant increase of farm subsidies over the last three years, which domestically it claims with pride has largely exceeded US\$30,000,000,000, (2) its refusal to negotiate in good faith agricultural export credit disciplines, and (3) its persistent deviation in implementing the Dispute Settlement Body recommendations and other standard WTO obligations.¹⁸

At the same time, the United States has a better record and more objective possibilities to side again with most trade liberalization goals, if their political leadership decides to retake its Uruguay Round position and drive. Unfortunately, for the time being, this remains a more fundamental question than a clear assumption. For doing that, its entire establishment, not only the Administration, who has to deal with the inner contradictions and restrictions of its economic system and trade policies.

It also is fair to say that the rest of WTO's critical mass is not quite that far from the main partners approach. With the exception of Cairns Group and some middle powers that were originally part of the Friends of the Round Group, and in spite of their interest in solving some implementation issues,¹⁹ in practice, most other Members were registering with some relief the

16. Multifibre Arrangement, Formerly the Arrangement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840.

17. See Agreement on Textiles and Clothing, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

18. Such as the Foreign Sales Corporation legislation, its insistence in pushing the so-called Carousel retaliation approach and its network of trade policy distorting measures such as those applied on steel, agriculture, sugar, wheat, Byrd amendment, etc., and other traditional imports.

19. Like the extension of transitional the Trade-Related Investment Measures

course of events in Seattle, and the relatively quiet trend started afterwards. Critical mass of the MTS traditionally has meant an equation composed of those Members who are significant traders or active or influential partners in the negotiation of key sectoral disciplines.

The other element that supports this reflection on the mood that prevails in the System was the generalized indifference and silence registered when it already was certain that it would be daydreaming to launch some form of comprehensive negotiations before the middle, or end, of 2001, due to signs coming from Washington and other main capitals. The weak efforts made by U.S. authorities to get fast-track authority were not the only indication of explicit low priority given by the U.S. administration to the WTO process. Indeed, the real problem is the motive that exists behind this political apathy.

Commissioner Lamy was extremely blunt when he made a forecast:

I still hold the basic proposition that we have to work out our differences with the United States before we can launch [a new round of negotiations]. It may be that 2001 will be a year of diverse coalition building for both of us, and that we will have to come together at a later point.²⁰

Keeping the substantive WTO process as it stands means real trouble for the System. After seeing how the U.S. administration had to reopen a closed deal during Mexico's accession to the North American Free Trade Agreement²¹ ("NAFTA"), and the blurred indications coming from the U.S. political debate, most people in Geneva would not want to discuss any package based on sketchy information about the price of the eventual trade-offs that could be part of a major negotiation. The notion of negotiating twice under defensive conditions, due to the great deal of uncertainty that exists about the size and content of the potential final U.S. mandated shopping list, is not a real attrac-

("TRIMS") exception provisions, textile commitments, preservation of Article 8 of the Agreement on Subsidies, etc.

20. Pascal Lamy, *New Round or No Round: Prospects for Resolving Transatlantic Disputes and Liberalizing Trade*, Address at the Tenth Annual Seminar on Trade and Investment, Wash. D.C. (Nov. 2, 2000), available at <http://www.eurunion.org/news/speeches/2000/001102pl.htm>.

21. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

tion for the rest of the WTO Members. Before Seattle, old timers would explain to new Geneva generations, that there is some history in the first failed attempts of round launchings.²² On that wisdom, let me quote my friend Murphy when he said, "history does not repeat itself, only historians repeat each other."

An illustrative enumeration of problems could help to visualize the implicit logic of some of the points already made. If pleasing civil society activists means to give them Internet access and to try quickly to make documents unrestricted, after their use cannot have unwanted legal consequences or speculative economic effects, as the ones contemplated in the introductory part of the still applicable addendum of Article XXVIII of the General Agreement on Tariffs and Trade 1994²³ ("GATT 1994"), it should be fine. The same applies to increasing the present number of periodic seminars with NGO participation and independent experts, ignoring there the extra load of work that this means on the already heavy and complicated agenda of Geneva's missions. The experience shows that, with few exceptional examples, trade diplomats and the WTO Secretariat have more to give than to take in their relation with outside expertise. But aside from a bad investment of the resource time, there is no harm in crowding the relative small facilities of the William Rappard Building to please this kind of civil society requests. It is only an expensive public relations campaign that should be carried out at home by each government, but at the end of the day these activities might not represent any dramatic breach of the institutional arrangements that must be preserved.

