

THE CURRENT STATE OF THE WTO

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Introduction

When the WTO was created to replace the GATT at the end of the Uruguay Round, it was an important experiment in remodelling the core institutions of the multilateral trading system. Nobody knew at the time whether it would work, but a good many people were convinced they didn't like things the way they were in the GATT, so they were willing to give it a try. The creation of the WTO changed the day-to-day relationships amongst the systems' participants, drastically altered the approach to settling trade disputes and was supposed to change the template for multilateral trade negotiations. Because the WTO is supposed to be the global forum for the negotiation of multilateral trade agreements, their implementation and for the resolution of disputes amongst its 145 Members, it makes sense to focus on: (1) the "institutional issue" of the way in which the WTO works and takes decisions on a day-to-day basis; (2) the experience since 1995 with dispute settlement; and (3) the post-Uruguay Round experience with WTO trade negotiations, including the current Doha Round.

One day you might come across a photograph taken on the third floor of the WTO headquarters building in front of the tapestry of Hannibal Crossing the Alps and showing Julio Lacarte Muro surrounded by some fifty negotiators from all over the world. This picture was taken at the end of the autumn 1993 negotiations that finalized the Agreement Establishing the Multilateral Trade Organization. Julio is holding the text of the MTO Agreement. I am standing at the left of the picture holding another paper. The title of my paper was the "GAT – General Agreements on Trade" and, at the time, it represented the United States alternative to the MTO.

The United States opposed the MTO until the very end, even though the negotiations in late 1993 had eliminated all of our major concerns with the earlier draft of the MTO Agreement. Throughout the fall of 1993, we systematically renegotiated the originally offensive MTO provisions on decision-making and amendments. Personally, I was also forced to spend an enormous amount of time and effort negotiating the preservation in the MTO Agreement of the exemption for American Jones Act restrictions that's now found in paragraph 3 of the GATT 1994. I always call that the ugly birthmark on the new-born baby.

In the end, and at the last moment, the U.S. agreed to the establishment of the new Organization, albeit on condition that the name be changed to World Trade Organization. This demand came at the behest of Senator Moynihan who believed that nobody would know what a "multilateral" trade organization was all about. As an aside, the name change and the acronym WTO brought immediate pain and suffering to that other WTO - Madrid's World Tourism Organization.

Even after the problems with the text were fixed, the United States delegation had opposed creating the WTO for a number of reasons. First, we were concerned that the formal organization might develop United Nations-type habits and practices and, like the UN, become politicised over time and therefore less able to deal with trade on a business-like basis. In the MTO negotiation we fought hard to preserve consensus as the way in which decisions were to be taken and we didn't want that undermined. Second, we were concerned that the shift to an organization model might change our relationship with the secretariat that, under GATT, had no real power of initiative. We wanted the trade body to remain a Member-driven organization. Third, we were sensitive to the danger that the Congress, having rejected something called the International Trade Organization years earlier, might reject this new organization – and with it the entire results of the round – out of sovereignty concerns. And finally, we saw that something which was becoming known around the world as “GATT” had a certain name recognition that could be preserved with “GAT”, but would be lost with MTO or WTO.

Once we made the decision to back the WTO, part of its attractiveness at the time was in allowing us to actually withdraw from the old GATT and pressure developing countries into accepting the full range of WTO obligations or lose MFN rights in the American market. Capitol Hill especially liked the argument that the WTO meant an end to “free riders”. That looked like a great idea. The rest of the Quad liked it as well. In terms of WTO Members and their obligations under its trade agreements, we were going to have a “one size fits all” approach, with the only real concession being the length of time given to developing countries to implement their obligations.

Another selling point for the WTO in 1994 was that the new body would serve as a forum for what we called “rolling negotiations” on individual topics and sectors, obviating the need for future eight-year agonies like the Uruguay Round.

Nine years later, and speaking as one who has worked as a delegate and a Deputy Director-General, I have mixed views about the WTO. Some of the things we have done over the years were good ideas; in other areas we made mistakes.

As it turned out, we need not have worried about the name recognition issue: Seattle took care of branding and publicity once and for all. Practically everyone knows something about the WTO although many continue to misrepresent its activities. And Congress didn't reject the Uruguay Round over the WTO, although there were some fairly heated debates over sovereignty.

So far, we have also been able to preserve the right relationship with the WTO Secretariat. The Secretariat and Director General have a bit more leeway now than they did under the GATT but WTO is still very much a Member-driven organization. (I have been moved to say on occasion that one problem is that some of the members don't know how to drive!)

Decision-making and Day-to-Day WTO Operations

The one size fits all approach hasn't worked. In fact it has been the major point of failure in the new WTO. Experience has taught us that major developed and minor developing countries cannot successfully operate on the same plane. In 1993, we wanted to get away from a multi-tiered trading system, but it turns out that ten years later few, if any, really want that. And for good reason.

