

The Significance of the Cancún Ministerial:

**Its context, reasons for breakdown and implications for
the future**

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1. Prolegomenon

The most significant truth which the writer has internalised from his studies in International Economic Law has been that Truth itself is relative. The student of classical philosophy will point out that the above statement is a self-referencing loop and can mean nothing. The post-modernist will disagree. QED. So personal, emotional and vexed are the questions and the possible positions which can be taken in this field of law that objectivity is indeed elusive.

For mom and dad who create opportunities for opportunities.

2. Introduction

This thesis endeavours to examine the context within which the Fifth WTO Ministerial, held between 10 and 14 September 2003 at Cancún, took place and attempts to place in a balanced manner the various reasons for its progressive breakdown and consequent failure. It also looks at the implications for the future of the Multilateral Trading Negotiations system and its alternatives being the growing of protectionist policies and the possibility of the further growth of bilateral agreements.

In order to place the agreements into context, the paper first considers the state of Free Trade Agreements prior to the formation of the World Trade Organisation (WTO) followed by those agreements entered into under the auspices of the WTO but before the Cancún Ministerial. It then surveys the geopolitical and economic context just prior to these talks. A short survey of the priority issues for the developing and developed world follows and then an in-depth discussion of the various factors which may have contributed to the failure of talks at Cancún.

These factors are of course varied and of wide-ranging character and the degree to which each contributed to failure is impossible to measure. There are nonetheless a number of identifiable factors which are taken

into account here, the following list is a summary of the most significant factors and issues raised and to be supported below:

1. The Optimism which was generated by the World Community in its declaration and use of the nomenclature of a "development agenda" is noted as a primary cause of the breakdown of the talks. The Developing World embraced the promise embedded in this sentiment and looked forward with raised expectation at an outcome which would benefit and engage with their interests. In fact it may not have merely raised expectations of the results future talks may bring but in fact called into question the content of previously signed agreements on the basis that the "developmental" aspect had not been taken into account when these were signed, and as a result these agreements needed to be revisited within the newly accepted context of development priorities. The perceived lack of progress in the approach to talks of the developed world and the consequent failure of the developing world in securing significant progress at Cancún on the issues it considered priorities was all the more disappointing in the light of these raised expectations.
2. The Chairman of the talks Luis Ernesto Derbez, the Mexican Trade Minister has been criticised for not focusing on the progress which had been achieved in the talks so as to motivate delegates to soldier on until a breakthrough could be achieved. In particular, it has been suggested that on the last day of the Cancún talks he underplayed

the concession by the developed world on which issues that bloc would no longer insist on negotiating, and that he unnecessarily and abruptly declared a deadlock and closed the session. This factor has been a central complaint following the talks but this paper argues that though the person of the Chairman can affect results to some degree the Chairman alone cannot determine the outcome of such complex talks and further that unless the seeds for failure already exist in the dynamic of the talks, the Chairman cannot force nor be responsible for a failed outcome. In fact an approach blaming the Chairman deflects from the real and underlying causes for failure and is unhelpful.

3. The negotiating tactics and in particular the timing of the announcement of concessions by the developed world has also been blamed for the lack of significant momentum and progress. Such lateness of concessionary proposals may lead to frustration in particular when positions which were firmly held are relinquished at a time when little progress can be made and when perceptions of good faith had already been diminished. A case in point is when Pascal Lamy, the European Union Chief negotiator agreed close to the scheduled end of talks that elements of the Singapore issues that of investment and competition could be discussed separately. This in the context that he had insisted throughout the talks that the full number of issues had to be negotiated together.¹ Such a concession
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made earlier on in the talks could have generated a significantly more constructive atmosphere taken place in an environment in which delegates were eager to make progress. However, it had unfortunately been insisted on for too long and jettisoned too late.

4. The formation of a developing country bloc known as the G-20 plus added a new dimension to the talks and its outcome. This group was able to stand firm in its demand for significant concessions for developing countries as a whole, in particular with regard to the lowering of subsidies for agricultural and textile products. The resilience of the group in the light of repeated attempts to fragment the coalition as well as with the unified agenda of the group, forced the talks to focus around a single set of specific concessions identified by the group and demanded by the developing countries. These concessions then were the make or break issues which polarised and focused the talks. The inability to make significant progress on these issues resulted in turn in the refusal of the developing countries to engage on the Singapore issues. It can be said therefore, admittedly stated in an over-simplified manner, that the essential deadlock and failure of the talks ensued from the deadlock which arose as a result of the G-20 plus on the one hand and the European Union and the United States on the other to soften these fundamentally opposed positions.

¹ The "Singapore Issues" were first treated as a whole but later treated individually. These issues are defined and discussed in more detail below.

5. The institutional structure of the World Trade Organisation has been widely criticised. With its one hundred and forty eight member-states meeting together, yet requiring unanimity in order to make progress it has been described as a “medieval organisation” by the European Union Commissioner.² Small numbers of small states in trade terms can hold back agreements despite and in the face of a large number of large states being in agreement. At the same time however, the larger states in trade terms are able to selectively persuade individual smaller states to abandon solidarity positions with other states of similar persuasion in return for individual trade advantages. The institutional structure of the Organisation has been debated at length prior to its inception but what amounts to a “fair” institutional structure seems more based on the individual interests of the proponent than on any meta-thesis. In such a scenario any attempt to please all parties inevitably results in an unwieldy structure. The current structure of the World Trade Organisation has not escaped this result. The inherently more complex trade matters now arising as tertiary levels of economies come under scrutiny result in new challenges for negotiators. Also there is significant complexity which inevitably arises when engaging in the task of streamlining previous agreements, especially when at the time of the adoption of those agreements, progressively more complicated and creative solutions had to be applied to generate them in the first place. There is also the

² Pascal Lamy in the Guardian “Cancun raises five crucial questions” September 16, 2003

matter of a legal framework in which on the one hand all states have equal rights and obligations whilst on the other hand and simultaneously some benefit from special and differential treatment rules and some from historically differing points of departure in the trade environment. Accordingly the failure of talks can often be blamed on the requirements which the institutional structure imposes in order to achieve success rather than the underlying potential and space for consensus distributed amongst the participants.

6. The media as a “first draft of history”³ has immense power in that it determines the point of departure in the mind of the lay reader as well as what aspects are considered significant about an event. In a medium in which the number of papers or journals sold or the number of viewers tuned in, determines the economic success of the medium in question there is an economic imperative which mitigates towards the controversial and the interesting. Thousands of marchers protesting in colourful dress or groups of naked women posing for photographers as a form of protest is far more dramatic and attention-grabbing than boring reams of statistics in actual talks. Similarly, controversial and emotional stories relating to protest suicides of farmers or heartfelt pleas for economic justice in impoverished countries make more engaging reading and documentaries than means of calculating a particular subsidy-type.

³ Bill Emmott Editor of the Economist “20:21Vision, The Lessons of the 20th Century for the 21st” p4

The media therefore and what it chooses to publish can have a significant impact on the discussions at hand and lead to unhelpful emotional responses to what is best dealt with as political and economic material. The ability to manipulate the media has also not been lost on the delegates. However, what was lost on the media is that what was discussed in media briefings and statements had very little in common with what was discussed in session.

8. The diverse priorities for the developed world on the one hand and the developing world on the other were as mentioned earlier the apparent and evident reason for the breakdown. No agreement could be reached on the formal launching of talks on the "Singapore Issues" which relate to international commerce issues including trade and investment policy, trade and competition policy, and government procurement and transparency. The developing world and in particular the G-20 plus refused to proceed with such talks until matters relating to agriculture and textiles were addressed and in particular as a response to the watered down proposals offered in this regard which did not scrap export subsidies as anticipated by the G-20 plus. An unanticipated distinction was also raised between countries which were large net exporters and others, which implied that certain developing countries such as Brazil would benefit less from special and differential provision prescripts. Similarly the matter of trade in textiles liberalization and how this affects West African nations was not conducive to progress. In short therefore those areas

of trade which affected developing and least developed countries were seen as areas in which significant concessions needed to be made towards liberalization in that these areas of trade were the mainstay of developing country economies. The position seemed clear that unless these fundamental areas of trade were addressed sufficiently, no other talks would proceed.

9. Non Governmental Organisations also played a significant role in the direction and flow of talks. Their impact on the talks through the media by virtue of protest action and press statements is now a standard feature of all World Trade Organisation talks. However, the behind the scene effect of these organizations is largely unknown. That they are effective in certain instances is however evident as was seen at Cancún by the effectiveness of Oxfam to the point where it assisted West African countries in placing the issue of cotton on the agenda.

10. The lack of expertise of certain developing and least developed countries combined with the fear that including new issues in trade talks could prejudice such countries has also been suggested as a reason for lack of progress. Suggestions that new agenda issues are complex and highly technical as well as that they are not closely enough linked with the mission and purpose of the World Trade Organisation abound. Opponents of this position claim that agreements on agriculture are of the most complex of all. However, a more likely reason for their recalcitrant position is the huge proportion of total trade which the trade in services sector constitutes. All of this

new and burgeoning trade cannot be taken advantage of by those countries who rely significantly on trade in goods and in particular on primary goods. In a sense these agreements will cement the economic divide between primary and tertiary economies.

After examining each of these issues in more detail the paper turns to counting and considering the loss resulting from the failure of the Cancún talks.

3. The state of Free Trade agreements prior to the WTO

The following is a short summary of and background to the more significant historical events leading up to the creation of the World Trade Organisation and the Cancún ministerial in particular.

3.1 The theories underlying liberalized trade and cooperation

In order to understand the evolution of Free Trade Agreements and the history which resulted in the creation of the World Trade Organisation it is useful to begin with the seventeenth century school of thought known as "mercantilism". At that time currency consisted of gold and silver and it was therefore feared that trade would be stifled if sufficient gold and silver was not available. This crisis was prevented by ensuring that traders in a particular country exported more than was imported thus ensuring an adequate supply of gold and silver.

David Hume was able to demonstrate in 1752 a mechanism to be known as the "price-specie-flow"⁴ which showed that a "natural" balance of payments mechanism existed in that if surplus currency was available prices would rise and excess currency flow would be outward thus correcting the overflow of currency. Similarly a shortage of currency would cause an inflow due to price depression.

⁴ Trebilcock and Howse "The Regulation of International Trade" p1

David Ricardo and Adam Smith generated dramatic and counter-mercantilist ideas which continue till this day to underpin the philosophy which supports the liberalization of trade. In 1776 Smith demonstrated that in the same way as product specialization benefited the performance of a particular national economy the same principle applied internationally. That is, that competition ensures that the consumer benefits from the cheapest price due to the market forces allowing only the most efficient producers of the specific commodity to survive. In the words of Adam Smith, "What is prudence in the conduct of every private family can scarcely be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we can make, better buy it of them with some part of the produce of our own industry."⁵

It is significant to note that this theory supports the idea of a unilateral liberalization of a country's policies in that it suggests that it is to the advantage of the local economy to buy a product which cannot be produced internally at a cheaper price, because purchasing it externally would cost the domestic economy less in resources than to produce it domestically, irrespective of the policy of the country from which it is being imported. In short therefore it argues that even a unilateral liberalization of trade would benefit the domestic economy in the long run in that it may ruin inefficient domestic businesses in the short run but in the long run the economy as a whole would benefit from being only

⁵ Ibid

composed of highly efficient producers as measured on a global scale, albeit in only a limited range of activity.