But if civil society participation means that NGO representatives will be authorized to sit behind a trade negotiator when he or she is trying to settle a dispute by striking a particular compromise or to propose a trade-off to get a piece of multilateral disciplines or to define a market access negotiation, kiss the MTS good bye, because everybody would be speaking to their constituencies on the room or back home and not to other trade negotiators. In such a setting, no delegation will agree to compromise for less than the national maximum proposed approach,

22. For example, after an attempt made in 1982, it took another four years to get the Punta del Este mandate for the Uruguay Round negotiations.

23. See General Agreement on Tariffs and Trade 1994, art. XXVIII, Apr. 15, 1994, WTO Agreement, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1184 (1994) [hereinafter GATT 1994].

because nobody in his or her right mind would take the responsibility of looking weak or defeated while being watched or pressured to accomplish unattainable goals.

The same goes for accepting amicus submissions from NGOs in dispute settlement procedures. This could mean a core conceptual breach in WTO rules and an extra load of work for the usually small national teams doing this job, which have been unable to keep on track all the required tasks demanded by the official submissions or rebuttals involved in those procedures. This is on top of the fundamental mistake of influencing WTO panelists with sectoral demands or biased points of view, not final products (like official submissions that are supposed to contemplate the balance of all society interests on the issue at stake) of each Member of this intergovernmental organization. The same goes for having NGOs observing dispute settlement cases or watching the General Council activities.

A. *Trade and the Environment*

Can anyone imagine a trade negotiator agreeing to reasonable trade and environment disciplines while the representatives of the business sector and the local branch of Greenpeace or the World Wildlife Fund for Nature ("WWF") are seated next to each other and him or her at WTO? If not, what is really being pursued when a government tables these kinds of proposals? Is this really an approach envisaged to strengthen the MTS?

For the more active sponsors of trade liberalization initiatives, including some shy supporters from developing countries, the incorporation of disciplines on this broad issue could be easily accepted, provided that you get what is being promised and not (1) a disguised attempt to introduce legal obstacles to the market oriented process of investment localization, (2) a new excuse for preserving legal instruments that could enable higher border protection, more subsidies, and (3) import prohibition disciplines that will further impede market access for legitimate exports, in particular exports of developing countries.²⁴

Without necessarily contradicting my intention of avoiding in this Essay the discussion on particular proposals, it came to my attention the above-mentioned essay made by the European

24. What has been defined as "eco-protectionism" in the words of a European Union new proposal contained in document WT/CTE/W/170.

Union on the relationship between WTO rules and multilateral environmental agreements (“MEAs”). Some concepts of that proposal deserve a mere underlining to understand its goals and approach. For example, the proposal states that unilateral measures “should be avoided,” not prohibited (as it is mandatory under the WTO rules). It claims opposition to “eco-protectionism,” something that has been said all along by many Members. It also repeats the formula of requesting no subordination of both MEAs and *ad hoc*, present and future WTO disciplines to each other, which is an excellent recipe to extend legal limbo and chaos to every issue. Let me side with my friend Terence Stewart who wrote an excellent piece of analysis with David S. Johanson where they said that this formula could give a determined legal hierarchy to the Precautionary Principle as stated in the Protocol, if it becomes part of the Customary International Law through interpretations based on the Vienna Convention.²⁵

The message here is that there is a well-based suspicion, in some developed and in the vast majority of developing countries alike that what the authors of these kinds of proposals really wish has little to do with legitimate claims on environmental preservation. People perceive these efforts as a cost equalization gadget to avoid the shifting of investment flows from high-cost markets to more competitive, and naturally more attractive locations.

