



# Economic Diplomacy

Essays and Reflections  
by Singapore's Negotiators

C L Lim • Margaret Liang

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*“As an open economy with a large share of exports in its GDP, Singapore has been keen to promote more openness in the international economy and has been active in formal and informal negotiations at the WTO to achieve greater consensus among members. The reflections in this book, offered by experienced Singaporean negotiators who have been at the frontline of regional and multilateral trade talks, vividly convey the process and dynamics of trade negotiations; they provide fascinating insights for any policy maker and negotiator working in the field.”*

**Supachai Panitchpakdi**, Secretary-General of UNCTAD

*“The Singapore economic miracle is founded in no small part on Singapore’s ability to ride the crest of globalisation. Singapore has faced the challenge of globalisation with both astute strategy and plucky self-reliance. As part of Singapore’s strategy, it has developed a cadre of trade policy experts with extraordinary skill and experience. This remarkable volume brings together a group of these experts to offer the benefits of that skill and experience to the rest of the world. This essential book fascinates and informs, but also will play a critical role in preparing trade policy professionals from around the world.”*

**Professor Joel P. Trachtman**, Director, Hitachi Centre for Technology and International Affairs, Fletcher School of Law and Diplomacy

*“Singapore has made a huge contribution to the development of the multilateral trading system, way beyond what might be envisaged from a nation of its relatively modest (if you will forgive the term) proportions. Why? Because strong multilateral rules tend to dilute the ‘law of the jungle’ and promote a more level playing field. How? Read this book and you will find out. It is because of the excellence of its negotiators (amply demonstrated in this book); because they master the substance; because they have earned and maintain widespread respect; and because they seek to build bridges. In the world of multilateral economic diplomacy, Singapore has proven time and again that influence does not depend on size. Long may it continue!”*

**Stuart Harbinson**, former Chairman, WTO General Council

*“The contributors to this collection provide a firsthand perspective of WTO/GATT and FTA negotiations. The result is a vivid, informed account of the evolution of global trade regimes, enhanced with a practitioner’s view on the future. With its mix of technical articles and personal narratives of the negotiation processes, this volume is an invaluable resource for those interested in economic diplomacy and multilateral legal negotiations.”*

**Tony Chew**, Chairman, Singapore Business Federation

*“This collection covers the whole range of international trade policy, bringing together the experience of the past with the perspectives of the future. It is a testimony to the great importance of smaller players in working for solutions and improvements in the multilateral context. Singapore is in the front row of the ‘friends of the system’, and the multilateral system is fortunate to have such friends.”*

**Renato Ruggiero**, former Director-General, WTO

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## FOREWORD

Trade is Singapore's lifeblood. It was for trade that Raffles established Singapore as an entrepôt for the British East India Company in 1819. That was in an earlier age of globalisation. Singapore will benefit greatly from a new age of globalisation in the 21st century. With the re-emergence of China and India on the global stage, a new East-West trade, creating new patterns of economic interdependence, is reshaping the civilisation of Maritime Asia.

Because trade is at the core of Singapore's economy, it is only to be expected that we favour trade liberalisation in any and every way possible. We support the WTO and its efforts at promoting multilateral trade. By promoting a rules-based multilateral trading system, the WTO enhances global governance. Even though the Doha Development Agenda is floundering and may take many more years to conclude, we must keep pushing in that direction. If we stop doing so, the forces of protectionism will push us in directions that are less advantageous, even dangerous, for us. This global financial crisis is bound to strengthen the forces of protectionism in every country.

The centrepiece of the Doha Development Agenda is liberalisation of agricultural markets. Because agriculture is rooted in the land and an inseparable part of the lives and cultures of billions of people, it is the most difficult sector to negotiate. Sometimes I wonder if we should not take a more practical approach and be less ambitious in our targets. Not having an agricultural sector ourselves, Singapore can afford to take a more detached view of the problem. Not so for many countries, however, where governments can collapse over farm issues.