In 1817 David Ricardo in his "The Principles of Political Economy" added to this perspective by demonstrating that even if a particular country produced nothing better than another country it was still better to buy a product there which it could not produce itself at a comparatively cheaper price. That is, it is to the advantage of both parties if the country which had no areas of trade advantage traded in the areas in which it had the least disadvantage. The modern example as set out by Trebilcock and Howse⁶ demonstrates the point by showing that if a lawyer was not only a very good lawyer but also a better secretary than his secretary in that he could for example type a document in half the time the secretary does, it is still better for him to employ the secretary at \$40 per hour (that is at twice the cost he could do it himself) rather than waste his hour doing the typing if he sells his hour as a lawyer at \$200. Even though the secretary is least efficient at both being a secretary and a lawyer, both the secretary and the lawyer benefit from the transaction. The key insight is that it is better for the lawyer to hire comparatively inefficient secretarial services than to use his resources secretarially when the same resources could generate more income if used legally. Also that the secretary also benefits from the arrangement despite being worse at both a secretary and a lawyer.

The conclusions of the theory is that liberalization and free trade benefits all countries participating in trade in that it maximizes the contractual opportunities available and allows even inefficient countries the opportunity to benefit by having more efficient countries purchase commodities even from those less efficient at producing these, so that it, the more effective producer is able to use its resources in those areas it is highly efficient in and thereby maximizing the use of its resources. Of course in the modern world it is not countries who trade with each other directly but companies within these. Nonetheless the theory holds true and in effect implies on a global scale that efficiency and productivity is measured on a globally competitive scale.

3.2 The creation of the Bretton-Woods Institutions

Shortly before the end of the Second World War the Allied powers met to consider the future of the global economic system.⁷ The world was in a state of economic depression fired by the devaluation of national currencies and tariff barriers. This conference was held in 1944 at Bretton Woods in New Hampshire and its agenda was designed to ameliorate the economic effects of protectionism and boost the world economy by the making available of development finances and by

⁶ Ibid at p3

⁷ John H, Jackson, "Restructuring the GATT system" (1990) and "World Trade and the Law of GATT" (1969)

creating a mechanism to prevent currency shortages which directly affects trade.⁸

The conference created amongst others the Bank for Reconstruction and Development also known as the World Bank, and the International Monetary Fund (IMF). The World Bank was tasked with the financing of long term reconstruction projects whilst the IMF was responsible for ensuring that balance of payments crises were averted by ensuring that signatory countries had available freely usable currency with which to pay for imports.

This it achieved by the creation of Special Drawing Rights, a mechanism which allows a country in a currency crunch to obtain a usable currency from another country which had such currency available.⁹ The system operates on the basis that Special Drawing Rights (SDRs) are an international reserve currency unit which is used to settle accounts between central banks.¹⁰ In the words of Edelman-Spero, "it was expected that national monetary reserves, supplemented when necessary by IMF credits, would finance any temporary balance-of-payments disequilibriums".¹¹

⁸ T. N. Srinivasan : "The Future of the Global Trading System", Presented at the conference "The Future of Globalization: Explorations in Light of Recent Turbulence" The World Bank, held at Yale on October 10-11, 2003, p3

⁹ See IMF website at <http://www.imf.org/external/np/exr/facts/sdr.HTM>

¹⁰ Edelman-Spero "The Politics of International Economic Relations", 4th ed, 1990 p 41

¹¹ Ibid at p33

Each member country is allocated a quota in the fund. The quota determines both the drawing rights in the fund as well as the subscription payable by the member country to the fund.¹² The quota is reviewed every five years at which time the state of the world economy and the relative state of members' economies are translated into quota adjustments.¹³

3.3 The creation of the General Agreement on Tariffs and Trade (The GATT)

An initiative by the United States culminated in a meeting of 23 countries who negotiated the General Agreement on Tariffs and Trade (GATT). The Final Act of this agreement was signed on March 24, 1948, by fifty-three countries. Interestingly the long delay was caused by broad disagreement on development issues.¹⁴ The Charter of and organisation to be called the International Trade Organisation (ITO) was in the process of being drafted but due to concerns that the GATT may not survive further turmoil it was decided to ratify the GATT before the ITO charter was completed. After failure by the United States to ratify the ITO Charter it was never to come into existence and the State Parties to the GATT "cobbled together" an institutional structure which survived for over 50 years effectively governing the multilateral trading system.¹⁵

¹² Jackson, Davey, Sykes "Legal Problems of International Economic Relations, 3rd ed, 1995 p 284

¹³ Ibid

¹⁴ Wilcox, Clair. 1949. Charter for World Trade. New York: Macmillan, p 32

¹⁵ David W. Leebron "An Overview of the Uruguay Round Results" 34 Colum. J. Transnat'l L. 12

In the words of Professor Ala'i "If you look at the GATT, the GATT itself was created post-World War II with the main thing to make sure never again we would have the protectionist policies that we suspect resulted in the Great Depression and the tragedies of the Great War, the Second World War".¹⁶ GATT entered into force "as a vehicle to promote tariff reductions in the trade of goods. The contracting parties hoped to prevent the spiralling tariffs that they blamed for sparking the Great Depression."¹⁷

The GATT not only envisioned the avoidance of protectionism as it was played out in the 1930s but also wished to create a view of the World which would result in what we understand today with hindsight to be one promoting globalisation. The GATT initially focused exclusively on trade in goods but it should be stressed that at this time trade in goods accounted for about eighty percent of all trade.¹⁸

The extension of the system by the formulation of the General Agreement on Trade in Services (GATS) cannot therefore be over-emphasised and the degree of increased trade in services may well be linked to the hardened stance of the developed world at Cancún.

¹⁶ Comment at the Conference on Linking Trade and Sustainable Development Roundtable Discussion, *Am. U. Int'l L. Rev.* 1303, p54

¹⁷ Catherine B. Harrington "Weather May Not Stop USPS, but Special Interests Will" 19 *Am. U. Int'l L. Rev.* 431

¹⁸ Keith Sealing "Indigenous Peoples, Indigenous Farmers" 18 *Am. U. Int'l L. Rev.* 1383

In 1986 The Uruguay Round of negotiations got underway. It broke new ground on two fronts. Firstly, it brought the World Trade Organisation (WTO) into existence and secondly, extended the ambit of regulation to services. The Final Act was signed by 125 signatories in 1994 and the World Trade Organisation finally became a reality.

3.4 An assessment of the institutional aspects of the GATT system

As discussed earlier one of the primary events which was blamed for the Second World War was the Great Depression as well as the harsh reparations required of Germany for the First World War. The disastrous United States Tariff Act of 1930 and other protectionist measures designed to protect its economy choked international trade and further stifled the world economy. The Bretton-Woods conference was sponsored and under the jurisdiction of the various finance ministers of the world and not the ministers of trade and this explains why the centrality of the regulation of trade was not essential to its outlook or agenda.

Since the International Trade Organisation did not come into existence, the GATT naturally evolved to fill this vacuum and became a forum for the negotiating and settlement of international trade relations on a larger than expected scale. An interim Commission which was designed to prepare the way for the ITO in effect became the secretariat servicing

the GATT together with a small staff.¹⁹ It was however the fact that this far-reaching agreement did not have an organisation at its centre which is the cause of a number of its inefficiencies. Jackson, Davey and Sykes refers to these as its "birth defects"²⁰ being:

1. That the application of the GATT was controversial and provisional despite in effect applying as binding treaty obligations. This in turn led to other problems arising from the treaty as opposed to the organisational structure including amendment difficulties, uncertainty in relation to the hierarchy of laws vis-à-vis domestic legislation, a lack of institutional dispute-resolution mechanisms, and consequences of a lack of members as opposed to "contracting parties" as well as clarity as to the rights and obligations of such parties.
2. The complexity in amending the General Agreement itself which arose from the delays built into the treaty acceptance processes including garnering the necessary number of acceptances by contracting parties as well as the fact that even if sufficient agreement could be obtained, the amendment would not apply to dissenting parties. The result was a rigid structure and an inability of the system to evolve to accommodate and regulate new developments in trade and new trade areas itself. Side agreements

¹⁹ Jackson "The World Trading System: Law and Policy of International Economic Relations" p 37

developed which generated unnecessary complexity and further problems in relation to determining the extent of each countries obligations to another.

3. The side agreements referred to above were the source of further problems within the structure in that though these were independent treaties they were in fact linked directly to the GATT framework. The hierarchy of obligations blurred in that it was unclear whether a side-agreement could take precedence over another side-agreement or even the General Agreement itself. As is typical of such side-agreements they would have their own dispute resolution mechanisms and the potential for forum shopping abounded. Also the fact that side-agreements only bound parties which agreed to them led to a multiplicity of agreements between contracting parties varying in unpredictable degrees from each other. The system became unacceptably unwieldy and needed urgent consolidation and reform

4. The hierarchy and precedence of GATT agreements and side-agreements in relation to domestic law was often not clear. This lack of attention to formalising the domestic relationship in each state with the GATT treaties did not generate clear law and protocol.

²⁰ Birth Defects raised in Jackson, Davey, Sykes "Legal Problems of IEL" 3rd ed, 1995 p 298

5. The status of a "contracting party" was not limited to sovereign states. There were a number of ways in which a territory could obtain "contracting party status". For example certain territories were "sponsored" by former colonists and in such cases the former colonies were allowed to enter the GATT with very little commitment and offering very little by means of reciprocal value.

6. Contracting party powers were also not very clear from the text of the General Agreement most notably the power of parties to interpret the Agreement for themselves and in particular to the relationship with effective side-agreements. Also the consensus decision-making model which later evolved led to a slow decision-making process and was not effective in dealing with controversial issues.

7. The dispute resolution mechanism was based on a very sparsely worded basis in the original agreement. However, through practice a significant basis for resolving disputes arose which was later formalised in the Tokyo round.

8. There was also uncertainty as to the exact legal relationship which the GATT was meant to fill in respect of the other Bretton-Woods institutions. The independent roles and interactive relationship was

never clearly established as the organisations evolved to fulfil the requirements of an evolving international system of interdependence.

The more significant Articles of the GATT are summarised below²¹:

1. The GATT system itself is contained in the over two hundred agreements, protocols and proces-verbaux. Article II contains the actual series of schedules which document each country's commitment to the reduction in their tariff limits.
2. Article I contains the Most Favoured Nation Principle (MFN) or non-discrimination principle which provides that every contracting party is obliged to treat any other contracting party no less favourably than it treats any other country with regard to imports and exports.
3. Article III contains the national treatment obligation which provides that imports to a contracting party country shall be treated no worse than goods produced domestically in relation to taxation or other regulatory mechanisms.
4. Article VI deals with anti-dumping and countervailing duties.
5. Article XI eliminates all quantitative restrictions.

The preface to the agreement lays the foundation and rationale for entering into the agreement and is useful to keep in mind when evaluating the behaviour of parties who presumably act under its

auspices. The significant portion of the preface reads: "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods . . . being desirous . . . to the elimination of discriminatory treatment in international commerce".²²

The preface does of course not address how parties are to ensure that its activities are evaluated to ensure the positive outcomes desired or the balance of trade-offs envisioned. It is also significant to note that an intention of the agreement is to develop the full use of the resources of the world which viewed on a global scale must certainly be acknowledged is a desire directed at the advancement of mankind but it does not deal with the question of the balance of benefit to be derived by the various parties to a transaction located in different parts of that world. As an example, it may indeed be beneficial to the world that copper be mined for use in electrification plants in Germany from a poor village in Africa, but the degree to which the Villagers benefit from the sale of that copper is not self evident from the agreement. This question is solved by resort to the idea of "equity". Rules of equity are well known throughout the world and have as a result of the effects of colonization spread in varying degrees of legal effect across the globe. The idea has three meanings in public international law being: justice as fairness,

²¹ General Agreement on Tariffs and Trade Text available at www.sice.oas.org/trade

filling of lacunae by the application of an equity measure; and as an established body of rules.²³ “Justice” in this sense is according to Aristotle related to “justice of community”²⁴. In short therefore, what is considered equitable is determined by the extent of the field of comparison. It is submitted that the GATT envisions a field incorporating the full “resources of the world” and as such the implication of the application of the equity principle must imply the progressive realization of equality across the globe.