In general, most environmental proposals tabled in the WTO don’t even match the standards set by some leading European NGOs, which can be counted among the main advocates on this issue. In the case of agriculture, these organizations have repeatedly pointed out that domestic and export subsidies are clear incentives for the irrational exploitation of already scarce resources like land and fresh water. In addition, some proposals tend to clash, for the same reasons, with the main goals included in the first paragraph of the Preamble of the Marrakech Agreement, which provides:

[E]xanding the production of and trade in good and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with

25. See Terence Stewart & David S. Johanson, *A Nexus on Trade and Environment*, July 2000.

their respective needs and concerns at different levels of economic development.²⁶

Without claiming the role of official interpreter of the Marrakesh text, in a setting where individual interpretation is the name of the game, it is clear that neither the "optimal use of the world's resources" nor sustainable development can be achieved by manipulative trade policy, relying on high border protection, subsidies, and other legal devices allowing the legal overexploitation of resources.

How can we trust that the participants are seeking real environmental answers when their proposals are based on the same approach applied in the effort to introduce at every possible forum the Precautionary Principle, so far present in Article 5(7) of the Agreement on the Application of Sanitary and Phytosanitary Measures²⁷ ("SPS Agreement") and in Articles 1 and 11 of the Biosafety Protocol.²⁸ Do we wish to apply to novel foods the same scientific and political wisdom included in the "Salem Witch Trials"?

All these decisions were conceived to seek the same goal and are part of one strategy. It is the backtracking of the Uruguay Round trade opening aimed at avoiding disguised, non-trade restrictions in the form of sanitary and phytosanitary ("SPS") policies not based on sound, accepted science. The whole idea behind this move is the explicit return to the scientifically groundless, zero-risk approach and the claim that only politicians (in fact their "wise advisers") have the privilege, without mandatorily taking into account the assessments of the scientific community, of deciding what is safe or unsafe for consumers or the environment. Unfortunately, also in the United States, the protectionist backers are winning ground and getting the support of government agencies like the Environmental Protection Agency.

For these and other motives, most WTO Members have seen the attempt to introduce environmental disciplines as an obstacle to liberalizing efforts. The proposals coming from the funda-

26. WTO Agreement pmbl.

27. See Agreement on the Application of Sanitary and Phytosanitary Measures, art. 5(7), Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

28. Biosafety Protocol art. 1, 11.

mentalist, environmental governments speak for themselves. The main objective behind those proposals is the automatic WTO legalization of MEAs that include policies negotiated outside the System's reach, with the dangers involved in that independence.²⁹ In spite of that, I rescue from those proposals the principle that is better to have multilateral rules than a legal vacuum. But not any rules.

B. *Trade and Labor Standards*

More explicit is the existing perceptions on having labor standards in WTO. In Seattle, the United States again received an undisguised rejection of its new attempt to introduce these standards as part of the WTO agenda of negotiations. Its delegation was clearly isolated by the entire Conference, including the few strong allies supporting this request (most of them remained silent). That was not an anti-U.S. sentiment, but an expression of overwhelming exhaustion from what everybody has perceived as a proposal conceived by the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") leadership or by its ghost-writers and advisors and activated for political reasons by the U.S. government to retain, artificially, more jobs in the United States. These proposals are not interpreted as an earnest effort or actual concern for the enforcement of labor rights around the globe (an activity that could be better served by the International Labour Organization ("ILO")).

Everybody knows that labor standards would not resist a round of economic or actual, social policy testing. This kind of proposal is seen as an application of the principle "if I have to pay, you should pay as well" and thus gaps in production costs between countries or regions could narrow or disappear. People also see this proposal as a simultaneous shot aimed at equalizing labor costs to promote the attraction of investments or simply to avoid their relocation to alternative markets.

In fact, the United States has already been building precedents in other trade settings, such as the new version of the Caribbean Basin Initiative and the U.S. Jordan Free Trade Agree-

29. MEA outsiders are not able to play or influence its rules, and the fear of the European Union and other promoters, is that so far these agreement were never challenged in the WTO, but of course this could be easily reversed in the future.

ment,³⁰ where labor standards are part of the requirements that have to be met by the relevant exporters in order to become eligible for U.S. trade preferences.

