



# Dialogue **on** Globalization

OCCASIONAL PAPERS

GENEVA

N° 13 / January 2005

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## What makes a Round a 'Development Round'?

The Doha Mandate and the  
WTO Trade Negotiations

A grayscale map of the Geneva region in Switzerland, showing various towns and geographical features. The word 'GENEVA' is prominently displayed in the center, with 'Genf' written below it. Other visible locations include Gex, Versoix, Coppet, Jussy, Annemasse, and Lancy. The map also shows some elevation points, such as '718 m' near 'de la Neige'.

## **Dialogue on Globalization**

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*Dialogue on Globalization* is co-ordinated by the head office of the Friedrich-Ebert-Stiftung in Berlin and by the FES offices in New York and Geneva. The programme intensively draws on the international network of the Friedrich-Ebert-Stiftung – a German non-profit institution committed to the principles of social democracy – with offices, programmes and partners in more than 100 countries.

This Occasional Paper is published by the Geneva office of the Friedrich-Ebert-Stiftung.

January 2005

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ISSN 1814-0079

ISBN 3-89892-336-3

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## Preface

WTO member governments launched a new round of trade negotiations at the Fourth Ministerial Conference in Doha, Qatar, in November 2001. In naming the agreement reached the Doha Development Agenda (DDA) these negotiations aim at a new and most challenging dimension: to make trade a tool for development and to improve conditions for economic growth, employment and poverty reduction. About two thirds of the at present 148 WTO members are developing countries, which are playing an increasingly important and active role, in particular since the Cancun ministerial conference, the appearance on the scene of the G20 group of leading developing countries and the start of improved coordination of interests by the G90 group of poorer countries. At the same time, there appears to be growing uncertainty on what 'development' is and how to achieve it. Whereas a number of major developing countries have been able to use trade expansion to become important competitors in the international market, others have been left behind and are unable to make use of opportunities for integration into the global economy. There is deep-seated doubt as to whether further trade liberalization and expansion will be able to deliver on growth and development; and whether the rules established by GATT/WTO will be able to be implemented and refined in such a way as to respond to the needs and aspirations of developing countries, in particular in poverty reduction and employment creation.

Against this background the FES Geneva office asked Dr. Federico Alberto Cuello Camilo, former Ambassador and Permanent Representative to the UN and the WTO of the Dominican Republic in Geneva from 1999-2002, to sum up his insights and thoughts on "What makes a Round a 'Development' Round?" as a contribution to the ongoing debate on the development dimension of the Doha Agenda. During his term in Geneva he was particularly active within a group of developing country' representatives in furthering initiatives in favor of enhancing the capabilities of developing countries to formulate national policies – a debate that has since been taken up by UNCTAD and others under the term "policy space." When he left Geneva in 2002, it was rumored that he had been recalled due to pressure exerted on his government by a major global power.

His paper examines major areas of importance to developing countries in the ongoing WTO negotiations and looks in particular at some of special provisions provided to these countries in principle. And it summarizes a number of policy proposals he regards as necessary to make the Doha negotiations a "development" round. The paper does not deal with the technical assistance provided to developing countries by the WTO Secretariat in support of their negotiation and implementation capacities. Even after the Framework Agreement of July 2004 that paved the way for further negotiations ahead of the Sixth Ministerial Conference scheduled for Hong Kong in December 2005, many observers and negotiators in Geneva would tend to accept his conclusion: "The absolute lack of progress on all issues of interest for developing countries since Doha, however, does not bode well for the so-called 'development' round," Much more has to be done to integrate developing countries into the international trading system and to make it work for development.

*Dr. Erfried Adam*  
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Geneva Office

# 1 Introduction<sup>1</sup>

To develop a country is to change a country. Development is triggering a self-sustaining process of increased productivity in all sectors that results in a more diversified economy. It is generating employment for most of the population of working age. It is increasing national income at a pace faster than population growth, so that real income per person increases over time. It is reducing the number of poor people so that national income is distributed more equitably over time. And all of this should result in higher living standards for all, so that a society's level of welfare improves in harmony with nature.

The development of a country has never been automatic. Governments have always intervened. By setting the legal framework for competition. By redistributing income through the tax system. By spending for infrastructure and social services such as education and health that are needed by the population. By creating an enabling environment for countries to invest, innovate and generate productive jobs. And, crucially, by influencing the investment decisions of the private sector through various kinds of sectoral policies.

**Trade is supposed to be a means for development; by diversifying the availability of imported goods and services, trade should be a powerful incentive to improve the price and quality of domestic production so that productivity levels are able to converge over time**

Trade is supposed to be a means for development. By increasing the size of the market for domestic goods and services, trade should permit increased growth in domestic production beyond the capacities of a country's internal market. By diversifying the availability of imported goods and services, trade should be a powerful incentive to improve the price and quality of domestic production so that productivity levels are able to converge over time.

But for trade to achieve these unquestionably positive outcomes, it should be truly free of distortions. More often than not, however, developing country products face insurmountable tariff barriers, complex rules of origin, discriminatory sanitary measures or subsidies of various sorts, all of which distort international prices and impede market access. In the process, developing country producers face dire choices. More often than not, the distortions are met with more distortions.

Trade negotiations should result in a removal of those distortions. Experience has demonstrated, however, that the process is slow and that, in the meantime, trade rules are being crafted in such a way as to preserve the policy distortions of developed countries while increasingly closing the spaces left for developing countries to implement the active policies applied by the developed countries while they themselves were developing.

It is therefore the thesis of this paper that a round would be a "development" round if it preserved the capacity of developing countries to implement the policies they require to continue to develop.

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<sup>1</sup> This paper is a substantially modified and extended version of "Preservar los espacios para las políticas de desarrollo en la OMC," written in Spanish in November 2003 at the request of the Friedrich Ebert Foundation in Santo Domingo, Dominican Republic. The author wishes also to express his gratitude to the Friedrich Ebert Foundation (FES) in Geneva for their generous and patient funding for this work.