The challenge of the future will be trade in services and knowledge products. Unlike agriculture, these are rootless and weightless like software, entertainment, financial services and biomedicine. For these new areas, a multilateral approach is impractical. Instead we need plurilateral

agreement among the advanced economies where these new industries are concentrated. They in turn should be generous to the other economies. As Pascal Lamy once pointed out to me, for this New Economy, the key is trust. The recent worldwide collapse of trust in financial markets shows how critical that trust is even though it is intangible. We need trust to establish standards and security.

Looking ahead, the Asia Pacific will lead the world economy. To promote trade in the New Economy, we need to build trust and set high standards. Singapore's FTA strategy is to move early whenever and wherever possible, and to encourage others to come along, both by example and by competitive pressure. Strengthening economic integration in ASEAN is fundamental. All our bilateral FTAs are negotiated with the intention of bringing the rest of ASEAN along eventually.

It is crucial to conclude the Doha Round as soon as possible because so much is at stake, so much is being left on the table. Beyond Doha, however, the next round of trade liberalisation in the New Economy will have to be plurilateral, not multilateral. The Asia Pacific will have to lead the way to that future. It is a future which will bring prosperity to Singapore.

Recently, a bold new initiative has been launched to create a Trans-Pacific Strategic Economic Partnership. It started with Singapore, New Zealand and Chile agreeing in 2002 to create a common platform of high standards which others could also plug into. After a few months, Brunei also joined in, creating the P4. In November 2008, the US, Australia and Peru asked to become members as well. Vietnam and others have indicated interest. This Trans-Pacific Partnership is the arrowhead that could eventually lead to an APEC-wide Free Trade Area of the Asia Pacific. The 21 APEC economies make up over half of global trade and global GDP. Though this enterprise will take many years to bring to fruition, it is of historic significance.

**George Yeo**  
Minister for Foreign Affairs  
Singapore

## FOREWORD

The evidence is unequivocal. Where countries are economically closed and decoupled from regional or global markets, one sees poverty and stagnation. Economic openness, on the other hand, has led many to growth and prosperity.

Singapore is testimony to this. We have benefited greatly from participating actively in the global economy. With our small market size and limited resources, Singapore could not and cannot afford to be insular. Our fortunes lie in our ability to navigate deftly through the ebbs and swells in the global economy and finding opportunities and niches for our companies and people.

With globalisation comes greater exposure to the changes on the world economic stage. This reality is especially evident in the financial turmoil which unfolded in 2008. What started as a subprime housing mortgage crisis in the United States developed into a global financial tsunami, impacting countries far beyond the United States, including Singapore.

During periods of economic downturn, the temptation to retreat and close markets is great. But this will only make a recession deeper and more prolonged. Instead, the key to recovery often depends greatly on countries' willingness to create conditions for investments and trade to continue to flow and grow.

The rules-based trading system of the World Trade Organisation has always served as a key buttress of economic stability for Singapore. Multilateral trade liberalisation has helped to improve the lives of millions over the past decade and it continues to play an important role in locking in trade liberalisation efforts and stimulating economic growth around the world. However, we should not take the WTO for granted. The WTO needs to stay relevant to the changing needs of its Members and the world through regular review of its processes and agenda.

While the multilateral WTO framework remains the bedrock of Singapore's trade policy, Singapore is also an active player in the region.

The closer integration and realisation of the ASEAN Economic Community has always been a key goal for Singapore. Singapore can only benefit from a stronger and more prosperous ASEAN.

The resurgence of China and India has shifted the global economic map and pushed Asia to the forefront in the 21st century. 60% of the world's population live in Asia. A dynamic and rich Asia is a great asset not only to Singapore but to the entire global economy.

Alongside regional integration, fostering closer inter-regional linkages is another key pillar of Singapore's trade policy. Closer inter-regional ties bring about greater interest in the success of another region. This often opens up new opportunities and also leads to greater stability and predictability in relations which again benefits businesses and the people in the two regions. In this respect, the Asia-Pacific Economic Cooperation (APEC) has surprised on the upside. Since its genesis as an informal Ministerial level dialogue group with 12 members in 1989, APEC has grown to become an effective inter-governmental grouping in the world. Through the efforts of APEC, tariffs and trade barriers across the Asia Pacific have been reduced and costs of business transactions slashed. APEC is now exploring the idea of a Free Trade Area of the Asia Pacific. Many building blocks are being put in place to achieve this. One such foundation stone is the Trans-Pacific Strategic Economic Partnership. Its expansion beyond the original group of four countries — Brunei, Chile, New Zealand and Singapore — offers a platform for ideas/initiatives to be tested and later explored with the larger APEC group.