The above outlines what the founders of the GATT intended the agreement to fulfill. What on balance however did the GATT become in practice? Essentially it created a set of norms and standards which have contributed where possible towards a large degree of predictability and order within the arena of international trade relations. It is suggested that were it not for these norms a similar crisis to that experienced in the early 1930s would ensue—the so-called “beggar-thy-neighbour” policy consequences which would spark off a “race to the bottom” in which each country would raise subsidies to gain advantage followed by similar retaliatory steps by other countries. The result envisioned is the progressive choking off of trade and the overall lack of world economic

²² Ibid

²³ Dicke DC “Public International Law and a New International Economic Order” in *Legal Issues in International Trade*, Sarcevic & van Houute (eds.) Graham & Trotman, 1990 p36

²⁴ Ibid

growth. Clearly this goal was achieved as is evidenced by the huge increase in trade when measured globally.²⁵

Another seemingly unforeseen achievement is also evident in that the system in fact prevents conflicts within a party itself in that it allows the government of a party to argue and defend the national interest against specific sectional interests within not only their own country but also within other countries. In the words of Roessler, "The GATT, although formally an international agreement among countries, is functionally part of the domestic constitutional order of each contracting party. It serves as a mast against which governments can tie their hands so as to escape the siren-like pressure groups."²⁶

This may well be why many opponents of the GATT and WTO argue that in a world dominated by globalised liberal democracies, these organizations to a large degree represent a coalescing of capital interests across borders and the organizations accordingly serve the interests of capital with little interest shown in the development of the poorer nations and the poor within all nations. In effect the international agreements arrived at insulate the government of a country from development based criticism with the excuse that international

²⁵ Roessler F "The Scope, Limits and Function of the GATT Legal System", 1986 8 WE 217

²⁶ Ibid at 218

agreements prevent that government from taking the necessary remedial actions.

4. The state of Free Trade agreements under the WTO before Cancún

It is reported that the World Trade Organisation charter which results from the Uruguay Round weighs 385 pounds and consists of over 22,000 pages!²⁷

The more significant aspects of the WTO agreement also known as the "Final Act" as signed at Marrakesh on 15 April 1994 are summarised below:

1. The Charter establishes a formal organisation endowed with legal personality. A secretariat, director-general and other powers are provided which are required by the organisation to fulfil its function.²⁸
2. The WTO framework includes the GATT up to and including the Uruguay Round amendments and includes all agreements thereunder concluded and all the results thereof obtained.²⁹
3. The Ministerial Conference heads up the organisation and meets at least once every two years whilst a General Council oversees the body together with a number of other subsidiary councils.³⁰

²⁷ Jackson, Davey, Sykes "Legal Problems of International Economic Relations, 3rd ed, 1995 p302

²⁸ Ibid at p 304

4. Specific references are made to the GATT to ensure continuity therewith such as that the WTO would “be guided by the decisions, procedures and customary practices followed by GATT”. Also that the WTO secretariat will be that previously of the GATT.³¹

5. The non-alignment of domestic laws with GATT obligations is resolved in the WTO regime by a clause in the charter which provides that “Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements.”³²

Since the creation of the World Trade Organisation in 1994 and before Cancún, four Ministerial Conferences took place. The first in Singapore in 1996, the second in Geneva in 1998, the third in Seattle in 1999 and the fourth in Doha in 2001.

The “Development” Mantle and the Services Imperative

It is widely accepted that the Doha Ministerial took on a “development mantle” largely to appease developing nations following the failure of talks at Seattle and the widespread belief that one of the main causes of

²⁹ World Trade Organisation Legal Texts Summary at www.wto.org/english/docs_e

³⁰ Ibid

³¹ Jackson, Davey, Sykes “Legal Problems of International Economic Relations, 3rd ed, 1995 p 302

³² Art. XVI:4 WTO Charter

the increase in terrorism culminating in the attack on the World Trade Centre was the lack of development.³³

Despite the “development mantle” being an act of appeasement the developing countries did seem to have made good use of the opportunity and been able to regain some initiative in the talks.

It is instructive to look at similar notions and promises of a development focus as played out in the United Nations context. After the Second World War a number of factors led to an increased interest and solidarity by the developed nations with the rest of the world. Cassese³⁴ offers the following compelling reasons: Firstly, the speed at which colonies were becoming independent and that their economic and social conditions were for the first time capable of assessment separate from the former-colonial power, led to the realisation of the true degree of underdevelopment within these countries. It was clear that despite these states being granted political independence that they were not left in a position in which they were capable of true economic independence and that significant development intervention was required. Secondly, as Socialist ideologies became progressively more influential the need to use development opportunities as a weapon against this ideology became apparent as well as the realisation that to a large degree the “cruel realities . . . to a large extent . . . had been brought about by

³³ See note 3 at p16

³⁴ Cassese “International Law in a Divided World” 1986 p355

European countries".³⁵ Thirdly, the developing countries began to vociferously claim a moral right to improved conditions within their countries and a significant say in the affairs of the world. Fourthly, and arguably the most compelling of these is the idea that a country which is economically and socially advanced is less likely to be engaged in desperate behaviour such as war. The number of wars that the United States, Britain and Germany have been engaged in certainly brings this suggestion into question!

In 1961, John F Kennedy, then United States President called on the United Nations to proclaim a "Decade of Development" which was followed by the passing of Resolution 1803 as adopted by the General Assembly on 14 December 1962.³⁶ The idea was to allow developing States to nationalise foreign holdings and thereby reduce the degree of foreign State control in their affairs, as well as a promise that aid for the purposes of development was to become a permanent feature to achieve true and real development and not merely a mechanism of political persuasion in the Cold War context. The condition attached however was that compensation was to be paid to the foreign holders. The development envisioned never occurred and the States who were meant to benefit could not afford to fork out the compensation required.³⁷

³⁵ Ibid

³⁶ United Nations General Assembly Resolution 1803 (XVII): Permanent Sovereignty over Natural Resources (14 December 1962) UN Document A/RES/1803

³⁷ Dicke DC "Public International Law and a New International Economic Order" in Legal Issues in International Trade, Sarcevic and van Houute (eds.) Graham and Trotman, 1990 p 24

The idea of an “international development law” grew out of the United Nations Conference on Trade and Development under the auspices of the General Assembly in 1964.³⁸ However such law was considered purpose-oriented and as such of insufficient theoretical grounding to justify itself as a full discipline of law. Thus, according to Bennouna³⁹ “international development law” is merely an investigatory method used by jurists “to employ in a world where inequalities and antagonisms persist, whereas information and knowledge know no boundaries”. This approach once again showed the true lack of commitment by the developed world to seriously focusing on development as a central theme. As Bennouna concludes, “This method is, of course based on the guilty conscience of the rich, a conscience which, however, rapidly revealed its limits once the call went out for a comprehensive transformation of the existing international system.”⁴⁰

A second “Development Decade” was equally unsuccessful and a mere re-iteration of the first. Pressure to focus on development did not lessen and the “Charter of Economic Rights and Duties” was adopted more than a decade later on 12 December 1974 by the United Nations General Assembly.⁴¹ Very little was achieved under this agreement in that the possibility of nationalisation did not favour a desire to invest and

³⁸ Mohamed Bennouna “International Law and Development”, Ch. 28 in Barsh RL “A special session of the UN General Assembly rethinks the Economic Rights and Duties of States” 85 AJIL (1991)

³⁹ Ibid

⁴⁰ Ibid

⁴¹ United Nations General Assembly Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States (12 December 1974) UN Document A/RES/3281

general economic conditions did not favour capital expenditure. As Detlev Christian Dick puts it, "the spirit of 1961/62 is gone and has yet to return".⁴²

It is not true however that nothing has been achieved and fortunately the result cannot be said to be merely one of doom and gloom. In 1977 the then President of the World Bank Board of Governors suggested that "Never has so large a group of human beings —two billion people— achieved so much economic growth in so short a time. In the quarter century from 1950 to 1975 the average per capita income of the developing world grew at over 3% a year. The present industrialised countries, at a comparable stage in their own development, required a much longer time to advance as far, and attained an annual per capita growth of only 2%."⁴³ He suggested also that, "Important social progress was made as well. Average life expectancy, for example, was expanded from about 40 years to 50 years. Though 50 is still 30% lower than the longevity currently enjoyed in the industrialised nations, it took Western Europe a century to achieve what the developing nations did in 25 years."⁴⁴ It is with these development initiatives as background that the pattern of engaging in development initiatives only when to the direct benefit of the financiers thereof must be seen. The coining of the Doha round as a development round was no different.

⁴² Dicke DC "Public International Law and a New International Economic Order" in Legal Issues in International Trade, Sarcevic and van Houute (eds.) Graham and Trotman, 1990 p 25

⁴³ Mcnamara RS "Address to the Board of Governors" 26 September 1977 (Washington DC) p5

⁴⁴ Ibid at p 11

The failure of the Seattle talks have been largely attributed to the violent demonstrations in that City and organised protests across the globe. However the underlying reason was disagreement over the agenda of the talks.⁴⁵ There was huge dissatisfaction amongst developing countries that the agenda be set through the "green room" process wherein only a select group of countries determined the agenda, which agenda was then put to the plenary for discussion. It also did not assist that the United States, the single largest economy chaired the meeting. Developing countries had agreed to talks on intellectual property without envisioning the final form these agreements would take. They then found themselves bound to agreements with unexpectedly high implementation expenses. With this context in mind they feared making the same mistake again. In addition the developing countries perceived the distinction between so-called agendas on the one hand and modalities on the other as no longer sufficiently clear.⁴⁶

The *coup de main* was however the United States President's (then Clinton) formal statement that the United States would impose trade sanctions on countries who refused to implement specific labour standards. No further compromises on the part of developing countries could be elicited.

⁴⁵ Dicke DC "Public International Law and a New International Economic Order" in Legal Issues in International Trade, Sarcevic and van Houute (eds.) Graham and Trotman, 1990 p 25

At Doha however, developing countries were more motivated to find common ground than in Seattle following a rise in protectionism resulting from the global economic slowdown at the start of the new millennium and a more open attitude to address real development issues in the post-September 11th atmosphere which seemed to spawn a desire by the more powerful economies to make a real commitment to development. In fact a new commitment was made, "At the behest of the EU, the ministerial declaration emphasized that the Doha Round should provide a major opportunity for developing countries. Consequently the agenda for the new WTO round has been coined the 'Doha Development Agenda'.⁴⁷

In the words of SJ Evenett,"... it is quite likely that the development mandate has raised the expectations of some trade officials from developing countries, emboldening them to make new and perhaps more ambitious proposals—some of which call into question the very status of previously agreed accords. Overall, I am not sure that all this window dressing or this WTO-equivalent of political correctness has been cost free".⁴⁸ This "development commitment" included addressing the concerns of developing countries with regard to how the commitments made in the Uruguay Round were to be applied, and

⁴⁶ For an in-depth discussion of the meaning of "modalities" see www.wto.org/english/tratop_e/negoti_mod1stdraft_3.htm

⁴⁷ Joseph Francois, Hans van Meijl and Frank van Tongeren "Trade Liberalization and Developing Countries under the Doha Round" Centre for Economic Policy Research at www.cepr.org/pubs/dps/DP4032.asp

⁴⁸ Simon J Evenett "The Failure of the WTO Ministerial in Cancun: What implications for future research on world trading system?" CESifo Forum, Vol.4 No.3 Aut.2003 at 11

generally how poor countries could be assisted to improve their trade volumes. In addition the WTO was geared at becoming more open and transparent and new Dispute Breaking measures would be incorporated.