## 2. In the origin, Venezuela

Preservation of the spaces needed for development policies was promoted eloquently by the Venezuelan Delegation to the WTO during 1997-2001. At the WTO Third Ministerial Conference (Seattle, 1999), the Venezuelan proposals sought to address two dimensions of the debate: trade regulations in the strict sense and those regulations that could increase the level of competitiveness of the developing countries in order to create and sustain increased participation in international trade, giving rise to positive impacts in their development processes.<sup>2</sup>

The Venezuelan proposals at the WTO expressed the concern of the developing countries regarding the growing interference of multilateral trade rules in measures applied within their borders. This interference was magnified by the results of the Uruguay Round (1986-1994). Since then, the scope of multilateral trade rules has greatly increased. Starting with the traditional concern with border measures, such as customs duties, non-tariff barriers, and other duties and charges, they now extend to the disciplining of potentially trade-distorting policies applied within the borders of developing countries, such as subsidies and local content requirements, as well as to factor markets, e.g. performance requirements (Pangestu, 2002).

When they signed the Uruguay Round Agreements at Marrakech, developing countries had no other option but to accept as a *fait accompli* the results of a negotiation where they knew what they did not want but not what they wanted.<sup>3</sup>

The Uruguay Round practically closed the circle pursued by Latin American and Caribbean development policies since the 1920s. From the total openness and minimalist state intervention of the beginning of the last century, policies since the Second World War became essentially protectionist, the idea being to create a domestic industrial capacity through import substitution and state control of some means of production (Corbo, 1988).

The region began a swift move towards an export-led growth model in order to confront the external shocks caused by the oil crisis and the external debt crisis of the early 1980s. Since then, the region seems to have begun a new phase, different from the previous ones, caused by the imminent consolidation of market opening, at least at the regional level and within common markets (MERCOSUR, CACM, CARICOM, Andean Pact) or free trade areas (NAFTA and the several free trade agreements negotiated since 1994 by Canada and Mexico, which followed the

**The Venezuelan proposals at the WTO expressed the concern of the developing countries regarding the growing interference of multilateral trade rules in measures applied within their borders**

**Some foresee a return to the model of import substitution at the regional level**

<sup>2</sup> The second set of Venezuelan proposals sought to address, specifically, “the range of policy tools that could be used by developing countries to modify their trading patterns in order to achieve and sustain competitiveness. The basic goal behind these tools is not only to induce the growth of their traditional trade flows (mostly commodities) but rather to promote the structural transformation of their economies as well as the possibilities to increase the value added to their exports” (Venezuela, 1999: 1).

<sup>3</sup> For the vast majority of developing countries, their refusal to sign or to ratify the Uruguay Round Agreements would have implied their exclusion from preferential trading agreements. GATT (and now, WTO) membership is one of the qualifying conditions for eligibility for those programs.

same model). Some foresee a return to the model of import substitution at the regional level (Bulmer-Thomas, 2001), which is contemplated in the proposals for an “open regionalism” and was proposed during the 1990’s by the Economic Commission for Latin America and the Caribbean (ECLAC).

Nonetheless, the political decision taken by the Western Hemisphere Heads of State in 1994 (again confirmed in 1998 and 2002) is leading to the convergence of the several processes into a unique Free Trade Area of the Americas (FTAA), scheduled to begin in 2005. This convergence should take place in accordance with the rules of the World Trade Organization (WTO), an intergovernmental institution responsible for the rights, obligations and trade disputes arising from the rules and specific commitments undertaken by its members in connection with a progressive multi-lateral liberalization process.

The Ministerial Declaration of San Jose (1998) launched the FTAA trade negotiations, establishing the general principle that “the FTAA should improve the WTO rules and disciplines whenever possible and suitable, taking into consideration the full implications of the rights and obligations of the countries as members of the WTO.” By adopting this general principle, the ministers intended to preserve the rights acquired at the WTO as a condition for making the FTAA a “WTO-Plus” agreement (Cuello, 1998).

**From a Latin American and Caribbean perspective, it is urgent to identify what spaces are still left for development policies in view of WTO rights and obligations – in order to preserve, and hopefully expand, these policy spaces in current and future trade negotiations**

From a Latin American and Caribbean perspective, it is urgent to identify what spaces are still left for development policies in view of WTO rights and obligations in order to preserve, and hopefully expand, these policy spaces in current and future trade negotiations. This would strengthen the hand of developing countries in other regional trade agreements with developed countries, such as the FTAA or the ongoing negotiations with the European Union for Economic Partnership Agreements (EPAs).

Furthermore, it is imperative to identify how the new WTO negotiations could narrow the margin inherited from the Uruguay Round. Therefore, in accordance with the Doha Ministerial Declaration (WTO 2001), both the current WTO negotiations and the possible implications of the working groups organized since Singapore and Doha will be evaluated in the light of issues of great relevance for development such as finance, debt, and technology transfer. Taiwan, a country that acceded recently to the WTO, is still using development policies that do not violate WTO rules. The report concludes with policy recommendations on trade negotiations addressed to the competent authorities at the national level.

# 3. WTO commitments

It took developing countries several years to realize the magnitude and financial implications of the reforms required to implement their WTO commitments. Based on a sample of developing countries, the World Bank estimated at some US\$130 million the cost of implementing Uruguay Round rules on customs, sanitary, and technical issues (Finger and Schuler, 2000: 25). This rather conservative estimate include neither subsidies and investment measures nor trade-related intellectual property rights. For the latter, 85% of the WTO members lacked any kind of relevant legislation or institutions during the organization's first five years of operation.

Facing this difficult reality, the ministers meeting in Geneva in 1998 decided to evaluate how the implementation of WTO agreements contributed to the achievement of its objectives. Wherever contradictions could be identified, concrete proposals for reform had to be tabled (WTO, 1998, paragraphs 8 and 9). As a consequence, the developing countries compiled a detailed package of implementation issues and concerns that was initially presented to the WTO by the Dominican delegation on behalf of the Group of Like-Minded Countries<sup>4</sup> in October 1999 (a summary, initially based on the broad work carried out and later compiled by the UNCTAD Secretary [2000], was included in Annex II of Cuello [2001]<sup>5</sup>), within the context of the organization of the WTO Third Ministerial Conference (Seattle, 1999).