As we focus on trade liberalisation, we also believe in building up the institutional knowledge and capacities of our people to drive our economic growth. This publication contains the invaluable experiences, perspectives and insights of the key people who have participated in and shaped Singapore's trade policy and trade history. These writers have been involved in Singapore's participation at various international, regional and bilateral trade fora in the diplomatic, economic as well as academic fields.

I trust that you will find this collection an engaging and insightful read, and a library of priceless institutional knowledge of Singapore's trade development.

**Lim Hng Kiang**  
Minister for Trade and Industry  
Singapore

## FOREWORD

In 1995, I moved from the Prime Minister's Office to the Ministry of Trade and Industry to be its Permanent Secretary. I knew that one key assignment would be to help then MTI Minister Yeo Cheow Tong chair the inaugural WTO Ministerial Conference. Besides the huge logistical challenges of hosting a global conference, the substantive part of the conference would involve getting trade ministers to make political trade-offs in sensitive sectors. As this would be the first WTO Ministerial Conference, and given Singapore's reputation, there were high expectations that the conference would not merely be an organisational success, it would also help move the global trade agenda forward.

We knew the challenges and we took our responsibilities seriously.

While the conference would actually be run by the WTO Secretariat, we knew that we would not be merely an event organiser. As the host, we had to also help the WTO Director-General bridge gaps, forge consensus, clear misunderstanding, help educate, cajole and persuade. It was a tall order.

The first task was to identify our resources, able diplomats and trade negotiators who had a strong global network, enjoyed trust as honest brokers and who were also knowledgeable about trade issues. Singapore was lucky to have many, including Chew Tai Soo, Barry Desker, K. Kesavapany, Tommy Koh, Lee Tsao Yuan, Kishore Mahbubani, See Chak Mun and S. Tiwari. But we needed many more.

The inaugural WTO MC was to assess the implementation and review of the so-called "built-in agenda" of the Uruguay Round, which took seven and a half years to negotiate and ran into 550 pages of legal documents. We needed domain experts in all the major chapters if we were to help forge consensus and make a serious contribution.

We made an important decision to assemble a big team of officials, drawn from the major Ministries and to bring them up to speed on all the

key trade issues. With the help of the WTO Secretariat, we organised many workshops, from Trade Policy 101 to more esoteric trade matters, like anti-dumping and countervailing duties, technical barriers to trade and sanitary and phytosanitary measures and the many sophisticated political complications of agricultural trade. Together with my colleagues, we went back to school, took part in most of the workshops and sat through the lectures and tutorials. It was a significant investment of time and resources but one which was absolutely necessary. Our efforts were noted and appreciated by the WTO Secretariat.

As a result, we expanded drastically our team of trade diplomats and brought them up to speed. Along the way, we enhanced our network with the WTO Secretariat and, through many durian and chilli crab parties, built strong bonds of friendship which would prove valuable in due course.

The inaugural WTO MC was held in Singapore, from 9 to 13 December 1996. It was an outstanding event. For many delegates, that was their first trip to Singapore and Singaporeans “wowed” them with our courtesy, hospitality and efficiency. For many heads of delegation, we achieved what we set out to do, which was to impress them as soon as they arrived, getting them to their hotel rooms within an hour of their planes touching down in Changi. This required careful organisation and excellent inter-agency coordination, and it was worth every cent of the extra effort. We strengthened inter-agency coordination and forged an effective “whole-of-government” (WOG) approach. The WOG approach would subsequently be honed into a major competency of the Singapore Government and repeatedly put to effective use when we tackled the Asian Financial Crisis, SARS and, more recently, Influenza A/H1N1.