Despite the seeming acceptance at the Doha Ministerial that development issues would be prioritized there was also significant disagreement on other issues. The main bone of contention was the relative importance placed on two different sets of issues. On the one hand the "agricultural issues" relating to tariffs and subsidies placed on agricultural goods and on the other, the "Singapore Issues". The Singapore Issues are generally taken to consist of international commerce issues including trade and investment policy, trade and competition policy, government procurement and transparency in relation thereto and practices which would facilitate trade such as efficient customs processes and procedures. The name "Singapore Issues" derives from the fact that these issues were first placed on the WTO agenda at the Singapore Ministerial meeting.

After the scheduled close of the Doha meeting a consensus was found on the future of talks with development as its bedrock. Ironically, as we will see later the perceived lack of seriousness to make a significant change in the Agricultural regime (a position articulated by the G-20 plus) on the one hand as opposed to the unwillingness to proceed on the Singapore Issues (as strongly pushed for by the EU and the US) on the

other seems to have been one of the main causes of the Cancún breakdown. The unrealized expectation of a “development core” agenda which expectation was created at Doha may well be one of the other main causes thereof. It may be that in the negotiating slump following Seattle the developed countries in their zeal to get the talks back on track overstated the development concessions to be made at Doha. If this was not done directly then certainly it seems to have been done by implication. However, this may have merely postponed the backlash and fanned the fire of dissatisfaction at Cancún.

On conclusion of the Doha talks a Ministerial Mandate was adopted which outlined the issues to be tackled. This programme was intended to be finalised by 2005 and included agriculture, services, trade and the environment, industrial tariffs, antidumping and countervailing duties, fisheries subsidies, rules on regional trade agreements, and dispute settlement.⁴⁹ It is of particular significance that before it was agreed to endorse a new round of talks the developing countries insisted that the difficulties which they experienced in implementing the Uruguay Round commitments were to be resolved and that these had to be an integral part of the agreed work program”.⁵⁰

⁴⁹Doha Ministerial mandate see

http://www.wto.org/english/thewto_e/minist_e/min01_e/min_decl_e.htm

⁵⁰ “Ministerial Declaration.” WT/MIN/01/DEC/W/1, Geneva: World Trade Organization

The focus on those issues of main concern to developing and transitional economies⁵¹, that is, those concerns which are believed to promote the development of developing and least developed countries, dubbed it the "development round". The final issues to be included in future talks were to be finalized at the Cancún round. It was during these discussions that agreement could again not be found and the talks ended before consensus could be reached.

The General Agreement on Trade in Services (GATS) as a topic for discussion at Cancún requires special mention in that its effect on the world economy cannot be understated. The general principles of GATS which became effective in 1995 will have huge implications for the future. According to the World Bank, trade in services accounts for between sixty and seventy percent of production and employment in the developed world. It is the fastest growing component in world. Services trade exceeded US\$ 1.3 Trillion in 1999, this figure considered to be significantly underestimated. This represents more than 20% of world trade in goods and services. Furthermore, at present more than 50% of Foreign Direct Investment flows are in services. The value of sales of services by United States firms is estimated to be 3.5 times that of cross-border exports⁵².

⁵¹ A "transitional economy" may be described as a previously socialist or communist, centrally-based economy now in the process of transformation to a free-market-based economy. The states which previously made up the USSR are typical examples.

⁵² <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/TRADE/>

The hardened stance taken by the developing states which required issues such as agriculture and textiles to reach finalisation before the Singapore issues could be placed on the agenda must be seen in this light. The Singapore issues to a large degree are the natural extensions to the Trade in Services interests of the tertiary economies of the developed world. In a sense the rise in services itself is a looming economic nightmare for developing nations as only the developed nations can take advantage of this economic surge brought about by technological advances.⁵³ In one sense, the staggering figures quoted above implies that economic development is not a linear process but may be likened more to a relay race in which fresh spurts of development occur when trade conditions are ripe. In this metaphor the developing nations have not yet properly begun the race whilst their developed counterparts have already handed over the baton to the next sprinter. The way in which these differing interests played itself out at Cancún is discussed later in this paper.

Members took the concrete step of setting deadlines for proposals at the Doha meeting to ensure the continued progress of the negotiations.⁵⁴

From the 10th to the 14th September the fifth Ministerial Conference was held in Cancún (Mexico). Its goal was to consider progress made in talks thus far and further talks flowing from the Doha Development

⁵³ Mattoo, Aaditya "An Introduction to the Economics and Law of Trade in Services", mimeo., World Bank

⁵⁴ See note 12

Agenda. The World Trading Organisation was poised to continue as successor to the GATT achievements in trade liberalization. Now as a larger organization with over 140 members, accounting for ninety-seven percent of world trade.⁵⁵

⁵⁵ See note 3

5. Economic and Political Context Prior to Cancún

5.1 Economic Context

The attack on the World Trade Centre coupled with the ongoing decline in major trading areas including technology resulted in a sluggish 2001 to 2003 with World Gross Domestic Product remaining under 3%.⁵⁶ The period of World Economic Growth which prior to 2000 had seen world exports grow by seven percent in three years had now sunk to between one and minus one percent growth.⁵⁷ Of course such statistics though true on a global scale cannot be applied to results in all countries. China's massive demand for commodities is a typical example. The current account deficit of the United States did also not assist, standing at the start of negotiations at US\$50 million per hour! Roughly translated this amounts to 5% of GDP per annum.⁵⁸

In the words of Christopher Maule and Rosemina Nathoo, "The deficit is financed by the willingness of other countries to be paid in US dollars and depends on lenders trusting in the creditworthiness of the US in order to hold dollars. If there is a collapse in the value of the US dollar, foreigners will lose buying power for their imports; US exports will likely decline even though the low value of the US dollar will promote their exports. The prospects for a worldwide economic downturn will be

⁵⁶ Centre for Trade Policy and Law (Canada) www.carleton.ca/ctpl/papers/cancunbriefingmodule.doc

⁵⁷ <http://www.worldbank.org/data/wdi2001/wdichanginterm.html>

enhanced. Slowing growth gives rise to protectionist pressures that can create additional harm to national economies. Excess production capacity in many industries is putting downward pressure on prices, so that deflation is considered as a possible economic outcome. Further trade liberalization is part of the medicine needed to restart growth.”⁵⁹

5.2 Political Context

The Afghanistan and Iraqi wars and the following political uncertainty in the Middle East including that in the Israeli/Palestinian conflict and in North Korea coupled with the outbreak of the SARS epidemic and political issues in Venezuela have resulted in further political uncertainties. Coupled with corporate governance issues in the United States, the European Union and Japan being the major trading nations have also contributed to turmoil in the political environment and consequent economic uncertainty as is evident from unstable market indices.

The conditions above have however also a positive effect on the negotiating will of the powerful nations and consequently their commitment to success in the talks in that a successful outcome to World Trade Organisation talks bolster both the institutional state of

⁵⁸ Ibid

world trade in the uncertain climate as well as the confidence of investors.⁶⁰

Whilst European economic consolidation has proved a worthy prize, many members of the European Union are concerned about their further integration—in particular upon the internal distribution of agricultural subsidies. Pascal Lamy's hesitancy to accede to a reduction in the agricultural subsidies of the European Union is seen by many as an effort to prevent a rise in tensions inside the European Union itself, particularly in the light of the French resistance to lower these subsidies.⁶¹

A rift between the United States and the European Union also seems to have taken root largely as a result of fear in the European Union that the “go it alone” statements of Robert Zoellick, the United States trade representative, seem to echo the sentiment of President Bush's isolationist outlook. This is of particular concern in the context that tens of thousands of manufacturing jobs are being lost in the United States and the suggestion by the Democrats in the presidential campaign that this is largely caused by unfettered world trade.⁶²

59 Centre for Trade Policy and Law (Canada) www.carleton.ca/ctpl/papers/cancunbriefingmodule.doc

⁶⁰ Ibid

⁶¹ Elizabeth Becker “Poorer countries pull out of talks over world trade” New York Times, 15 September 2003

⁶² Ibid

Given the anti-globalisation influence that the protests have had on the Seattle talks the political influence of Non-Governmental Organisations cannot be overemphasised. The growth in number and professionalism of these Organisations claiming to represent the “global citizen” the environment and a range of other interests, also themselves range in position. Those on one end of the spectrum merely wishing to influence the outcome of negotiations whilst those on the other end are determined to stop the talks and reverse its gains.

The increased usage of information technology has massively increased the amount of information available to and from these groups and their global coordination capacity. The direct political effect on the negotiations has been that more opposition to any talking point has been garnered and consequently the stakeholder arguments need to be more coherently put and researched. The need for further inclusion of such organisations to involve them in the process rather than have them protest “from the outside” has been suggested as the only way to channel this force in support of positive outcomes. Discussion on this issue is taken further below.

There are a number of positive factors supporting further negotiation and discussion at Cancún. These include the fact that the multilateral trading regime under the agreements already in force has effectively supported the dramatic growth in exports and foreign direct investment. The success of the system is further borne out by the fact that the

organisation represents 147 countries and that this number continues to increase with 26 countries at present applying to join.⁶³ The diversity of countries which are members and the fact that ninety-seven percent of world trade is regulated under the main agreements is clear testimony of its global support. The collaboration of United Nations agenda issues with trade issues also bodes well for the leading position in world affairs which global trade is capable of championing. In recent times activists in diverse fields such as proponents of labour standards, of environmental protection and of human rights have looked to the World Trade Organisation as a mechanism for enforcement of principles.⁶⁴

5.3 Overview of Developing country Alliances

Before examining the main priorities of different groupings it is instructive to consider the alliances of developing countries which have hitherto emerged as this generates a sense of the dynamism and complexity of the interests of different nations and explains the fragmentation of development country support. It also defies the simplistic North/South Developed/Developing homogeneity.⁶⁵

Developing countries are self-defined whilst Least developed countries are identified by the United Nations. There are various alliance groups which have formed on various issues. These groupings have dynamic

⁶³ http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

⁶⁴ Maura Blue Jeffords "Turning the protester into a partner for development: The need for effective consultation between the WTO & NGOs" 28 Brooklyn J. Int'l L. 937

membership and countries often belong to more than one group. The following are traditionally identified as significant:

- The **ASEAN** Countries: this group from Southeast Asia includes Brunei, Malaysia, Thailand, Philippines, Singapore, Myanmar, and Indonesia.
- **African Group**: consists of forty-one African countries.
- **CARICOM**: Caribbean Island states generally work together under the ambit of the existing Caribbean Community or CARICOM.
- **Mercosur**: Brazil, Argentina, Paraguay, and Uruguay, joined from time to time by other Latin American countries, occasionally present joint positions.
- **Grulac**: In some cases, countries from Latin America and the Caribbean work together under this grouping.
- **Like-Minded Group**: This grouping is not based on geography and usually consists of Cuba, Dominican Republic, El Salvador, Haiti, Honduras, Kenya, India, Nigeria, Pakistan, Sri Lanka, Uganda, and Zimbabwe.

⁶⁵ Ibid

- **India and China:** Due to their economic size and populations, they are considered as developing country heavyweights, and usually speak up on behalf of a majority of developing and least-developed countries in the WTO.