The package of implementation issues and concerns sought to identify three kinds of problems that severely reduced the scope of action of development policies as well as the potential for creating increased trading opportunities for developing countries.

## 3.1. Unfulfilled promises regarding market access issues

The main purpose of trade negotiations is to consolidate and increase the access to new markets of products from participating countries under conditions of non-discrimination, national treatment, transparency, and predictability. Nonetheless, since the establishment of the multilateral trading system in 1948, the developing countries have not been able to achieve this objective in their two main sectors of interest in trade in goods – agriculture and textiles:

- *Agriculture*: The integration of agriculture into the multilateral trading system began during the Uruguay Round: Special rules were created that allowed the developed countries to continue to intervene with domestic support

4 The original members of the Like-Minded Group were Cuba, Egypt, Honduras, India, Indonesia, Malaysia, Pakistan, Dominican Republic, Uganda, Tanzania and Zimbabwe.

5 Transcription of the conference "Toward a national strategy for trade negotiations," presented to the Diplomatic School of the Secretariat of Foreign Relations of the Dominican Republic in Santo Domingo, 27 April 2001. Annex II presents a summary of all the implementation issues and concerns tabled by developing countries, including those promoted by the Like-Minded Group.

**It took developing countries several years to realize the magnitude and financial implications of the reforms required to implement their WTO commitments. The World Bank estimates at some US\$130 million the cost of implementing Uruguay Round rules**

**Integration of agriculture into the multilateral trading system got underway already during the Uruguay Round. Yet participation of the developing countries in world agricultural trade has barely increased**

measures, export subsidies, export credits, import quotas and high tariff “peaks.” As a consequence, participation of the developing countries in world agricultural trade has barely increased, from 14% of the total at the end of the Uruguay Round in 1994 to just 15% in 2003. During the same period, the OECD reported that the total amount of subsidies and domestic support provided by the developed countries had grown annually at a 2% rate in real terms (Cuello, 2003a). The developing countries documented several cases of arbitrary import quotas granted by the developed countries in their schedules of commitments, where they replaced non-tariff barriers with tariff quotas.

- *Textiles and clothing:* Market access for this sector, where our countries are highly competitive, was also increased at the Uruguay Round. With the removal of the Multi-fiber Agreement (MFA) scheduled in the Agreement on Textiles and Clothes (ATC) of the Uruguay Round, the quota system that has protected this industry for more than two decades in the developed countries is now gradually being dismantled. This system was skillfully used to generate geographically concentrated multinational ties between developed country suppliers of raw and intermediate inputs and developing country manufacturers of finished products. Products of commercial importance were slowly integrated into the WTO rules. Furthermore, the so called “transitional safeguards” were applied indiscriminately, preventing the growth of exports from the countries taking advantage of the new market opportunities created by the ATC as well as of the trade preferences still in place until 2008. Finally, frequent cases were observed of unjustified application of antidumping measures against developing countries.

### 3.2. Imbalances between rights and obligations

**The Uruguay Round agreements reflected the unequal relations of power between the participants of the negotiating process. The rules preserve certain policies and restrict or prohibit others**

The Uruguay Round agreements reflected the unequal relations of power between the participants of the negotiating process. The rules preserve certain policies and restrict or prohibit others. The first are still being applied by the developed countries. The second were applied by those same countries when they were developing. Having developed, they no longer need them. As a consequence, the developing countries must eliminate them as a part of their multilateral obligations:

- *Infant industry protection:* Article XVIII of GATT 1994 recognizes that “adopting measures of protection or of any other kind that affect imports” is justified because “it eases the achievement of the objectives” of the agreement for those countries whose economies can only “offer a low level of life” and that are currently “within the first stages of development.” Therefore, these countries “could temporarily move away from the provisions contemplated in the other articles” of the GATT. Section A allows the withdrawal of concessions to increase protection levels above bound levels through consultations with the countries affected. Section B allows for trade restrictions under balance of payments crises. Section C allows for state aids “to ease the creation of production branches that may raise the population’s general living standards.” The Uruguay Round adopted strict procedures and restricted the kind of measures that could be authorized under Section B of this Article. Based on the “Understanding on Measures on Balance of Pay-



ments,” those measures “based on (...) prices” will receive preferential treatment (meaning import surcharges or the deposits prior to import), not those that restrict the amounts imported. Such measures will be subject to periodic notifications and examinations at the WTO and will not be able to exceed either the amount or the time required to overcome the crisis. WTO practice after the Uruguay Round has made virtually impossible the application of the other measures contemplated in sections A and C of this Article. The withdrawal of concessions allowed in Section A, for instance, now has to follow Article XXVIII, and is thus subject to compensation claims. Similar limitations affect state aids allowed for under Section C, because after the Uruguay Round the Tokyo Round Agreement on Subsidies and Countervailing Measures (SCM) became mandatory for all WTO members. The developing countries believe that, as an implementation concern, sections A and C of this Article should be developed in detail in order to differentiate them from the other WTO provisions.