In many ways, what comes out of the WTO today looks more like UNCTAD than the old GATT. At the level of the General Council, relationships are dysfunctional. Consensus is getting harder and harder to achieve. For an Organization supposed to be dealing with trade, the quality of the decisions taken has deteriorated. This is mainly because the Members who believe that the WTO should be used to obtain objectives in trade policy areas have needed to compromise with those who are unable to or uninterested in participating in the system on the same level.

Using the single undertaking and the creation of the WTO to force developing countries to accept all of the WTO's new obligations was our single biggest mistake. We never should have done it. The problem of "free ridership" we thought we were curing is nothing compared to the problems we have created by forcing a large number of our fellow WTO Members to join the organization and theoretically accept obligations they could not implement. And we are continuing to compound the situation through accession negotiations.

At some point, we collectively decided that the WTO should be an organization with universal membership instead of a club for the countries that conduct the bulk of world trade. Not only from a trade standpoint but also from the development standpoint, it's been assumed developing and least developed countries could only reap the potential benefits of the trading system if they were made to take on its obligations and participate in its rule-making.

Once they join the WTO, many of these countries cannot afford to maintain a presence in Geneva – and certainly not a presence that permits effective participation in the WTO. This has meant that either they don't actually get the benefit of participating in the crafting and implementation of the rules and market access opportunities or they demand that the process slows to a pace that allows their partial participation. This is particularly troublesome in an organization that needs to maintain the dynamism of the WTO.

On the accession front, I think it is crazy to force a country like Vanuatu to spend years negotiating accession to the WTO when we already know that at the end of the day, Vanuatu won't be represented in WTO meetings in Geneva. If Vanuatu did set up a Geneva office with sufficient staff, it would probably be a criminal waste of the country's meagre resources. . There are twenty-two people in the US Mission working only on the WTO and ½ of one person working on the ILO. How can a tiny country with one or two persons in its entire Geneva mission keep pace with this level of work?

All of this has meant that neither the developed nor developing countries are comfortable with the situation in the WTO. For the developed countries, the inability of developing countries to keep pace has frustrated their ambitions in the round. For the developing countries, the inability to effectively participate in rulemaking or to implement their existing obligations has made them reluctant to add new agreements and new obligations to the work of the system.

The need to recognize the inevitable two-tier nature of the system has been there from the beginning.

The drafters of the original 1947 GATT were smarter than we were. They had a provision in article XXVI:5(c) that allowed ex-colonies to benefit from "de facto" GATT membership. GATT Contracting Parties gave the "de factos" all of the benefits of MFN treatment. We took it for granted that they more or less conducted their commercial relations in accordance with the rules. They never had to send representatives to Geneva.

The inapplicability of the one size fits all model has created problems for negotiations, for implementation and for decision-making. If the current situation degenerates much more, I am afraid that the major trading partners will lose patience with the WTO. If we want the organization to stay relevant, we have to address these problems.

I'm not sure I have an answer. Some think that the decision-making problem can be addressed by involving fewer countries. Certain observers have argued for the re-creation of the Consultative Group of 18. Pre-Singapore, the US convinced the Quad to institute what was known as the Invisibles Group... a CG-18 type group of senior officials from capitals who would meet and discuss key issues, but not take decisions. That group still meets outside of the WTO, as "senior officials from capitals". Would it be useful to try to formalize an idea like this? In the Uruguay Round, the USA and others advocated creating a GATT Management Board.

Getting at participation may be another way of dealing with the problem. I don't think we can go back to the "de facto" membership plan for the bulk of our current members, but we might be able to use it in place of accession for some of those not yet in WTO. Or we could do it selectively. In investment and competition pre-Doha we briefly discussed the possibility of permitting developing countries to opt out of participation in new agreements. Would it really create insurmountable problems to have a formalized two-tier WTO? Should we really care if Uganda participates in the agreement on transparency in government procurement?

I think we need some ideas.

Dispute Settlement

We've decided that the DSU needs some fixes. The negotiation is underway. Some of these proposed fixes are important, others less so. But I would argue that notwithstanding the need for some improvements and clarifications, and set out against what we aimed to achieve in the Uruguay Round, the dispute settlement mechanism of WTO has to be seen as a major success story. I don't want to pretend that a good number of people in the USA and elsewhere aren't too happy with the way the DSU has worked in practice on specific disputes. Many of these people now question whether we should have wanted to create the system we did. But that's really a separate question.