Some elements explain the skeptic perception of WTO Members and countries trying to accede to it on this issue. First, it is rather odd to say that you support the worldwide application of long-existing ILO conventions but that there is no room in the United States for its ratification. Second, there are no clear explanations on peculiar episodes, such as the U.S. official initiative related to the comprehensive implementation of an ambitious prison labor program to cope with the shortage of labor in its economy.³¹

C. Future WTO Members

Another issue that might be part of the hidden causes of the present MTS standstill is the already mentioned, and not organically debated, implication of the future presence of new powers, which are politically influential, low-cost producers, efficient traders, and still non-market economies expected to get into WTO in the next few months or years. While these incorporations are an extremely welcomed development that enriches and universalizes the MTS, they also demand a methodic understanding of their real implications.

This issue cannot be tackled without covering the existing and future competition rules. Experience gathered in the framework of particular accessions has already shown that there is much work ahead on this process. In addition, among the problems that deserve a hard look are the functions of WTO rules on State Trading Enterprises, which are not exceptional features within many of the acceding economies. Attempts to shed light on this problem have failed in the former GATT and also in the WTO's short life.³² They failed, because many of the present Members, which are also hosting those entities in their market economies and in their Economies in Transition,

30. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct 24, 2000, U.S.-Jordan, available at <http://www.ustr.gov/regions/eu-med/middleeast/US-JordanFTA.shtml>.

31. See Betty Liu, *Prison Inmates Offered the Escape of Work*, FIN. TIMES, Dec. 30, 1999, at 16.

32. The only tools available presently are Article XVII of GATT 1994 and the Understanding on this Article approved in the Uruguay Round and not much more.

thought that the shots were aimed at their windows and not at an honest effort to solve the horizontal need of the System.

The postponement of that discussion will always be regarded, at a future date, as a major institutional mistake. Only a mature reply of all the parties involved in this challenge will avoid a package of sensitive problems and future disrupting mortgages.

A few words on the WTO's institutional reform. The System already has been able to make some progress through informal consultation methods without absorbing the dramatic stand suggested by people who ignore WTO facts (such as the U.N. Secretariat). Other proposals already known on this issue (there were some in the making while this Essay was written), such as having Parliament members incorporated to some structure of the System, resemble ILO's corporative ways and means, forgetting that this could delay the easing of the national bargaining on trade policy.³³ In addition, this has been suggested while ILO looks for the changing of its organizational scheme to recover reliability, deeply weakened by the lack of implementation of the commitments taken by its membership. This does not preclude enhancing national efforts to involve more deeply the Parliament and other expressions of the society in domestic discussions, but that task is a question of national sovereignty. It would be very unwise to decide in Geneva how to handle this kind of domestic affair.

IV. A CONSTRUCTIVE AGENDA

The reason why there is a lack of competitive abilities of most affluent and some emerging countries' socio-economic models in relation to those existing in (artificially or real) low-cost markets does not have an easy answer. Their current, structural, competitive hardships are very difficult to solve under the existing WTO rules. This discussion is very tough, if one does not want to fall into the risk of seeing this approach as an attempt to incorrectly neutralize the competitive advantages of present and future Members. The impression that to solve such types of issues the WTO must prepare crazy replies that would

33. Foreign policy, including trade negotiations, is always the kingdom of executive powers not Parliaments. Therefore, this idea might not become a sample of constructive intelligence for the strengthening of the System.

only mess-up things farther and could undermine, in addition, the effectiveness of the System must be avoided at all costs.

The effort should concentrate in getting political support for changes that can remove critical and perhaps justified fears to its rules without altering the essence and goals of the institution. A settlement of this nature would still require strong adjustments of some traditional trade policies applied by Members, but this would not suppose the termination of economic activities that are able to compete under normal international conditions and market requirements in some countries and regions. Today the quick disappearance of economic sectors is being produced by reasons not totally known while the present WTO disciplines were drafted, like a generalized coexistence of market and all expressions of non-market economies.

Having said that, I suggest that there is before us a two-tier task ahead. One is to rethink the organization, improving its disciplines and the System's market access coverage, to fulfill the needs of a membership structure that is no longer, for good, a rich man's club. And, at the same time, it will be necessary to agree as soon as possible on a comprehensive, realistic, and intelligent negotiating agenda. Both challenges require a tremendous constructive and cooperative drive. That road map should take into account the warning made during a recent briefing for top negotiators by Japan's Viceminister of Foreign Relations, Yoshiji Nogami. He underlined that the present lack of answers given by the MTS has induced the business community to increasingly click-off the WTO from their screens.