- *Subsidies and countervailing measures*: Subsidies applied by the developing countries became actionable, that is, subject to WTO dispute settlement, because they are “specific” within the definition of the SCM; these include, among others, those provided exclusively to exporting industries as well as those favoring the use of inputs of national origin (Art. 3.1). These were explicitly prohibited by Article 3.2. Other specific subsidies are those granted to industries located in specific regions of a country. Non-actionable subsidies include those received by specific companies (Art. 2.1a), those automatically conferred according objective criteria (Art. 2.1b), and those intended to diversify production during a limited time period (Art. 2.1c). Article 8 considers as non-actionable those subsidies usually applied by the developed countries, such as: non-specific subsidies, assistance amounting to up to 75% of research costs and of 50% of the development phase (referring to the pro-competitive industrial application of the research findings); assistance to disadvantaged regions; and assistance “to promote the adaptation of existing venues in order to satisfy new environmental requirements.” However, Article 8 of the SCM had a temporal validity of five years, which expired by the end of 2000, and was not renewed. Nevertheless, such subsidies are not prohibited; they have just become actionable. As a consequence, each WTO member granting any of these subsidies is subject to possible countervailing measures if any other WTO member is able to demonstrate damage. As an implementation concern, the transition period given to developing countries to continue to grant forbidden subsidies was extended at Doha. Developing countries still want to classify as non-actionable those subsidies included in Article 8, which has expired. These have a potential to contribute to the creation of competitive advantages in the developing countries, as has been widely documented (Cf. Porter, 1990).
- *Trade-Related Investment Measures (TRIMs)*: Using an illustrative list, the TRIMs Agreement identifies those requirements incompatible with national treatment: local-content requirements as well as authorization for imports of raw materials subject to export outcomes. It also forbids quantitative restrictions. These requirements include policy instruments usually employed within sectoral policies of import substitution or export diversification

**Subsidies applied by the developing countries have become actionable, that is, subject to WTO dispute settlement. But developing countries still want to classify as non-actionable those subsidies included in Article 8, which has expired**

(Pangestu, 2002) that could help increase the intersectoral linkages between foreign investment and their potential local suppliers (UNDP, 2003: 237). As an implementation concern, developing countries sought to extend the transition period to eliminate their TRIMs.

- *Trade-Related Aspects of Intellectual Property Rights (TRIPS)*: The TRIPS agreement provides for mandatory minimum standards of protection in seven areas of intellectual property: copyrights, trademarks, geographical indications, utility models, patents, integrated circuits and undisclosed information. As such, these provisions are not a “model law”; countries are completely free to decide how to implement them (Art. 1.1) in accordance with their own legal and institutional systems. Its objectives (Art. 7) stipulate that protection and enforcement of these rights must contribute to the promotion of technological innovation and the transfer and diffusion of technology to the reciprocal benefit of the producers and consumers of technological knowledge – in order to promote social and economic welfare – as well as a balance between the rights and obligations between the parties. Its principles (Art. 8) establish the freedom to adopt the necessary measures to protect the population’s public health and nutrition or to promote the public interest in sectors of vital importance for socioeconomic and technological development as well as to prevent the abuse of intellectual property rights by their holders or the adoption of practices that could limit trade in an unjustifiable manner or that may affect international technology transfer negatively. In this agreement, developing countries have placed the greater emphasis on patents due to their direct relation to technology transfer and their implications for affordable access to medicines. Concrete measures compatible with the agreement may be applied regarding the authorization of parallel imports (Art. 6), compulsory licenses (Art. 31) or the control of anticompetitive practices (Art. 40). In the pursuit of human development, competitiveness and the diversification of domestic supply capacities must also result in the improvement of the health conditions of the population, in order to confront affordably today’s diseases with today’s medicines (Cuello, 2003c; 2004). But patented products and processes have to be replicated without violating their owners’ rights. Because of TRIPS, these technologies will enjoy a longer protection period of 20 years. Therefore, to replicate patented products and processes domestically would require either foreign investment or national production under compulsory licenses. If they lack domestic manufacturing capacities, countries are free to authorize parallel imports from third markets.

**Developing countries have placed the greater emphasis on patents due to their direct relation to technology transfer and their implications for affordable access to medicines**

However, bilateral pressures have prevented countries from exercising these rights, even after their enactment in national legislation. Paradoxically, the developed countries apply precisely the same measures domestically in order to counter anticompetitive abuses resulting from the temporary monopoly privileges conferred by the patents (FTC, 2003). Realization of the objectives and principles of the TRIPS is currently the main implementation problem for developing countries. The Doha Declaration on Intellectual Property and Public Health (WTO, 2001c) and the Decision on Paragraph VI of the Doha Declaration (WTO, 2003) were supposed to ease the burden faced by

developing countries in implementing these provisions, but these were cosmetic victories at most and meant more procedural complications, at the least<sup>6</sup>.

- *Trade in services*: The General Agreement on Trade in Services (GATS) integrated into the international trading system a sector enjoying high rates of growth. It generates already 60% of world output, 30% of world employment and 20% of world trade. Its provisions are probably the least imbalanced of those in WTO agreements. It allows for progressive liberalization through positive lists in which the developing countries may include fewer sectors or modes of delivery than the developed countries, and open them at a pace dictated by their development policies (Art. XIX). It also forces the developed countries to adopt specific commitments regarding the liberalization of sectors and modes of delivery of interest to the developing countries (Art. IV), the aim being to boost their participation in the world trade in services.

These commitments should facilitate access to technology in commercial terms as well as to distribution networks and information channels. However, it mandates the elimination of any restrictions on payments and transfers made by companies in the sectors included in the schedules of commitments (Art. XI). It also restricts domestic regulations (Art. VI). Unlike trade in goods, the GATS allows for different commitments on market access (Art. XVI) and national treatment (Art. XVII). As a consequence, it is possible to distinguish between nationals and foreigners on taxation issues. The inclusion of the “commercial presence” mode of delivery among the modalities of service trade is also perceived as an additional complication of the GATS. This modality clearly corresponds to foreign investment, even though it is limited to the service sectors. Nonetheless, the binding of commitments under positive lists, the absence of detailed stipulations regarding host-country measures on foreign investment or subsidies for trade in services, and the possibility of discriminating under national treatment leave a wide margin for the developing countries to continue applying development policies in this sector. The main problem identified by developing countries under this agreement is the need to implement fully Art. IV in the new negotiations.