6. Priorities for the Developing World

Agriculture was by far the most important issue for developing world negotiators. The importance of this issue stems from the perception that the World Trade Organisation: Agreement on Agriculture was perceived to allow the developed countries to continue to subsidise their farmers to a large degree. Such farmers are consequently able to dump massive surpluses into developing countries at depressed prices. As a result, local food supply is replaced by foreign supply and a dependency is created upon the foreign food supply with consequences for food security and the destruction of the local agricultural market.⁶⁶

Mechanisms for the alleviation of these protectionist policies were provided for in the World Trade Organisation—Agreement on Agriculture.⁶⁷ Why then was this still such a major concern for developing countries at Cancún? The answer lies in the nature of the provisions as it stood before Cancún. These provisions may be summarised under the following headings:

⁶⁶ Carmen G. Gonzalez, "Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries" 27 Colum. J. Envtl. L. 436

⁶⁷ See http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#aAgreement

Market Access

The agreement provided that all non-tariff barriers such as levies, duties, and quotas be converted into tariffs with at most the same level of protection. These would then be reduced by at least 36% over 6 years in developed countries and 24% over 10 years in developing countries. Various exceptions were catered for.⁶⁸

Export Subsidies

Developed countries were to reduce export subsidies by 36% and the total volume by 21% over 6 years. Developing countries were to reduce subsidies by 24% and volume by 14% over 10 years.⁶⁹

Domestic Subsidies

Developed countries were required to reduce by 20% over 6 years and developing countries 13.3% over 10 years.⁷⁰

The essence of why this agreement was not able to effectively liberalise agriculture lay in the opportunity of complying with the letter of the agreement whilst still avoiding effective liberalisation. In the area of Market Access the practice of "dirty tariffication" was practised. This implied that the non-tariff barrier replacements were set excessively high. Also the highest tariffs were set by developed countries on

⁶⁸ See note 30

⁶⁹ Ibid

⁷⁰ Ibid

products most significant to the developing countries. The fact that the prescribed reduction was based on an average reduction across products allowed developing countries to pick which to lower. The practice of lowering those which were already low and of little interest as well as those in which no competitive market existed in any event in the developed country, lead to further ineffectiveness of the liberalisation attempt. Also complex tariff systems were put in place which would further complicate future talks. As regards Export subsidies the agreement effectively sanctioned a permissible level of subsidisation rather than outlawing it. The market distortions therefore remained intact. Domestic subsidies also exempted many of the subsidies traditionally used by developed countries. The effect of this was that once again only minimal reductions were achieved but constitutes a first step towards providing a basic framework for liberalisation.⁷¹ It is this next step which was anticipated by developing countries at Cancún.

In the run up to the Cancún talks no progress could be made on this issue and only after much insistence by the developing world and barely one month before the talks were due to start the European Union made suggestions of movement on the issue. However, it offered little in the light of what was demanded. In particular export subsidies the central focus of demands was not to be reduced under the new plan. The G-20 plus alliance countries were formed representing half the world's

⁷¹ David W. Leebron "An Overview of the Uruguay Round Results" 34 Colum. J. Transnat'l L. 25

population and two thirds of its farmers. Its position was clear— the richer countries which subsidise agricultural farming most, should make significant cuts in such subsidies. The subsidisation by rich countries has remained fairly constant over the past 15 years in excess of US\$300 billion.⁷² In fact there are suggestions that it has increased from approximately US\$308 billion in 1986-1988 to approximately US\$352 billion in 1998.⁷³ “[I]n the real world . . . , agricultural production and trade is determined not so much by comparative advantage as by comparative access to subsidies—an area in which food producers in the industrialised world enjoy an unrivalled advantage over those in developing countries.”⁷⁴

Interestingly a number of small African countries were worried that they might lose their special preferences as a consequence of the cutting of subsidies by rich nations. In addition a few West African countries including Benin, Burkina Faso, Chad and Mali succeeded in placing the matter of cotton subsidies by the developed world, amounting in excess of US\$3 billion per annum, on the agenda.⁷⁵ The history of the Agreement relating to Textiles begins in 1961 prior to which no specific provisions existed in the GATT itself. A series of multilateral agreements were entered into which became known as the “Multifibre Arrangement” (MFA) in 1974. These were repeatedly renewed, the final renewal taking place in 1986. Under the MFA quotas were set which placed severe

⁷² The Economist “The WTO under fire” September 20th 2003, p29

⁷³ See note 30 at 468

⁷⁴ Ibid

limitations on the exporting capabilities of developing countries to developed countries.⁷⁶ In particular these quotas were set in relation to historical imports. The Uruguay Round Agreement required that all bilateral quota restrictions under the MFA be phased out over a 10 year period.⁷⁷ A number of categories are defined and reductions must take place in each specific category. All other textile restrictions are to be phased out over one year unless a special monitoring body known as the "Textile Monitoring Body" allows an alternative plan of reduction. The intention is that after the ten year period all Trade in Textiles will be regulated under the GATT as a whole together with all other regulated trade.

Mexico's foreign minister Luis Ernesto Derbez was Chairman of the Cancún meeting and it is therefore important to understand Mexico's priority. Also in the arena of agriculture, corn is of fundamental importance to Mexico. Corn was developed by indigenous Mexicans who "gave" it to the world.⁷⁸ The Mexican government is under extreme pressure to have not only the intellectual property of indigenous farmer's recognised but also to ensure that trade in corn benefits the indigenous population.⁷⁹ The issue of subsidisation of American agribusiness by the United States government is of grave concern to Mexico.

⁷⁵ Ibid

⁷⁶ David W. Leebron "An Overview of the Uruguay Round Results" 34 Colum. J. Transnat'l L. 25

⁷⁷ Ibid

⁷⁸ Arturo Warman "Corn & Capitalism: How a Botanical Bastard Grew to Global Dominance", Univ. of N.C. Press 2003

7. Priorities for the Developed World

Throughout the meeting European Union's chief negotiator, Pascal Lamy was focused on the Singapore Issues. These issues were first raised at the 1996 World Trade Organisation Ministerial meeting which was held in Singapore. At this meeting developing countries were not convinced that these issues required a multilateral regulatory framework. The developing countries did however agree to place these items on the agenda in return for a strong mandate on proceeding with agricultural negotiations.⁸⁰ The Singapore issues consist of Investment Issues, Competition Policy, Transparency in Government Procurement, and Trade Facilitation. Pascal Lamy insisted upon including all four issues in the agenda. Only upon the morning of the last day did he offer to give up some of these issues and it was generally understood that only trade facilitation was then being insisted upon.

It is critically important however to understand the importance of the Singapore Issues for the developed world in the context of the increase in the services industry. It bears repeating that the General Agreement on Trade in Services (GATS) regulates trade which exceeded US\$ 1.3

⁷⁹ See note 4

⁸⁰ Centre for Trade Policy and Law (Canada) www.carleton.ca/ctpl/papers/cancunbriefingmodule.doc

Trillion in 1999 and that this represents more than 20% of world trade in goods and services.⁸¹

The Singapore Issues are a natural extension to this line of development of the regulation of the Services Industry in that the General Agreement on Trade in Services is not considered to have far-reaching impact with the result that the schedules of commitments within various service areas is not significantly liberalised. It is instructive therefore to consider the place of GATS in the overall scheme of trade regulation and the state of agreement in liberalising this sector. A critical feature of the GATT is that there are default provisions which apply to any trade area not specifically catered for in the agreement.⁸² This is absent from the GATS and it follows that a country may impose restrictions on any service which is not expressly catered for in its schedule of commitments. Other aspects such as quantitative restriction measures and even action contrary to the most favoured nation principle may be taken.

Why does the GATS exhibit such lack of regulation? The answer lies in the fact that unlike goods, regulation of services is not usually done via border measures in that one does not literally import a tangible object which crosses a border and therefore "tarrification" is not a relevant

⁸¹ <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/TRADE/>

⁸² David W. Leebron "An Overview of the Uruguay Round Results" 34 Colum. J. Transnat'l L. 29

mechanism of control. Rather services are regulated by means of regulatory prescripts.⁸³

Liberalisation therefore tends to focus on prohibiting restrictions on the registration and existence of legal entities and the movement of persons as well as the Foreign Direct Investment which may be made into a foreign country. It should be evident from the massive portion of world trade that services occupy as well as the nature of services trade, that the Singapore issues were central to the developed world's priorities.

The aspect of the Singapore issues relating to competition policy also bears some elucidation. The GATT and Uruguay agreements address only government intervention in preventing competition. However competition policy is focused around ensuring that powerful conglomerates and cartels are not impeding competitive trade. It is envisaged that the only effective means of ensuring compliance with such provisions is the creation of an international monitoring body which could subject private firms to competition scrutiny.⁸⁴ Alternatively, forcing countries under threat of direct sanction to ensure competition principles are adhered to within their jurisdictions. However the substance of competition law varies dramatically in different jurisdictions and little agreement has been found even on a core of policies. Also given that competition policy and direct investment go hand in hand with the services industry and that the services industries are concentrated in the

⁸³ Ibid

developed world the negotiating of these agreements should be expected to elicit resistance in the developing world.

The Singapore Issues have been criticised for firstly, not being sufficiently related to market access and secondly, that the complexity and expense of both negotiating and implementing such rules would be prohibitive. Critics argue that as a result of this lack of proximity it cannot be said that economic welfare will be improved by reciprocal reduction of impediments to markets.

Supporters argue that the link between trade facilitation and market access is well established and that it is clear that custom's procedures result in more effective access to the local market.⁸⁵ Similarly, that government procurement policies certainly are related to market access in that such rules would be specifically designed to give access to the state procurement markets. In addition supporters find little difference in the type of market access generated by the General Agreement on Trade in Services and foreign investment policy.⁸⁶

The question arises as to whether the appropriate test for inclusion in the agenda is proximity to market access or whether there are other areas of trade law with suitable characteristics for inclusion. According to

⁸⁴ Ibid at 31

⁸⁵ Simon J Evenett "The Failure of the WTO Ministerial in Cancun: What implications for future research on the world trading system?" CESifo Forum, Vol.4 No.3 Autumn 2003 at 5

⁸⁶ Ibid at 6

Evenett⁸⁷ the following five criteria must be met in order to qualify as a policy field worthy of inclusion in a policy instrument:

1. There must be a discernable positive welfare impact to undertaking the collective action;
2. At least one domestic constituency in each of the major trading partners must support the negotiation of the initiative at the World Trading Organisation;
3. Reasons must be advanced as to why the proposed multilateral obligations must be binding (that is, as to why hortatory language expressing best intentions is insufficient);
4. The obligations must be codified precisely, their implementation observable, and where the collective action at issue permits some discretion for national policymaking, the latter must be relatively transparent;
5. The obligations created must be amenable to enforcement through the World Trading Organisation's dispute settlement understanding.⁸⁸

Whether the Singapore Issues meet these criteria is open to debate, and this is what makes negotiation as to their inclusion capable of being used

⁸⁷ Ibid at 9

to force strategic concessions from those countries which support inclusion.

⁸⁸ Ibid at 9

8. Reasons for the Breakdown

There are a number of reasons which have been put forward for the breakdown of talks at Cancún. As it is impossible to ascertain the degree to which each reason contributed to failure, the following are possible reasons listed in no particular order: optimism following from the idea of a “development agenda”; the chairing of the meeting and time factors; tactical and timing miscalculations; the formation and holding firm of the G-20 plus; the structure of the World Trade Organisation; the Media reports; diverse priorities and the interactive dynamics between them; the role of NGOs; and the Lack Expertise and Fear of Implications of “New” Issues. The background to the emergence of these reasons have been discussed above. How these reasons directly contributed to the breakdown is described in this section.