A. The Strengthening of the System: Organizational Issues

In the last fifteen years, there were several discussions on getting a more transparent and efficient decision-making process. Those exercises did not succeed because the powers that be were comfortable as they stood. They only got a little nervous with the sudden appearance of the Cairns Group in the Uruguay Round, as a new party that had to be consulted. Cairns was, from the beginning, a different type of animal, less easy to control and very active. But they managed to live with it.

Due to the different size and complexity of the new WTO membership, some people suggested again, in the last few years, the possible creation of some kind of executive board of the na-

ture that operates in multilateral financial institutions, such as the International Monetary Fund, the World Bank, and in regional plurilateral official banks. This is not, broadly speaking, a realistic option for the WTO, because we are dealing with a contractual setting, where each Member has to claim its own rights and respond individually for its obligations. In addition, this would give a different role and more profile to the Secretariat, hardly a welcomed development in this institution.

There does not seem to be room, in principle, for dramatic changes in the global WTO structure to deal with daily monitoring issues, its consultations, and most of its dispute settlement procedures. But I am not that sure that something similar to an Executive Consultation Board³⁴ ("Ecoboard") would not help to discuss new trade initiatives.³⁵ The existence of an open, transparent, non-underground body would relieve the tensions that exist to address better, although not perfectly, the question of main stream participation, follow up, transparency, and orderly knowledge of what goes on in the William Rappard Building of the WTO and other auxiliary places (where the real cooking goes on).

The Ecoboard would have an environmental name and be organized in such a way that its work would be linked to the participation, through consultative building blocks and the provision of written classified information to the whole membership. This informal body would also facilitate the natural incorporation of new comers to the WTO's chain of command without giving the impression that the power management could be tilted only to suit this particular need. As has been said before, some progress already has been made on this issue, but more can and should be done.

The possible existence of more efficient permanent bodies would also question the organizational need of having, only because it is mandatory under the Marrakesh Agreement, frequent Ministerial Conferences (at least every two years) when there is no real substance to convene ministers, or adequate political

34. An approach less arbitrary than the presently manipulative Green Room approach that creates an extreme dependency on the judgment of the people in charge to convene it and organize the play.

35. Like the informal consultations on the launching of a negotiating process, structural changes and other issues not automatically well covered by the present official chain of commands, bodies and informal settings of the System.

timing to hold those conferences. After three of these experiences and in spite of some excitement in the streets and the thrill of not knowing if one is going to reach the meeting rooms, it has to be recognized that this expensive and politically burdensome pastime does not serve very well the System as it is now. Why not have Ministers meet when the menu is ready for their decisions and not before? Why inflate unnecessarily the political exposure, the number of engagements, and the budget of the System? Would that approach not solve, simultaneously, part of the permanent disrupting linkage between WTO decisions and the U.S. political and electoral processes? Would in turn the U.S. leadership be more able to participate constructively in the WTO by making some of its participation less driven by immediate and conflictive national political priorities?

Other issues that must be addressed are the need to preserve the Council on Goods (which most of the time is largely a ceremonial body), the role of the General Council on Trade Policy Review, and the amount of Secretariat resources devoted to it, as well as the extremely burdensome notification and counter notification mechanisms. Also, I am tempted to ask about the role of the Regional Trade Agreements Committee as it stands, but it becomes difficult to recommend an alternative solution to address its present task in any format.

On substance, it seems necessary to assess the *de facto* role assumed by the Appellate Body, which in some cases tends to interpret WTO provisions under a light that differs from the approach than that the Uruguay Round participants negotiated and approved. This unexpected, "almost legislative" outcome may require some thought and a hard look from WTO Members.

B. *Disciplines and Market Access Coverage*

As an attempt to ease the present tensions and to create a more stable and accurate setting, WTO disciplines should be compatible with the present state of the art of fair competition needs. The only instruments of protection should be the level of tariffs bindings and the set of legal, non-tariff measures already present in the System, or their adjusted version and extension if there is a real need to proceed in that way. The same goes for

exceptions covered by the balance of payments, safeguards, and waiver provisions.