**The GATS forces the developed countries to adopt specific commitments regarding the liberalization of sectors and modes of delivery of interest to the developing countries, the aim being to boost their participation in the world trade in services**

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6 Cuello (2004) appraises in more detail this situation in relation to access to medicines as well as in the context of recent WTO-plus negotiations, such as the Free Trade Agreement between Central America, the Dominican Republic and the US (DR-CAFTA). This new context introduces further procedural barriers to the entry of competitive products to the pharmaceutical markets of developing countries in a manner that nullifies any of the flexibilities included in the TRIPS agreement. One such procedural barrier is the General Council Decision on Paragraph 6 of the Doha Declaration (WTO, 2003), which restricts severely the use of compulsory licenses by countries without a pharmaceutical manufacturing capacity. Recent agreements, such as the DR-CAFTA, further restrict the scope for competition, by protecting undisclosed information beyond the requirements of the TRIPS agreement, and by thus impeding local industries from obtaining the required marketing authorizations. If agreements such as the DR-CAFTA were to enter into force as negotiated, domestic pharmaceutical industries would only be able to produce less effective generic medicines, while patented products would be able to enjoy their monopoly privileges without further challenge until the expiry of the patent. More worrisome will be the effect of this situation for our poor ill people, who will have to choose between continued illness and unaffordable treatment.

### 3.3. Best-endeavor nature of special and differential treatment provisions

**It is clear that, in real terms, some countries are more equal than others. But the crucial distinction is levels of development**

It is clear that, in real terms, some countries are more equal than others. Shares of world trade, national output and population levels are clearly different. But the crucial distinction is their levels of development. Awareness of this reality is crucial if we are to achieve a more equitable international trading system. As a consequence, the search for equity requires that the rules reflect these inequities in an unambiguously binding manner so every country in the world may enjoy the same rights without being immediately subject to the same obligations. Achieving equity in the multilateral trading system thus requires special and differential treatment.

Practically every WTO agreement contains provisions on the subject. Even though some are considered binding and other discretionary (UNPD, 2003), the reality is that all of them have become best-endeavor clauses and are subject to case-by-case implementation. It is not possible to state that there is an incontrovertible law regarding special and differential treatment for developing countries under WTO rules or admitted by juridical practice, with the exception of the 49 least developed countries (LDCs). Part IV of GATT 1994, for example, includes wide-ranging provisions on trade and development intended to: secure the growth of developing country exports; stabilize their product prices; diversify their productive structures; obtain financial resources from the international organizations as a matter of a priority; and achieve appropriate market access conditions in developed country markets without having to grant reciprocity.

**Preferential regimes are able to condition market access on compliance with WTO-plus rules on foreign investment, intellectual property, government procurement, corruption, labor standards, environment or human rights**

Besides the commodity agreements or the preferential trading agreements, the provisions under Part IV became a dead letter almost immediately. With the exception of oil, no commodity enjoys stabilization mechanisms anymore. Most preferential trade is regulated not by the voluntary multilateral provisions contained in the 1979 “Enabling Clause” but rather by “waivers” to GATT 1994. The non-reciprocity requirements can therefore be eluded. Preferential regimes are thus able to condition market access on compliance with WTO-plus rules on foreign investment, intellectual property, government procurement, corruption, labor standards, environment or human rights. It must be recognized, however, that trade preferences have provided developing countries with a clear opportunity for export diversification. But preferences will be replaced within the next years by free trade agreements, most of which are still under negotiation and which will require full reciprocity between the parties.

The remaining special and differential treatment provisions contemplated in the WTO agreements are: additional transition periods; special thresholds for activation of dispute settlement cases; and flexibility in the implementation of certain rules. Practically every additional term has already expired and flexibility for implementation is granted on a case-by-case basis. Hence the developing countries’ proposal to make these provisions legally binding.

# 4. Negotiating mandate: the Doha Development Agenda

With the adoption of the Declaration of the Fourth Ministerial Conference in Doha (WTO, 2001b), a new round of multilateral negotiations was launched. At the very meeting at which ministers would adopt the Declaration, the new round was already being baptized a new “development agenda,” for, as stated by the then European Commissioner for Trade Pascal Lamy, development could be found in each one of the operating paragraphs of the Declaration. However, the title “Doha Development Agenda” (DDA) does not ensure a favorable outcome for developing country interests in trade liberalization, trade rules or, more generally, preservation of development policy spaces. Since Doha, it is the opposite that has taken place. Attempts have been made to push only for issues of interest to developed countries, while the other elements in the DDA are being left behind. It is already clear that our countries step up increase their efforts – initiated since 1998 – to ensure that the DDA results are development-enhancing and not development-distorting.

**The term ‘Doha Development Agenda’ (DDA) does not ensure a favorable outcome for developing country interests in trade liberalization, trade rules or, more generally, preservation of development policy spaces**

## 4.1. Old and new issues

The Doha Ministerial Declaration resolved a considerable set of *implementation concerns*. Countries such as the Dominican Republic, in particular, achieved their main objective concerning the issue: the extension of the term established to grant tariff incentives to export-oriented manufacturing until 1.1.2010. The remaining implementation issues were referred to the corresponding negotiating groups or to the WTO subsidiary bodies. Therefore, the main specific development concerns stemming from the application of the Uruguay round agreements will have to be considered on equal terms among the subjects on the negotiating agenda. If not, the development-enhancing potential already contained in existing WTO rules will not be realized.

As a result of the new mandate for *agriculture negotiations*, efforts are currently being made to reduce the distortions in the sector’s “three pillars”: market access, export subsidies and domestic support. Special and differential treatment “will become an integral part of all the negotiation elements,” including, “as appropriate,” of the rules and disciplines to be negotiated, in order to make them operationally effective, while considering the needs of the developing countries regarding food security and rural development. To that effect, developing countries are currently promoting concrete proposals intended to ensure a special and differential treatment that will exclusively benefit the developing countries through creation of a “development box” that may replace and integrate the other policy “boxes” adopted during the Uruguay Round (Cuello, 2003a). This aspect has higher priority than the market access issues, where too much emphasis could contribute to the erosion of the preferential access enjoyed in the Caribbean Basin or by countries belonging to the African, Caribbean and Pacific Group of States (ACP). After the General Council Decision of 2004, the proposal for a development box was narrowed to a definition of special products to be chosen by WTO members during the negotia-

**Developing countries are currently promoting concrete proposals intended to ensure a special and differential treatment that will exclusively benefit the developing countries through creation of a ‘development box’**

tions. Moreover, elimination of so-called “blue-box” subsidies has been put off to a later date, while its scope of application is to be narrowed. Domestic support will not exceed 80% of its current (November 2004) level. And export credits may begin a phase-out process. It appears as if WTO rules on agriculture will survive mostly unchanged.