8.1 Optimism flowing from the idea of a “development agenda”

The contribution which the concept of the Doha round as the “developmental round” which would take particular cognizance of the needs of developed countries has already been discussed above (under the heading The state of Free Trade agreements under the WTO before Cancún). It suffices to repeat that the development mandate may have raised the expectations of some trade officials from developing countries, emboldening them to make new and perhaps more ambitious

proposals—some of which call into question the very status of previously agreed accords.

This expectation that developed countries should assist developing countries in actual development is often constructed as a right held by developed countries.⁸⁹ No objection is raised to the right of a developing country to develop itself of and by its own accord where no impairment of any other State is a feature but if the right to development is construed as a right to be assisted to develop to the same degree as developed nations of the North, the implications are indeed dramatic. Possible means of such assistance would include aid and preferential trade agreements.

According to I Seidl-Hohenveldern, "The States of the North have never admitted the existence of such a general right. In so far as they recognize a legal—as distinct from a moral—duty to grant such aid, they do so only in so far as they have entered into specific commitments to such effect."⁹⁰ The International Court of Justice has held that the giving of aid "is more of a unilateral and voluntary nature".⁹¹ Also, the continued objection by the North to recognise a right to development in the extended sense prevents the practice of giving aid becoming a binding

⁸⁹ RJ Dupuy "The Right to Development at the International Level" Hague Academy of International Law, 1979

⁹⁰ "International Economic Law" p6

⁹¹ Nicaragua v United States , ICJ Reports 1986 p138

rule of International Law as no law persistently objected to by a State can become binding upon such a State.⁹²

But whether the right to development is to be interpreted in the limited sense or otherwise does not change the expectations which a voluntary agreement engenders. In this context the perception of the developing nations' approach to the talks derives from a perception that the developed nations had voluntarily bound themselves to placing the development issues at centre stage. The development verbage of the earlier talks and especially those following Seattle is the mischief which raised expectations but which on more sober ground at Cancún could not be fulfilled.

8.2 The chairing of the meeting and time factors

The Mexican Trade Minister and Chairman of the talks at Cancún, Luis Ernesto Derbez has been widely criticized for closing the talks too abruptly. South Africa's ambassador to the World Trade Organisation Faizel Ismail said in an essay published under the name "Africa After Cancún", contained in the ministerial report that "In the mid afternoon of day four of the five-day meeting, the chairman (Derbez) of the ministerial meeting sealed the fate of the meeting with the release of his draft ministerial text, "which did not reflect any of the progress which had been made in agriculture, as well as possible areas of agreement that

⁹² Anglo-Norwegian Fisheries Case, ICJ Reports 1951, p131

had been identified. The Mexican minister had also "misrepresented" the debate on four key issues namely, competition policy, investment, transparency in government procurement and trade facilitation by brushing aside objections from developing nations to the launch of negotiations on these issues. The reaction to the text sparked a series of consultations, but it was Korea's insistence that all four issues had to be negotiated "that finally broke the negotiations. The chair then decided to call the entire conference to a halt to the surprise of all involved."⁹³

It is true that the effect that the identity of the Chairman of the talks can have an impact on the outcome resulting, particularly in the light that the suggestion is that the specific timing of the close of the meeting was largely at fault. The writer submits however that the magnitude of the resulting effect is limited by the will of the participants to proceed. With hindsight it would seem that this element has been blown out of all realistic proportion.

Similar criticisms came from other sources who also blamed missed deadlines in the run up to the talks: "despite missed deadlines for agreeing on modalities, agriculture negotiations did progress to some extent. To be sure, the liberalization offer was nowhere near what the Doha Round had expected at the time of the launch, it was reported in the business press that the ministers were prepared to discuss it on the

⁹³ John Fraser "RSA Report Blames Mexican Negotiator for Failure" Johannesburg Business Day, 5 December 2003 at <http://www.bday.co.za/>

last day in Cancún, when the chairman of the world trade talks Luis Ernesto Derbez decided that the negotiations were not progressing and brought them to a formal close. If they had not been ended abruptly, there was a plausibility of some more progress in the area of trade in agriculture"⁹⁴

8.3 Tactical and timing miscalculations

Accusations were levelled at the European Union's tactics of postponing concessions aimed at developing nations and that in the light of the lateness of these proposals they were too little given the time remaining for negotiations. In particular the eleventh-hour agreement that conceded that issues relating to investment and competition would be treated separately.⁹⁵ Pascal Lamy retorted that, in reference to the timing of the proposals "I did it at a time when I thought negotiations could move," and that in any event "We [the EU] fed the beast meat in Doha, meat in Cancún and meat in between. It didn't work. We have not seen much coming from other people's pockets, apart from the US on agriculture".⁹⁶

Lamy insisted that he had negotiated in good faith and had added fresh concessions to those already on the table. He questioned to what the accusations that they had moved too slowly could be attributed and to what it was being compared: "Compared to what or to whom, might I

⁹⁴ See note 10 at p 19

⁹⁵ Russell Hotten "EU in last-ditch WTO concession" The Times (UK), Monday September 15 2003

ask? Compared to the total immobilism of the other big players, not one of whom budged an inch? I would accept that criticism if the discussion process had picked up any pace, but I think there are enough witnesses around who can confirm that it wasn't so."⁹⁷

However, the Director General of the World Trade Organisation Supachai Panitchpakdi alludes to the unfortunate timing of concessions in the following words, "We may have to learn the Cancún lesson that when participants take too long to unveil their true positions, compromise becomes even more difficult to achieve. We may also need to work closely with groups of countries and address their concerns earlier to prevent the unnecessary hardening of positions that complicates the decision-making process at ministerial conferences."⁹⁸

8.4 The formation and holding firm of the G-20 plus

This group variously known as the Group of 20, G-20, G-21, G-22 and G-20 plus as it grew by the addition of new allies took the developed countries by surprise as they were not prepared for an organized and resilient new bloc of this size to stand firm. Despite specific offers made to specifically target certain countries in the group the coalition did not falter and the increased participation of the development world in the talks had become a tangible reality as the bloc represented more than

⁹⁶ Charlotte Denny "EU negotiator refuses to shoulder blame for Cancun" The Guardian, Wednesday October 29, 2003

⁹⁷ Pascal Lamy "Result of the WTO Ministerial Conference in Cancun" Plenary Session on the Ministerial Conference of the WTO in Cancun, Strasbourg, 24 September 2003

⁹⁸ Supachai Panitchpakdi "After Cancún The real losers are the poor" at www.wto.org, Thursday, September 18, 2003

half the world's population and would be ignored at considerable cost. In particular it was different in nature to the coalitions typical of the past in that it was not designed to block a position nor to set a specific agenda. President Bush attempted to intervene directly by communicating with both South Africa and India whilst the European Union put pressure on the African, Pacific and Caribbean countries to withdraw.⁹⁹

The leading developing countries Brazil, India, China and South Africa formed a group of members prior to Cancún known as the G-20. It included Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, the Philippines, South Africa, Thailand and Venezuela. In Cancún, El Salvador withdrew, Nigeria and Indonesia joined, and Egypt and Kenya, among others endorsed the G-20 position. In the weeks following the Ministerial, an additional five countries — Colombia, Costa Rica, Ecuador, Guatemala and Peru — left the group, bringing the number of Latin American countries that withdrew to six. This group was formed to articulate and negotiate the broad position of developing countries at large.

This followed on an earlier group led by Brazil and India at the Uruguay Round in 1986 which disintegrated due to pressures from stronger nations. It is easy to understand the euphoria expressed by developing nations and Non-Governmental Organisations flowing from the cohesive

⁹⁹ Dr. K Coetzee "Crack-up at Cancun" Farmer's Weekly 17 October 2003, p23

success of the group despite the losses which may be felt flowing from the fallout of failure of the meeting.¹⁰⁰

The G-20 plus have been applauded for their “sense of purpose, technical sophistication, and their awareness of best alternatives to negotiated outcomes” or BATNA, the mainstay of non-positional negotiating techniques.¹⁰¹

On the other hand it has been said that the G-20 plus had overplayed its hand as on the final day of the meeting the European Union had, albeit late, abandoned its insistence that negotiations and investment policy talks had to proceed and had opened up its position in respect of Agriculture.¹⁰² However, the fact that the European Union and the United States did not respond to a proposal which the G-20 plus had put on the table was seen as a lack of good faith.

8.5 The structure of the World Trade Organisation

The size of the World Trade Organisation with 148 members operating on the basis of unanimity makes it a cumbersome structure. Decisions can be held hostage by small numbers of opponent nations which in itself is not supportive of a democratic process. On the other hand smaller countries fear being forced along with the decisions of larger and richer countries and therefore resist attempts at centralising the

¹⁰⁰ See note 1 at p2

¹⁰¹ See note 35

structure. The structure also results in severe inefficiencies and often institutional paralysis. In the words of the European Union trade commissioner it is a "medieval organisation".¹⁰³

Pascal Lamy asks, "[D]oes the WTO, its ground rules and organisational principles still meet today's needs? What about the principle that members have the same rights and obligations, flanked by rules on special and differentiated treatment and the asymmetry of remaining protection? What about its increasing difficulty, qua organisation, in building consensus among an ever wider membership on issues which may be technical but now affect the lives of billions of men and women and consequently have far-reaching political implications?"¹⁰⁴

Pascal Lamy, the European Union chief negotiator also relates the structure directly to the tasks currently at hand, "The procedures and rules of this organisation have not supported the weight of the task," he said. "There is no way to structure and steer discussion among 146 members in a manner conducive to consensus. The decision-making needs to be revamped. The EU will continue to work in this direction, within the WTO."¹⁰⁵

The issue of decision-making is a central theme in regard to the structure of the World Trade Organisation. It is of course necessary that

¹⁰² Ibid at 32

¹⁰³ The Guardian "Cancun raises five crucial questions" Tuesday September 16, 2003

¹⁰⁴ See note 28

a balance is struck between fast and efficient development of the regulatory measures on the one hand and ensuring that effective representation and inclusivity of members involvement in the processes thereof be incorporated. This is particularly so in the given context in that the over-arching concept is one of sovereign states agreeing with each other to adopt mutually beneficial behaviours which once adopted rank as International Law.

An historical survey suggests that certain trends are evident in the voting system adopted historically by International Economic Organisations. Majority voting dominated the systems adopted in the 1940s and 50s when these were to the benefit of Western countries (evident from the IMF, IBRD, FAO, GATT) but in the 1960s a definite shift towards consensus grew.¹⁰⁶ A number of reasons may have contributed towards this shift including decolonisation which implied a larger number of countries all of which would have votes within a majoritarian system. However, the most significant reason may be the fact that it became evident early on that proper implementation would suffer particularly in the light that only mutually beneficial agreements would in any event lead to the desired behaviour coming into being. Once an agreement were shown to be mutually beneficial the agreement of a party thereto could largely be assumed.