Those measures should be improved by recognizing explicit non-market deviations, like those emerging from improper ways of assessing costs, the establishment of political prices, and other operational tools generally available in non-markets and in some market economies. This includes all the activities of State Trading Enterprises, irrespective of the economic system in which they operate, taking into account that those entities usually have exclusive privileges and goals that differ from "commercial considerations"³⁶ and are able to apply policies that could hide subsidization, dumping, improper import mark-ups, and other competition irregularities.

Another issue so far ignored in the WTO's trade policy coverage, which is too biased in favor of the contractual legal side and not enough on the economic realities to which the rules are applied, is the clear influence of sharp swings of the exchange policy over the competitive edge of countries, as is the present case in the relationship between the Euro and the U.S. dollar.³⁷ These sharp movements affect the level of effective import protection envisaged when the tariff was bound in the WTO. For example, by having a *de facto* negative import protection. The same reasoning applies to the applicable rules of some credit disciplines. But there are no legal, short-term, or timely solutions for this case within the WTO. So far, if you are an OECD, an emerging country, or other high-cost economy facing these problems, instead of seeking that kind of solution after exhausting the options coming from increases in productivity, you try to solve this political and socio-economic problem by pushing a package of non-trade concerns, for example. This is not serious nor the way out of a real problem that has been permanently with us.

In 1947, the drafters of GATT foresaw, very generally, this kind of issues (Articles II:3 and XV:4). But there are no efficient legal remedies to it in the WTO Agreement. Of course, I do not think that solutions are easy from the technical point of view, nor can it be justified in any situation related to a lack of com-

36. See WTO Agreement art. XVII.

37. A devaluation of around 29% in a few months is not a marginal problem for trade operations.

petitive abilities different from those mentioned. It is another complex and high priority concern that requires mature thought.

Solving these type of concerns would create some fresh air in the presently available WTO disciplines and procedures aimed at establishing the actual cost and price of trade operations and the existence of inner subsidies and many other practices that are expressions of unfair and unrealistic situations anywhere. It also has to be accepted that people looking for the approval of a broad, non-trade agenda are saying exactly the same thing but looking at solutions that could severely undermine the goals of the System or the System itself. They did not mention these as the real hard choices before us, nor that it would be a tremendous error to keep disguising them under alien motivations. Trade problems have to be solved by unambiguous, genuine, trade policy answers. Everybody knows that such is hardly the real force behind many of the proposals tabled over the last decade on these issues.

If there is good faith and interest in an eventual discussion of this nature, nobody can expect to confuse the adjustments that could be contemplated in the relevant disciplines affected, with a twisted attempt of impairing the competitive hedge that comes from fair, comparative, and competitive advantages of the countries and regions where they exist.

The same explicit approach should be able to deal with market access of goods and services. How can a trading system that has disciplines and commitments ruling over most economic activities not have specific commitments and disciplines in sectors like water and air transportation and electronic commerce? Is it not odd to have in the WTO a broader push for labor standards and civil society participation than for core instruments of trade policy covering the backbone sectors of modern trade?

A separate issue that has to be tackled very soon is Members support to one of the finest Secretariats in the world. It has a small, top quality, and hard working staff. But the lack of economic incentives and the frustrating working climate that has been prevailing in the last years for its staff needs to be overcome urgently.

In addition, the System cannot afford the repetition of an-

other selection process for the Director-General with the unhelpful, political characteristics that were registered when Mike Moore, Supachai Panitchpakdi, and their team of Deputy Directors General were elected.

C. The Agenda for the Next Negotiations

If all of the required political decisions to support the System and the launching of a realistic and comprehensive round of negotiations can be adopted in a timely manner, the WTO could easily regain its confidence and face most of the present challenges posed by the business community and the rest of the civil society. I have submitted a few additional methodological reflections on how to meet these goals. (There is a deliberate omission of a specific trade agenda or of sectoral initiatives).

1. Procedural Issues

The agenda of a new round should only contain issues related to Uruguay Round mandated negotiations (built-in agenda), implementation, the Singapore package as well as other issues for which there are clearly defined, and accepted TOR and clear horizontal deadlines. The process should be carried out under the principle of a single undertaking. The fate of issues that belong to the built-in agenda (agriculture, services, implementation) should not be linked to the willingness of launching a more comprehensive round; that credit already was paid before and nobody can expect the acceptance of double charge for the same asset or commitment. It is one thing to say that it would be better and politically more comfortable to have a comprehensive negotiating approach and another to take for granted that, if there is not a full fledged round, the existing rights covered by the built in agenda could be ignored. This kind of precedent could affect other processes and all categories of commitments in the future.