Regarding *Trade in Services*, the Declaration reaffirmed the negotiating guidelines adopted in the light of the proposals made by a great number of developing countries. These include the effective implementation of GATS Article IV and creation of a monitoring mechanism designed to ensure compliance.

By readdressing the negotiations regarding *market access for non agricultural products*, the DDA intends to reduce or suppress tariffs, including tariffs peaks and highly damaging tariff escalation, “particularly those concerning the products of export interest for the developing countries,” without requiring full reciprocity. Regarding *intellectual property*, the Declaration addresses three sets of issues. The first emphasizes the importance of applying the agreement on TRIPS to support public health and the research on and development of new drugs, one of the Declaration’s main objectives (WTO, 2001c). The second launched the negotiations on a multilateral system of notification and registry of geographical indications for wines and spirits, which confronts serious difficulties given the additional costs and obligations concerning an issue that will only benefit a few producers in certain developed countries. The third and most ambitious issue, of great relevance for the development of developing countries, instructs the TRIPS Committee to follow the guidelines, objectives and principles of the agreement when examining its relationship with the Convention on Biological Diversity, the protection of traditional knowledge and folklore, as well as other issues derived from the agreement’s revision required by Article 71.1. These efforts should allow the incorporation of measures that could help developing countries in the fight against the patenting of their genetic resources or traditional knowledge by foreign firms, giving them monopolistic control over items that, given their previously known status, should not be patentable (CIPR, 2002: 74).

Also at Doha, revision of three WTO agreements was authorized: *antidumping measures, subsidies and countervailing measures*, and *regional trading agreements (RTAs)*. However, the standard for negotiation is high: to “clarify and improve” their disciplines, “preserving at the same time” their basic concepts and principles. Within this context, it is not possible to foresee a weakening of the regulations, and the intention to consider “the needs of the developing participants and those least developed” will have to be achieved by strictly fulfilling the mandate on clarifying disciplines. For example, regarding subsidies, there is a need to define specific conditions under which development policy instruments will be considered to be “non-actionable.” Besides, on the subject of RTAs, the countries belonging to the ACP Group have already understood as a matter of priority the need to introduce more specificity in Article XXIV of GATT 1994 and its Uruguay Round Understanding, in order to better negotiate their free trade agreements, such as the EPAs or the FTAA within reasonable conditions of coverage, phased liberalization and asymmetry.

The fact that negotiations on *trade and environment* could be launched was a triumph for the European delegation, even though its implications have not been sufficiently analyzed from the development perspective. The Doha Declaration instructs WTO members to identify the possible links between trade and the multilateral environmental agreements (MEAs) already in force and to identify the barriers for environmental goods and service trade as well as the WTO rules that could be reviewed from an environmental perspective. However, the US insisted on language preventing the use of existing MEAs to which a WTO member is not a party for purposes of dispute settlement. Global warming, with its clear effects on rising sea levels, can only be controlled by strictly implementing the Kyoto Protocol. The trade-related effects of the copious emission of global warming gases should be brought eventually to dispute settlement in the WTO. The wording in the Doha Declaration, however, may stand in the way of such relevant pursuits for the interest of developing countries with trade-related activities in coastal areas, such as beach tourism. As a consequence, an eventual linkage of the environmental agreements with WTO rules will be useless for dispute settlement against countries that are not a party to such agreements.

*Special and differential treatment* was the last issue negotiated in the Doha Declaration, with agreement reached to examine the provisions regarding this subject in order to “reinforce them and make them more precise, effective, and operational.” Though the word “binding” was avoided, the proposal to negotiate a framework agreement on special and differential treatment was discussed. These negotiations were complemented with by work program adopted on the matter aimed at continuing work on implementation issues.

## 4.2. A balanced agenda?

By the look of the DDA, it appears as if developing countries achieved a balanced agenda in which their subjects of interest have the same relevance as those of the developed countries. After all, a satisfactory mandate was achieved regarding implementation, agriculture, and services, as well as on the discussion on certain subjects concerning intellectual property and special and differential treatment. However, the developed countries got the upper hand. They were able to include more priority subjects on the agenda: industrial products, services, intellectual property, WTO trade rules, and trade and environment. They have greater technical skills on all the negotiation issues, and also know in detail the real legal and economic status of the other negotiating parties,<sup>7</sup> even better than the negotiators themselves. Nevertheless, without attempting to quantify the importance of each one of these subjects, it is clear that the size of the trade flows originating in the developed countries as a result of the liberalization commitments obtained for their issues of interest will be greater than anything developing countries could achieve.

The apparent balance of the agenda disappears once the mandates conferred in eight of the work programs mentioned in the Doha Declaration have been evaluated. Four of them are being discussed in working groups created since Singapore, at

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<sup>7</sup> This situation of asymmetry of information is further complicated by the high degree of personnel rotation at all levels of developing country diplomatic missions.

the instance of the developed countries: trade and competition; trade and investment; transparency of government procurement; and trade facilitation.<sup>8</sup> Two new groups were created at Doha, at the initiative of the developing countries, to work on trade, debt and finance as well as on trade and technology transfer. These are complemented by the work programs on the least developed countries (at the existing WTO sub-committee for these countries) and on small economies, under the sponsorship of the WTO General Council.