¹⁰⁵ Reported in the Guardian in an article by Charlotte Denny, Larry Elliott and David Munk "Brussels urges shakeup of 'medieval' WTO" on September 16, 2003

The International Economic Organisations established between the 1960s and 1980s clearly exhibit in large number the shift towards consensus and includes the following organisations adopting a consensus decision-making approach: Organisation for Economic Cooperation and Development (OECD), European Free Trade Association (EFTA), Organisation of Petroleum Exporting Countries (OPEC), International Tea Promotion Association (ITPA), Caribbean Economic Community (CARICOM), Association of Tin Producing Countries (ATPC), Cooperation Council for the Arab States of the Gulf (CCASG), Preferential Trade Area for Eastern and Southern African States (PTA), Economic Community of Central African States (ECCAS), and the African Petroleum Producers Association (APPA) amongst others.¹⁰⁷

The GATT council has always taken decisions by consensus and even though the General Agreement does not formally make provision for consensus by contracting parties, decisions were not generally referred to a vote.¹⁰⁸

In practice both majority based decision-making and consensus approaches have advantages and disadvantages. Majority voting ensures that a few members cannot hold the body to ransom by obstruction whilst it inevitably creates implementation problems in those

¹⁰⁶ Voitovich S “Normative acts of International Economic Organisations in International Lawmaking” 24:4 Journal of World Trade (1991) at p 22

¹⁰⁷ Ibid

countries which did not support the vote but had the decision “imposed” upon them nonetheless by operation of the vote.¹⁰⁹

Whilst consensus methods intuitively should make for superior application where mutually beneficial interests are at stake it is however open to obstructionist forces as well as exhibits a tendency to dilute an agreement to its lowest common acceptable denominator. The implications are often vaguely worded agreements which may exhibit the flavour of the original intention but with little or no practical enforcement “teeth”.

As with most dilemmas it would seem that the middle path is the most desirable. In the words of Voitovich the International Economic Organisations are, “striving for the most reasonable combination of both methods, taking into account the subject-matter and the importance of the decisions, as well as the conditions under which those decisions are to be taken.”¹¹⁰

The World Trade Organisation exhibits the consensus approach and has been criticised in certain quarters in that this implies that some decisions are unlikely to ever be adopted due to the fact that there will always be some opposition thereto. A case in point are the proponent’s of specific issues such as labour standards which are particularly difficult areas in

¹⁰⁸ Ibid

¹⁰⁹ Zaitseva OG “International Organisations: Decision-making” Moscow 1989 pp71-78

which to engender very wide support. These proponents blame the structure of the World Trade Organisation for their failure, "The WTO's decisionmaking structure—which requires unanimous approval of any new trade agreement—may make the introduction of labour standards a political impossibility."¹¹¹

8.6 The Media reports

The media has also been criticised for reporting more on the protest than the progress of talks with the claim that reports of the tens of thousands of protestors were more newsworthy than the more formal nature of the talks at work. A classical example is the effect of reports of the suicide of Kyung Hae Lee, a Korean farmer who publicly stabbed himself to death in protest over the WTO negotiations. Such an effect is not easy to evaluate. It cannot however be ignored in that the media has embedded in the minds of people the world over the degree to which some activists would go in their opposition to trade talks. Even more so the degree to which negotiators themselves were impacted by these reports is impossible to ascertain but the following extract from one report shows the emotional nature of the content: "Perhaps European and even urban South Koreans won't be able to understand why Lee killed himself, but that is because they don't understand the reality of Korean farmers," says Han Gyuha, an official of the Jangsu county office involved in preparations for the funeral on Thursday. "Lee knew the Korean

¹¹⁰ Voitovich S "Normative acts of International Economic Organisations in International Lawmaking" 24:4 *Journal of World Trade* (1991) at p 23

countryside is slowly dying, that farmers are living lonely, miserable lives. He wanted to tell the world. That is why he sacrificed himself and that is why we call him a hero."¹¹²

The one-sidedness of the reports around the world on September 15th and 16th 2003 expresses the perspective of the callous indifference of the developed world without in any way touching on the corresponding posturing by the developing world. The reality that what was said at press conferences was completely different from what was discussed in the talks seemed to be totally lost on the press.

8.7 The Diverse Priorities:

It is significant to note that to a large degree what is considered "fair" and therefore a priority is a matter of ideology. As Howse and Alvarez put it: "Individual member states' perceptions of what policies fall on one side of the line and what on the other are going to vary depending on ideology, regulatory traditions, and so, all of which generate intuitions about whether someone's regulatory behaviour looks like "normal" public policy or, rather, like something that might only be done in the circumstances for protectionist reasons."¹¹³

¹¹¹ Daniel A. Zaheer "Breaking the Deadlock: Why and How Developing Countries should Accept Labor Standards in the WTO" 9 *Stan. J.L. Bus. & Fin.* 69

¹¹² The Guardian "Field of Tears" Tuesday September 16, 2003

¹¹³ Jose Alvarez & Robert Howse "From Politics to Technocracy—and Back Again" 96 *Am. J. Int'l L.* 94 at 3

A number of sources suggest that the Singapore Issues were the apparent reason for the failure of talks: The “apparent and proximate cause of the collapse of the Ministerial ‘s collapse was a failure to agree on launching formal negotiations on the so-called Singapore Issues”.¹¹⁴ The “Rejection by the developing countries of the so-called Singapore issues, including trade and investment, was the nominal, if not the underlying, cause for the collapse of the Ministerial Meeting at Cancún in September 2003.”¹¹⁵

The main proponents of these issues were the European Union, Japan and Korea. Within the European Union itself many larger economies did not support a strong stand on these issues fearing even more loss of control over their domestic economies. Though the initial stand of the troika was that negotiation on all four issues had to proceed simultaneously the European Union withdrew this insistence too late into the last day to save the talks. By this time the view of the G-20 plus was that the insistence on the Singapore Issues was merely a ploy to divert attention from their intransigence in respect of the agricultural question. Japan and Korea insisted to the end that all four issues be moved forward. It is generally accepted that the agricultural protections lavished on the farming sectors of the developed world are starkly illiberal and distorts trade. This resulted in their negotiators at Cancún being placed on the defensive as their governments seem incapable of accepting that

¹¹⁴See note 10 at p1

¹¹⁵Andreas F. Lowenfeld “Investment Agreements and International Law “ 42 Colum. J. Transnat’l L. 123

their agricultural regime must change significantly. The argument goes that the refusal to move forward on the Singapore Issues was a scapegoat for not facing up to the agricultural demands.

However, it must be noted that the massive increase in trade in services¹¹⁶ made these issues central to the advancement of the developed world, whilst in fact being a matter of crisis for the developing world which was not in a position to take advantage of this "new trade" and would in effect be left behind.

But few can argue with the fact that close to the end of the talks the only Singapore Issue still up for discussion was trade facilitation; an issue which is widely considered to be in the mutual interest of all parties. In the words of Robert Zoellick, Chief US negotiator, "The breakdown occurred over measures that would have simply facilitated trade and helped land-locked countries by ensuring prompt release of goods, publication of procedures, and timely and fair rulings on customs questions. These commonsense steps are in the interest of all; their rejection was a political statement. Sadly, this decision was emblematic of a broader culture of protest that defined victory in terms of political acts rather than economic results."¹¹⁷

¹¹⁶ <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/TRADE/>

¹¹⁷ Robert B. Zoellick "America will not wait" Paper published in the Financial Times, September 21 2003

The reason for Agriculture being of prime importance to trade within the developing world and the reasons for the view that the current regulatory measures are insufficient to ensure fair treatment of developing country exports is detailed above.¹¹⁸ It suffices to add the following comments relating to the expectations with regard to the development of this issue. It is interesting to note that trade in agricultural products which was a late addition under GATT has for that very reason become the most controversial issue for developing countries in trade negotiations. Repeated requests for the further liberalization in this arena during the Doha round led to an ambitious commitment to concede to such requests and an agreement to taking "the development dimension seriously across the board"¹¹⁹.

The Ministerial Declaration stated further that "we agree that negotiations [on the relationship between trade and investment] will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations."

In the period until the Fifth Session (i.e., prior to 2005), a Working Group is to consider a framework for negotiations, including "the special development, trade and financial needs of developing and least-developed countries."

"Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment."¹²⁰

The EU and the US followed this up with a "framework for the liberalization of farm trade" in August 2003. However, it was broadly considered to be a watered down proposal when compared to the Doha commitment in that it neglected to eliminate export subsidies in its entirety.¹²¹ The draft was also particularly unacceptable to Brazil in that it differentiated between those countries who were "large net food exporters" and other developing countries in determining the reach of special and differential treatment provisions. Accordingly Brazil took the lead in organizing the G-20 plus to bid for the agricultural proposals to be more ambitious than the August 2003 text.¹²²

In addition the specific issues around cotton which are of major importance to West African economies was underplayed with only a vague reference to a review of the textile sector in the draft document released at the talks. In particular the issues of compensation and cotton subsidies were ignored. In the words of the Guinea delegation, "The cotton offer was unjust and ignored what was demanded by African nations. Coming into this meeting everyone said, 'yes, cotton is an

¹¹⁹ Doha Ministerial Declaration, November 20 2001, paragraph 13

¹²⁰ Ibid paragraphs 20-22

¹²¹ Dilip K. Das "The Doha Round of Multilateral Trade Negotiations: Causal factors behind the failure in Cancun" (unpublished) available from the author at dilip.das@sympatico.ca

important question; yes, agriculture is important' But when it came down to negotiations, our daily problems were ignored".¹²³ The effect was that the levels of frustration of the major cotton producers was in turn reflected in the refusal to compromise over the Singapore Issues. It bears repeating that the Singapore issues would open the door to the largest expanding area of trade being trade in services.¹²⁴ Only the developed world would have the capacity to take advantage of this shift in trade and the insistence by the developing world of requiring significant compromises in the area of agriculture and textiles as quid pro quo becomes explicable.

A dynamic interaction between the cardinal issues of Singapore, Agriculture and Cotton played out to a deadlock. The perceived intransigence of the European Union, United States, Japan and Korea towards the G-20 plus developing countries and the West African states led to a digging in of heels and a refusal to budge on the Singapore Issues.

Despite the fact that there was a gulf to be navigated between the positions of these three blocs it must be said that all parties did make some concessions. The European Union and the United States were prepared to consider the re-classification of certain subsidies and the

¹²² The World Bank Group "After Cancún: Continuation or Collapse?" Trade note 13, December 17, 2003

¹²³ See note 17 at p1

¹²⁴ Carmen G. Gonzalez, "Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries" 27 Colum. J. Envtl. L. 436

European Union proposed scrapping export subsidies "on products of interest to developing countries".¹²⁵

There were also proposed concessions to be made in the market access arena in that there was a move to reduce certain tariffs to zero, place a maximum on others and have the rest described by a (non-linear) formula.¹²⁶ However the wealthier countries wanted a comparatively small subset of products to be reduced to a zero-tariff and the formula to apply to a group of products, whereas the developing nations wanted a line-by-line minimum reduction in tariffs so that it is not possible for a country to reduce tariffs merely on products in which they have little or no industry thereby reducing the average overall tariff of the group of products whilst leaving those products where a significant industry exists, at the same level. The effect of this would be to comply with the tariff reduction requirement without creating market access on the products which would significantly benefit the flow of trade. This is perceived as the position at present and the developing countries were determined to prevent this mathematical "escape" from meaningful reductions. The position of the wealthier countries became progressively to be seen as intransigent and progress slowed down.

The ostensible cause of the collapse was however on the Singapore Issues. Japan insisted that all four of the Singapore Issues had to be

¹²⁵ See note 35

¹²⁶ Carmen G. Gonzalez, "Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries" 27 Colum. J. Envtl. L. 436

moved forward whilst the ACP and African Union groups refused to proceed on any of these issues.

It is significant to note that the Least Developing Country spokesperson, Bangladeshi Trade Minister Amir Chowdhury said he thought the alliance would have been more forthcoming if more had been offered in agriculture, particularly cotton¹²⁷. Arguably at issue here is the sequencing of issues brought forward for discussion. Many developing country delegations have noted that they did not want to make concessions on launching negotiations on the Singapore issues before knowing what would be the quid pro quo on agriculture.