To avoid some exclusions, the issues that might drag on for a period that go beyond the general deadline set for the main negotiations should be left out from the "single undertaking" and subject to individually agreed deadlines if by the time that is due (the general deadline), it remains clear through consultations that there would be no agreement on them. The negotiations on these issues could be still retained for extra time, setting

a new date by consensus, but they would not affect the approval of the main package under the single undertaking traditional rules. Issues in this category (e.g., Trade and Investment, Competition, and others) are for different reasons sensitive to many Members. The same method should be applied to non-trade concerns that could eventually gather momentum under agreed TOR and critical mass for their support (I will not elaborate on the definition of critical mass for this purpose) such as, or perhaps mainly, trade and environmental issues.

So, the single undertaking of a new round could have two speeds. Box one would cover the Uruguay Round mandated negotiations and implementation, the non-controversial Singapore issues (under the conditions mentioned above), and others. Box two could cover issues having agreed TORs, but subject to reservations; that second category of issues would jump conditionally to box one with the clarification that they would only retain its box one status until a consultation could be held on a particular date.

The negotiations in this category should cover only problems related to lack of or faulty enforcement of existing disciplines and market access related commitments. They should not cover a redrafting of "the accuracy" of the goals of the original disciplines themselves, which is a problem that has to be dealt with in the groups that are negotiating or will negotiate new rules if there is consensus for it. While it can be admitted that sometimes this distinction is not easy to draw, no Member should pretend to discuss the implementation of a mistake or a goal not achieved in a previous negotiation.

2. Substantive Aspects of Negotiations

An important effort should be made to avoid the implicit and perhaps involuntary change of core rules and principles. For example, the proposals on reviewing the SPS Agreement text and its implicit procedures can and must follow the provisions of Article 12(7) of the Agreement,³⁸ a decision that at present might be made anytime not necessarily in the framework of the negotiations started in February 2000 or in a new negotiating round. The SPS Committee can do this job anytime, if it is possible to reach a consensus on that. The Agreement on Technical

38. See WTO Agreement art. 12(7).

Barriers to Trade³⁹ (“TBT Agreement”), the SPS Agreement, and other Agreements have been drafted as a self-contained texts and that status should not change due to a conceptual mistake.

Politicizing the present and future negotiations could only stall further the System. In GATT Article XVI(3)⁴⁰ and in Article 18(5) of the Agreement on Agriculture,⁴¹ there are clear examples of wrong disciplines like the discussion on what is “having more than an equitable share of world export trade.” This approach leads to nowhere and entails unacceptable subjectivity. As proof of this statement, after more than fifty years of the System, is that market-sharing provisions were never a basis of identifiable and applicable obligations and, in some way, they contradict the notion of fair competition and objective, legally acceptable advantages. The problem with those kinds of situations and legal irregularities is that in certain situations panels and the Appellate Body, not trade negotiators and drafters of the rules, are making the rules; this is another core conceptual mistake.

WTO Members should avoid keeping legal vacuums. Revised or new disciplines should not include, at least without definition of its scope and the applicable practical procedures to enforce rights and obligations and concepts like “due restraint”⁴² that can mean anything and in practice they mean very little.

One of the most important short-term issues is the avoidance of further delays in solving issues that had to be dealt with by the time of the failed Third Ministerial Conference. These issues are now part of a legal limbo and confrontational situations (e.g., the validity of Article 8 of the Subsidies Agreement⁴³ and the extension of the transitional TRIMS provisions).

CONCLUSION

The next twelve months will be crucial to keep the MTS alive and well. It is my view that a strong effort should be made

39. See Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

40. GATT art. XVI(3).

41. See Agreement on Agriculture, Apr. 15, 1994, art. 18(5), WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

42. Agreement on Agriculture art. 13.

43. See Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

to avoid messing around with the finest tool that has made trade disciplines and trade liberalization an instrument that serves extremely well economic expansion, sustainable development and world peace. Nobody has the moral right to stay indifferent in achieving these crucial goals.