The WTO Ministerial Conference held in Cancún in September 2003, should have launched negotiations on the four Singapore issues on the basis of a decision adopted by “explicit consensus,” resulting from the most specific efforts realized by the respective work groups and, in every case, in “fully aware[ness] of the needs of the developing countries and those least developed participating.” This, of course, did not happen, in spite of all the attempts made.

**The reality is that this is the minimalist agenda that the US could then accept in order to be able to build an agreement suitable for the needs of its multinationals to penetrate new markets**

In *trade and competition policy*, the beginning of negotiations was supposed to rest on the elucidation of principles such as transparency, non-discrimination, and due process; provisions on hard-core cartels; voluntary cooperation modalities; and support for the strengthening of the authorities responsible for competition policies and legislation. By proposing a debate focused on those principles and concepts, it seems that an agenda limited to the real participation possibilities of our countries was considered. The reality is that this is the minimalist agenda that the US could then accept in order to be able to build an agreement suitable for the needs of its multinationals to penetrate new markets. The real disciplines for competition policies, concerning the abuse of a dominant position, merger control, or the prohibition of all cartels, had vanished from the discussion well before the failure of Cancún, even though they have been present in the European tradition. To discuss those subjects at the WTO could result in disciplines that would allow every country, including the developing countries, to control anticompetitive practices in sectors highly relevant for international trade, such as air and maritime transport, which are essential for the flow of tourists and merchandise.

Regarding *trade and investment*, the expectations were that negotiations would start out with a discussion of a series of seemingly harmless concepts, such as “scope and definition, transparency, non-discrimination, modalities for pre-establishment commitments based on GATS-type positive list approach, development provisions, exceptions and BOP safeguards, consultation and settlement of Disputes between Members” (WTO, 2001b: 5). However, the same paragraph establishes “the existing bilateral and regional agreements on investments” in which the regulations negotiated have reached deeper levels that could be difficult to accept for the majority of the WTO developing countries, such as those in NAFTA or in the bilateral investment agreements negotiated by the European Union or the US. For example, these rules prohibit the use of performance requirements for technology transfer, restrict the granting of investment incentives; confer pre-establishment rights to the foreign investor; and allow investor-state disputes.<sup>9</sup> As can be

8 Since then, these issues have been known as the “Singapore Issues.” The first three of these were dropped officially after the failure of Cancún, in the General Council Decision of 1 August 2004.

9 Most of these are being adopted in bilateral and regional agreements, such as the recently concluded DR-CAFTA.



verified, if these precedents are standardized, the spaces for development policies would be further limited. Ever since Singapore, the developed countries have continued to promote this issue based on the premise that the common rules on investment issues would introduce the legal certainty required to increase foreign direct investment (FDI) flows. No evidence exists, however, on the relationship between investment rules and FDI flows. As a result, the matter was officially dropped from the WTO agenda in July 2004.

In relation to *transparency in government procurement*, the initial intention was to achieve a multilateral agreement. “Such negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers” (WTO, 2003b: 6). Santos (2003) has emphasized how an eventual negotiation on this subject would attract the interest of more competitive international suppliers to the purchases of goods and services and the construction services procurements currently made by governments. According to the author, the amounts involved represent up to 15% of GDP in some countries and even 20% of world trade. In 1999, government procurement represented 5.6% of GDP for a total of US\$915.1 million in a country such as the Dominican Republic. If the matter had been negotiated in the WTO, it would have been essential to introduce clear rules that would have provided preferences for national suppliers based on thresholds. Even though the matter has also been dropped from the WTO agenda, bilateral and regional negotiations are prejudicial to the future treatment of this issue in the WTO. For those bilateral or regional negotiations go well beyond transparency and include also commitments on national treatment and market access. However, these negotiations have a potential to help in the fight against corruption and towards a more efficient allocation of public expenditure. The clientelistic element of public expenditure could be reduced and, if the preferences for national suppliers are achieved, it would be possible to preserve an important space for development policies, given the effective impact of the public expenditure in generating a domestic supply capacity.

On the subject of *trade facilitation*, the objective of the eventual negotiations is to “further expedite the movement, release and clearance of goods, including goods in transit.” Regardless their development level, WTO members support this issue. However, the developing countries allege that the main obstacle to trade facilitation is the proliferation of rules of origin, in spite of the fact that as of 1998 they should have been harmonized in the WTO. There is also a fear that the eventual regulations that could be negotiated on the subject might be subject to the WTO dispute settlement procedure, which would mean that any of them would have to anticipate expensive disputes over situations in which the dispatch of goods could take over 24 hours. It is undeniable that greater commercial efficiency would have a highly favorable impact on development. If the developing countries abandoned this fear, placing the issue outside WTO dispute settlement, these eventual negotiations could be sustained without difficulties.

**The stated aim is to  
'safeguard the multi-  
lateral trading system  
from the effects of  
financial and monetary  
instability'**

On the other hand, regarding *trade, debt, and finance*, discussions have begun to gradually “enhance the capacity of the multilateral trading system to contribute to a durable solution to the problem of external indebtedness of developing and least-developed countries, and to strengthen the coherence of international trade and financial policies, with a view to safeguarding the multilateral trading system from the effects of financial and monetary instability” (WTO, 2001b: 8). The participants of the developed countries have not been at all enthusiastic, and the actors that have promoted these discussions have all been removed from their posts in Geneva. The creation of this group was proposed because of the difficulties of using the mechanisms contemplated in Art. XVIII(B) of GATT 1994, with the intention of eventually having rules that allowed the temporary modification of the trade conditions of developing countries whenever they were confronted by a crisis caused by external debt, financial fluctuations, or monetary instabilities, and to make it possible for them to compensate for a lack of currency by creating newer market access opportunities. These problems are recurrent ones in developing countries. However, at the WTO they have been faced with objections based on the belief that this could create a situation of “moral hazard,” favoring irresponsible behavior regarding foreign indebtedness and encouraging countries to later use commercial restrictions to counter the effects. The future debates will concentrate on discussing trade liberalization as a source of growth; WTO regulations and financial stability; the importance of market access and the reduction of other trade barriers within the framework of the current negotiations. It has also been decided to submit to the IMF and the World Bank the discussion on trade and the financial markets and the financing of trade. Finally, a joint discussion will be established with these two institutions on greater coherence as regards the conception, application, and supervision of the reforms related to trade; the interrelations between external liberalization and internal reforms; and external financing, commodity markets, and export diversification (WTO, 2003b).