Any judgment on the state of health of the WTO dispute settlement system needs to begin with a recollection of how different the system was under the GATT. The WTO DSU is different from the GATT system both procedurally and philosophically. Procedurally different in that many of the criticisms of the GATT system have been corrected in the WTO DSU system. Philosophically different in that the DSU reflects the triumph of the juridical approach over the negotiating approach associated so closely with the GATT days.

At the bottom line, the old GATT system was ineffective and because it was ineffective, non-compliance was often allowed to continue without multilateral sanction. Cases that were "settled" were often settled outside the scope of the GATT rules. The messy nature of all of this made it hard to be confident in the system and this, in turn, encouraged "unilateral" behavior, particularly on the part of the United States. Unilateralism was very bad for the multilateral trading system and there was a great deal of pressure put on the United States to act only within the rules of the system. The American reaction to this was simply: we will comply with the system once it is made to work.

Well, did we get what we paid for? I think we did.

So far, 281 disputes involving 228 distinct matters have been brought to the WTO. The system has been resorted to by 43 different WTO Members (counting the EC 15 as one).

Notwithstanding the small number of highly publicized cases of non-compliance, such as bananas, beef hormones and the US FSC case, the vast majority of disputes brought to the DSU have been settled through out-of-court settlements or eventual compliance with panel and Appellate Body recommendations. Interestingly, in the most recent full year, 2002, just under half of the panels established were at the request of developing countries (8 of the 18 requests for panels came from developing countries out of which 5 were against developed countries).

Experience has led some to question whether we should have wanted to create the system we did. Bilateral conciliation and negotiation of dispute settlements seems rare compared to the emphasis placed on winning a case through a panel proceeding. Recourse to retaliation seems a less than desirable mode of behavior for members in a trade liberalizing organization and many commentators have argued in favor of various compensation approaches as an alternative. Certain decisions of panels and the Appellate Body are hard to understand and justify, especially in cases where one might have imagined a greater deference to implementing authorities. We also wanted an automatic system where only a consensus against adoption of panel and appellate body reports stopped their acceptance. Given the enormous power now vested in the Appellate Body, as well as the curious nature of certain Appellate Body decisions, many commentators today ask whether this was wise.

But none of this should change our basic appreciation that when compared to the GATT or to other models of international dispute resolution, the WTO DSU system is effective and works efficiently. Disputes are generally settled within acceptable timeframes. Even in the cases of continued non-compliance, the losing party has nearly always said it would eventually seek to comply with DSB findings and recommendations.

And the faults we've identified with the DSU, even the famous sequencing issue, have not proved so serious as to make the DSU inoperable. In practice, we've been able to work around these problems.

The WTO as a Forum for Negotiations & the State of the Doha Round

The Uruguay Round was supposed to be the last "Round" of its kind. We were not supposed to rely on huge multilateral rounds of negotiations to get things done in the WTO. In 1993, negotiators wanted to avoid a repeat of the long-running agony of the Uruguay Round.

In 1996 and 1997, we successfully completed three major sectoral multilateral trade negotiations in the Information Technology Agreement, and the Agreements on Basic Telecoms and Financial Services. The Maritime Services negotiation failed, but not because it was being conducted outside the context of a "round."

But here we are again, back in a Round. There are all sorts of reasons for that, most of them not very good.

On top of that, the agenda for the Doha Round is an ambitious one, complicated by the involvement of more than 160 countries and territories. The range of interests, which Members are bringing to the table, is much larger than in the Uruguay Round. In addition, there has been some slippage in what was in the early 1990's a nearly universally accepted creed that

open markets and free trade are good for you. Against this background, we have tasked ourselves with reaching a consensus on a complex single undertaking.

The way things are going, we won't likely finish on schedule. Deadlines are slipping badly and a mindset has already set in which works against the existing timetable. Cancun later this year looks to be an extremely problematic meeting. I think it's very unlikely that the Round will finish on schedule at the end of 2004. Some of the "optimists" on the WTO are suggesting end-2006. That's nothing new.

What are the main points worth spending time on at this stage of the round?

The first priority for many countries continues to be the further **reform of global agricultural trade**, and real remains extremely critical for a large number of developing countries. Without a demonstrable improvement in the current situation for agriculture, Doha would have no real promise for development.

A serious deadlock in the talks now threatens our ability to meet the March 31 deadline. March 31 is not just a notional target: it's a constitutional deadline agreed by Ministers in paragraph 14 of the Doha text. If the deadline turns out not to be met, it's a serious issue not just for agricultural market access, but also for all the procedural timetables built into the Doha Declaration. If the reference to March 31 in paragraph 14 can be ignored, why not ignore the 1 January 2005 deadline in paragraph 45? In a poll of more than seventy people in Geneva and around the world that I conducted in the middle of February, I found nobody – nobody – who thought it likely that the end-March deadline for agriculture could be respected.