8.8 The role of NGOs

Non-Governmental organisations have played a significant role in past trade negotiations and Cancún was no different. Oxfam in particular assisted the West African countries in getting cotton placed on the Cancún agenda.¹²⁸ More than 1,490 NGOs have had some interaction with the WTO most of which are from Europe and North America. Of that total, approximately 495 come from North America and 555 from Europe.¹²⁹ The issue of the position of Non-Governmental Organisations came to the fore at the Seattle Ministerial meeting where a number of elements of civil society effectively forced the closure of the meeting.

¹²⁷ Ibid referring to ICTSD 2003

¹²⁸ See note 19

These elements ranged from protesters to those wishing to make a valuable contribution to the talks. The international law model of only recognizing State parties and in some instances International Organisations with legal personality was challenged for the first time as Non-Governmental Organisations sought recognition.¹³⁰ The essential question is whether and in what manner the World Trade Organisation should recognise these organizations and what role they should be allowed to play.

The importance of the issue lies in the fact that many of these organizations and in particular the powerful international structures amongst them can play an either constructive or destructive role and either add or detract from the legitimacy of future trade talks. Certainly the picture of large numbers of protestors and the negative statements of respected heads of these organizations do not lead to a conducive climate for fruitful negotiations and can whip up the negative sentiment of countries who feel at a disadvantage.

Once again the degree to which this affected the outcome and hot-headedness at Cancún can only be speculated. The inevitable conclusion is aptly put by Maura Jeffords, "WTO members are tasked by the Doha Ministerial Declaration to conduct negotiations that will improve

¹²⁹ Maura Blue Jeffords "Turning the protester into a partner for development: The need for effective consultation between the WTO & NGOs" 28 Brooklyn J. Int'l L. 937

¹³⁰ Ibid

the lives of all people, especially those in the developing world, partnering with NGOs is a smart step in reaching that goal."¹³¹

8.9 Lack of Expertise and Fear of Implications of "New" Issues

There have been claims that expertise considerations on the part of smaller and poorer countries constitute an impediment to the progress of talks at multilateral trading negotiations and consequently on the difficulty of finding consensus. In particular "it is also argued that the 'newer' subjects for discussion at the WTO are 'complex' and 'highly technical' ".¹³² These claims refer in particular to the 'newer' Singapore issues. However the counter argument put forward by some writers is that issues such as anti-dumping and agriculture are in fact of the most complex and highly technical subjects.¹³³

Lack of expertise has also been claimed as the reason some countries, especially the Least Developed Countries, often have the "deck stacked against them" in dispute resolution cases. This capacity argument also reflects on the legitimacy of the consequent agreements arising from lack of informed agreement and on the unequal power relations caused by the unequal distribution of intellectual resources. As one commentator puts it, "So, in this sense, the United States is a disproportionately

¹³¹ Ibid

¹³² See note 10

¹³³ Ibid

influential player because it can bring hundreds of lawyers to multi-lateral negotiations ... and because it has such a well developed NGO and [societal] set of networks. And it is up against ... smaller countries that may not even have a permanent representative in Geneva and may not even have access to the documents in their original language...[T]hose kinds of issues really affect the ability of governments to reach agreements that we would think of as being democratically legitimate, and that is a challenge ... going forward for the WTO and the other multi-lateral institutions as well"¹³⁴

Whether in fact a lack of expertise contributed significantly to the outcome at Cancún by certain countries being fearful that they had not fully understood the import and fuller implications of the Singapore Issues and were therefore reticent to proceed with talks on these issues is not known. The last published mini-census of expertise amongst participating governments was undertaken over five years ago¹³⁵ and the World Trade Organisation is at present compiling another.

¹³⁴ See note 2 at p16

¹³⁵ Constantine Michaelopoulos "The participation of Developing Countries in the WTO"
World Bank Policy Research Paper 1906, March 1998 at
<http://econ.worldbank.org/resource.php>

9. Counting the Loss

Clearly all parties have lost as a result of the failure. If time is money then a lot of time was lost. According to the World Bank the Doha round could raise global income by more than US\$500 billion a year by 2015, and that more than sixty percent of this benefit would go to developing countries—it estimates that this could move 144 million people out of poverty.¹³⁶

The Director General of the World Trade Organisation Supachai Panitchpakdi suggests that the disappointing outcome of the Cancún Ministerial will have many ramifications but that sadly its most significant impact will be its impact on the poorer countries.¹³⁷ He concedes however that “Opening markets for trade in manufactured products, services and agriculture can provide the key for global economic growth and development. Unquestionably, we will need a balanced outcome to this round of negotiations. At the same time it is essential that the negotiations deliver more to developing countries than they have received from trade rounds in the past.”

However he suggests that though the proposal for improving the position of cotton farmers in West Africa did not go as far as governments in that region wanted, that nonetheless the issue had been successfully placed

¹³⁶ See note 19

¹³⁷ See note 29

on the agenda and that once there it could have been improved upon in time. He also projects similar sentiment in relation to the agricultural issue and states that the negotiations had been moved in a positive direction and though it may not have been as far as the proponents of the further liberalisation of wealthier countries markets may have hoped that these countries should be realistic in relation to the political and economic concerns of their trading partners.

He concludes that "Sadly, those that will suffer the most for their inability to compromise are the poorest countries among us. A more open and equitable trading system would provide them with an important tool in alleviating poverty and raising their levels of economic development."¹³⁸

The issue of agricultural subsidies applied in the European Union and the United States has been at the centre of the collapse at Cancún. "The immediate cause of the breakdown was proposed new trade rules for investment and government procurement, which had been promoted by the European Union but opposed by the poorer nations. But agriculture was the pivotal issue."¹³⁹ This is a very emotional issue in countries which rely on agriculture for a large portion of their Gross Domestic Product and the debate in such countries is reminiscent of classical exploitation and dependency relationships by developing countries upon developed countries. In particular when one examines the degree of economic loss occasioned by developed countries the numbers are

¹³⁸ Ibid

indeed staggering. US\$300 billion per annum is spent on subsidies in developed countries. This number is six times larger than the development assistance given to all developing countries in the world. With a case such as this it seems indeed incomprehensible that the *status quo* is defensible.

So why do these countries resist lowering these subsidies? It would seem that the answer is institutional. In the United States subsidies were used to save local farmers from starvation during the Great Depression whereas in Europe it was used to rehabilitate the European economies after the Second World War. Nowadays these farming magnates have enormous political power in the form of party political election finance. The consequence is significant reticence on the part of these governments to change the status quo.

In this context it is clear that the failure at Cancún cannot be said to benefit the developing nations in that the current position of huge subsidies remains at the present time. This is of particular impact if one accepts that a compromise could have been reached at Cancún were it not for logistical and strategic moves. The net effect is however that billions of US dollars could have been pumped into developing country coffers. Perhaps the point is that in any negotiations the poorer countries would be at a disadvantage but that the disadvantage is certainly less in a multilateral negotiating environment than a bilateral one.

¹³⁹ See note 17

However, the prospects for the Least Developed Countries particularly in Africa are not bright. In the words of Boos: "If the building of a modern private-sector-led economy in [s]ub-Saharan Africa is simply an unrealistic goal, as some would argue, we are driven back to the despairing conclusion that the best the rest of the world can do for Africa is to provide a kind of safety net, in practice continuous subsidy—and pauperisation."¹⁴⁰

At present the United States has bilateral trade deals with Australia, Mexico five Central American and Southern African nations, Israel, Jordan, Singapore and Chile and is at present negotiating with Bahrain, the Dominican Republic and a number of South American nations. It may face resistance from one of the leading G-20 plus members, Brazil using its influence in the region.¹⁴¹

The European Union has a huge amount of bilaterals one of which consists of the African-Caribbean Pacific Group of 77 nations. This bilateral already includes investment rules.

¹⁴⁰ Eric J. Boos "Between Scylla and Charybdis: The Changing Nature of U.S. and EU Development Policy and its effects on the Least Developed Countries of Sub-Saharan Africa" 11 Tul. J. Int'l & Comp. L. 181 at 210

¹⁴¹ Nick Mathiason and Faisal Islam "How the US and EU are having the last laugh despite the WTO revolt" The Observer, Sunday September 21, 2003

On the face of it these bilaterals are more onerous and less beneficial to the weaker partners. The United States has gone as far as to require some of its trading partners to rewrite their labour laws. The investment rules of the African-Caribbean Pacific Group (ACP) allows multinationals a largely *laissez faire* environment in the host country.

Bilateral agreements continue to multiply and the very face of world trade may shift away from multilateralism to bilateralism. Robert Zoellick, the US trade representative threatens to do just that, "But the key division at Cancún was between the can-do and the won't-do. For over two years, the US has pushed to open markets globally, in our hemisphere, and with sub-regions or individual countries. As WTO members ponder the future, the US will not wait: we will move towards free trade with can-do countries."¹⁴²

His threat is amplified by Chuck Grassley, the chairman of the US Senate committee on finance, "The US evaluates potential partners for free trade agreements on an ongoing basis. I'll take note of those nations that played a constructive role in Cancún and those that didn't. We stand ready to pursue increased economic growth and development with all who are prepared to join us."¹⁴³

Pascal Lamy, the European Union Chief negotiator is thinking along similar lines, "do we still give preference to the multilateral approach,

¹⁴² See note 40

hitherto the hallmark of EU external policies? Do our partners share that preference? If not, are we strong enough to get them to change their minds? Should bilateral or regional agreements still be seen as an adjunct to the expansion of multilateral disciplines?

Could these replace multilateral disciplines, if a period of immobilism leaves the WTO dispute settlement mechanism to interpret an incomplete corpus of rules and ends up taking the place of the 148-member Ministerial Conference as international legislator?"¹⁴⁴

Whilst at present there still seems a large degree of willingness to establish whether progress can be made through the World Trade Organisation, clearly an alternative to the system should it fail is already being determined. Most importantly this alternative from a developing country point of view is a matter of "out of the frying pan into the fire". Clearly the losses to the developing world will be incalculable.

¹⁴³ See note 58

¹⁴⁴ See note 28

10. Conclusion

Although the recent WTO summit was somewhat disappointing, it did offer some hope for fairer world trade, says Patricia Hewitt, the British secretary of state for trade and industry, "It is important not to let pessimism prevail over the trade negotiations in Mexico earlier this month. Of course we were disappointed not to make progress on the Doha development agenda, but we must and will press on...we must be clear on the future direction of world trade rules. A multilateral solution, reached via the WTO, will always be fairer to developing countries than a system composed of bilateral deals, in which the poorest countries can be isolated and pressurised...Cancún was a hard lesson to learn, but we will continue to work for the success of the agenda. We know that all countries stand to gain, but the poorest stand to gain the most."¹⁴⁵

In the final analysis there is no end in sight to the US\$4 billion subsidies paid to United States cotton farmers and no escape from the abject poverty faced by West African farmers. Similarly on a global scale there is no end in sight to the US\$300 billion per annum spent on subsidies in developed countries and the consequent loss of this revenue in developing countries. While time ticks by there is no benefit to the developing world and a very definite possibility that if the World Trade Organisation momentum cannot be revived that this drastic inequality

¹⁴⁵ Patricia Hewitt "Learning the Lessons of Cancun" Department of Trade and Industry Publication, Tuesday September 23, 2003

will be cemented in place by the withdrawal from multilateral negotiations and the formation of "competitive liberalisation" in the form of bilateral agreements. Poorer countries will then no longer be competing with wealthier countries for a slice of the cake, rather they will be competing with other poor countries for the crumbs.

List of Abbreviations

ACP	African-Caribbean Pacific Group
G-20 plus	A new alliance of developing countries (see 8.4)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IMF	International Monetary Fund
ITO	International Trade Organisation
MTNs	Multilateral Trading Negotiations
NGO	Non-Governmental Organisations
WTO	World Trading Organisation

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