*Trade and technology transfer*, an issue of great relevance for development, and one for which there are numerous precedents, is currently under discussion (UNCTAD, 2001). The purpose is to advance “any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries” (WTO, 2001b: 8). Even though the discussion is still in its early stages, there are provisions contemplated in the WTO agreements on technology transfer that might be strengthened and complemented on the basis of those already included in other international instruments. Future discussions should be focused on examining the precedents and also on defining a course of action that could allow for their integration within the WTO rules. However, thus far the discussion has been dominated by questions surrounding the appropriate environment for technology transfer and concerned with the framework of development policies that should be promoted nationally (WTO, 2003a). Though still an important and healthy debate, investing too much time in these aspects could divert attention from the original purpose for which the group was created.

# 5. What is to be done?

The trends that led up to the Cancún failure continue. Much like previous precedents, the recent decision of the WTO General Council on the Doha Work Program (WTO, 2004) continues to give priority, at least on paper, to development, to the concerns of developing countries and to a balanced outcome. The absolute lack of progress on all issues of interest for developing countries since Doha, however, does not bode well for the so-called “development” round. And, as Cancún demonstrated, developing countries will not sit idly by to see how certain issues advance while their own issues continue to receive the cold shoulder.

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We should all follow the wise words of the late President Kennedy, whose view it was “our task is not to fix the blame for the past, but to chart the course for the future.” Thus, if developing countries are to obtain negotiating outcomes that are development-enhancing and not development-distorting, they should preserve the relevant provisions that already exist and bring on board new rules that would strengthen their hand in the new WTO-plus environment created by RTAs. They should, therefore:

- a) *Resolve implementation issues and concerns, with priority for:*
  - achieving non-discriminatory procedures for the allocation of agricultural tariff-quotas;
  - preventing the replacement of textile quotas by antidumping measures; and
  - reactivating Article 8 of the SCM Agreement, in order to consider as non-actionable subsidies granted for research and development, least-developed regions or environmentally sound technologies.
  
- b) *Change existing rules by, inter alia:*
  - eliminating all subsidies granted by developed countries to their agricultural sectors;
  - eliminating all forms of subsidized export credits;
  - developing a new understanding of GATT Article XVIII on infant industry protection;
  - renegotiating the understanding on GATT Article XXIV, in order to introduce greater specificity to the meaning of flexibility, coverage, phased liberalization and asymmetry to allow the article to become an appropriate instrument to deal with trade liberalization through RTAs between developed and developing countries, a situation that did not exist when the GATT was under negotiation;
  - introducing annexes on specific service sectors, providing for particular rules relevant for achieving effective compliance with GATS Article IV;
  - reviewing the TRIPS agreement by achieving compatibility with the Convention on Biological Diversity;
  - strengthening the standard of review of the antidumping agreement in order to prevent its arbitrary application;
  - clarifying the conditions under which development policies will be considered non-actionable in the SCM agreement.

*c) Achieve binding special and differential treatment, by:*

- replacing all conditionals with imperatives (“shall” for “should”); or
- unifying all provisions into a separate, binding agreement.

*d) Launch negotiations on development-related issues, such as:*

- trade debt and finance, in order to introduce rules on situations of financial instability; export price fluctuations; exchange rate fluctuations; interest rate fluctuations; and fiscal erosion due to trade liberalization; and
- technology transfer, so that existing rules could be unified in a single instrument that would provide for multilateral provisions covering existing precedents on sectors such as health, the environment, conservation of biodiversity and the exploration and sustainable use of maritime resources (UNCTAD, 2001).

**Even smaller are the expectations for the technical assistance or capacity-building programs developing countries need to take advantage of all the flexibilities in the rules, to diversify their exports or to improve their trade capacities**

A reading of WTO (2004) from this perspective is, unfortunately, disappointing. Development is again brought into the debate in a way that appears to be satisfactory but that again may prove to be inadequate. For instance, paragraph 1.d on “development” in WTO (2004: 1-2) covers issues such as “principles,” “special and differential treatment,” “technical assistance,” “implementation” and “other development issues.” However, its language does not go beyond the Doha Declaration. It may well highlight the “important role that enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity building programmes can play.” But it does little to improve the expectations for greater market openings for products of interest to developing countries (such as cotton) or in a rebalancing of the rules in the manner proposed in this paper. Even smaller are the expectations for the technical assistance or capacity-building programs developing countries need to take advantage of all the flexibilities in the rules, to diversify their exports or to improve their trade capacities.

Progress in implementation is not likely under the new mandate, which continues to rely on a division of labor between the Committee on Trade and Development and the relevant subsidiary bodies. By dividing up the issue in this manner, implementation has been deprived of the centralized focus it received prior to Doha. Developing countries are thus more easily conquered.

**The only hope for a change in the rules that is at least being discussed, compatibility between TRIPS and the CBD, faces the immutable opposition of the US**

Changes to existing rules are already following a course that will not be beneficial to the developing countries. Blue box subsidies, for instance, will continue even after the conclusion of the Doha Round. Other domestic support measures will survive, and at the end of an initial phase-out period they will remain at 80% of their current levels. And the only hope for a change in the rules that is at least being discussed, compatibility between TRIPS and the CBD, faces the immutable opposition of the US.

New negotiations on special and differential treatment, as well as on new issues of interest for developing countries are not called for in the text. All this seems to indicate that the debate will go on as before. And developing countries will have to continue to take a “damage control” approach to multilateral trade negotiations, knowing that all changes will be written with increased speed in the bilateral and regional processes, without development-enhancing multilateral rules to preserve their policy spaces.

# 6

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