It is easy at any time to find sceptics on the subject of agriculture, but I think that this time around, even the agricultural people are negatively influenced by what can only be called a disastrous performance in the **TRIPS and access to essential medicines** debate. At issue is how to make compulsory licensing of patented pharmaceuticals useful to countries with no manufacturing capacity and most contentiously, which diseases should be counted as public health hazards justifying recourse to compulsory licensing. In this area, the Ministerially-mandated deadline came and went with no agreement and by all accounts the atmosphere in Geneva on this question is venomous.

The negotiations on trade in **services** are a relatively bright spot. I have to say I still find it curious how the area of trade that so negatively excited developing countries in 1986 is today one of the least contentious areas of the talks. The risk for services is that it will be hijacked by agriculture.

The negotiations on **market access in industrial products** had a very rocky start. It took until August 2002 to reach agreement on a timetable for agreeing to negotiating modalities. I think we are going to have trouble meeting the mid-Spring deadline for agreement on negotiating modalities for industrial tariffs for two reasons. First, although tariffs are perhaps the simplest area to deal with conceptually, historically the negotiation of a modality for tariff cutting has been extremely contentious. Second, the industrials negotiations are bound to be impacted by what transpires (or does not transpire) in the case of agriculture and services.

Earlier, I suggested that the problems with the Uruguay Round DSU were not so major that we couldn't work around them. In large part, for this reason, we decided to fast-track the **DSU** negotiations and keep them out of the single undertaking, with an earlier deadline of this

coming May. We did this because we didn't want the DSU improvements exercise to be a part of the horse-trading, but rather something undertaken with the view that the result would be for the common institutional good. Nice try, but it's not going to work. It is probably not a viable option at this stage to try to restrict a set of results in May to a small package of "fixes", keeping the bigger issues for another day. Those seeking more significant changes, whether you think they're needed or not, in a group that includes *inter alia* the EC and United States, consider that their leverage for achieving a bigger result could disappear if their proposals were de-linked from the procedural repairs that enjoy such widespread support. The negotiation will likely go to Cancun for a new mandate.

In investment, as well as in competition and the other "Singapore issues", we agreed at Doha to the initiation of negotiations after Cancun. There's a Catch 22 situation, however, because the negotiations can only proceed on the basis of generally acceptable modalities and these have not yet been agreed. That has to come first and that should be decided at the Cancun Ministerial. Unhappily for Cancun, India is not playing a constructive game now and reports from Geneva indicate that not only does India remain the most outspoken opponent of an investment agreement in the WTO but its active opposition also seems to be increasing, not diminishing. In my mid-February survey, sixty percent of respondents thought it unlikely that there would be agreement on investment modalities in Cancun, with the other forty percent giving agreement a 50-50 chance.

Any discussion of **trade and environment** has to start with the recognition that that EC did not leave Doha happy with the outcome. From the beginning, the EC sought a broader mandate for this work. Many suspect that Brussels wants to take back through trade and environment much of what it gives up through the agriculture talks. This is an area that bears watching in Cancun.

In this round, deadlines are being missed all over the place, some of them more important than others. It is possible that the agriculture talks will come together miraculously and we'll have agreement by the end of March on the modalities needed to establish commitments. If that happens, there would be a good chance that other deadlines would be respected as well and Cancun could be a well-oiled stop on the way to a successful on-time conclusion. But I've seen this movie before and I don't believe that will happen.

Much more likely, the agriculture deadline won't be met. That will add to pressures not to meet deadlines in services and industrial market access. Becoming more concerned that their own interests are not advancing in the talks, governments will make negative linkages to progress in other, un-related areas. Those opposed to the Singapore issues will have no incentive to cooperate on modalities negotiation, because there will be little or no risk that they and their issue will be an isolated source of trouble in Cancun. This might seem pessimistic, but I would argue that it is nevertheless realistic.

This WTO Round is important both politically and economically. It is, after all supposed to be the development round. You might think that this is a pretty sobering assessment of the state of play in the negotiations, but I am an optimist. I believe the Round will eventually end successfully. But WTO's Fifth Ministerial Session is likely to be a difficult and stormy affair. And that is without taking into account the fact that September is hurricane season in the Caribbean.

Wrapping Up

Now, believe it or not, I'm an optimist. The WTO today is certainly not a shining success on all fronts. But it is a work in progress. WTO has also demonstrated its resiliency. A couple of years ago everyone was concerned that China's entry into the WTO would change forever and negatively the way the trading system operates. Instead, I think we would all agree now that the changes have been in China more than WTO. Where we have institutional problems, it is probably not too late to do something about fixing them provided we get our act together soon. And the issues are not un-linked. Solving the important participation and decision-making issue would contribute to advancing the progress of the Round.

Thank you for your attention.