Just as importantly, the inaugural WTO MC achieved more than merely reviewing the UR’s implementation. It moved the multilateral trade agenda forward, with the establishment of four permanent working groups: transparency in government procurement, trade facilitation, trade and investment, and trade and competition, otherwise known as the “Singapore issues”. As an additional bonus, many key WTO members including the US, the EU, Japan as well as Singapore signed on to the Agreement on Information Technology, covering more than 90% of world trade in IT products, and agreed to eliminate tariffs for IT products on an MFN basis. The inaugural WTO MC firmly established Singapore as a small but influential consensus builder at the WTO.

The successful hosting positioned Singapore for its next stage of trade policy development. Trade is our lifeline. Our external trade is more than

three times our GDP. Our prosperity depends on gaining fair access to the global market. More than many other countries, we have much more at stake in working to avoid trade barriers and protectionist sentiments at international borders. We have worked tirelessly with like-minded countries to advance successive global trade rounds. But we are not purists and do not adopt an ideological approach. Knowing the limitations of global trade rounds and the increasing difficulties of forging ambitious trade liberalisation, we are among the early pioneers who saw a need to also forge bilateral FTAs. To us, such sub-regional FTAs and global trade rounds are not mutually exclusive. Indeed, for small countries, the two can be synergised, both to secure our domestic position, as well as to spur the global round.

We actively leveraged on APEC to translate our insights into practice. After the WTO, APEC is the most important trade policy forum for us. We are active players in APEC to help advance global trade issues. We also use APEC to negotiate and conclude many bilateral FTA deals.

That was how our first FTA with New Zealand was done. We were like-minded on this trade policy strategy and we pioneered a way forward. With growing confidence, we raised our ambition further, by attempting an FTA with Japan. This was followed in quick succession by the launch of the US–Singapore FTA (USSFTA) in 2000, and the European Free Trade Association–Singapore FTA (ESFTA) which was concluded in record time by November 2001.

The Japan negotiation was memorable because it was especially challenging. First, ideologically they had been against bilateral FTAs — the GATT/WTO had been their mantra for over 50 years. Second, there was a perception that the balance of benefits was lopsided as Japan was a huge economy, and ours tiny. Third, they had many sensitive sectors, especially agriculture, while ours was fully open. As the then MITI Vice Minister put it bluntly to our then Ambassador to Japan, Chew Tai Soo, “You are already naked, what else have you got to show?”

Nonetheless, we had the audacity to consider the impossible and put all our hearts into the venture. Ambassador Chew was indefatigable in lobbying the Japanese politicians. His reports of many visits to the Japanese politicians were fascinating. Slowly and patiently, we moved the ground. Of course, MITI itself was on the reform path, without which no outsider could change their ideology. Along the way, we made many friends, and helped Japan speed up its rethink on global trade issues. When we finally signed the FTA with Japan, it was a major trade policy achievement.



Our FTA journey was also a testimony to the importance of being nimble and being able to seize the opportunities as they emerged. The best example of this was the launching of the USSFTA in Brunei, on 16 November 2000.

On 11 November 2000, five days before the APEC Summit, then US Trade Representative, Charlene Barshefsky stopped by Singapore *en route* to Brunei. At her call on MM Lee Kuan Yew, the strategic imperative behind a USSFTA was carefully articulated. The next day, at Barshefsky's request, a "four-eyes" meeting was arranged, between her and Minister George Yeo in Brunei. Barshefsky said that a USSFTA was "doable" within US President Clinton's remaining term in office. This was however a very short window, as Clinton was due to step down in January 2001.

On 14 November, at the APEC Leaders' welcome ceremony, then PM Goh Chok Tong invited Clinton for a golf game. Clinton accepted the offer and suggested that it be done that night. Officials from both sides scrambled to arrange one, especially since confirmation of the game was only received during the APEC dinner itself when the leaders were still eating! Tee-off time was scheduled at midnight. As the arrangements were being made, there was a thunderstorm. It was only ten minutes before the leaders proceeded to their tee box that the sky finally cleared. Clinton enjoyed himself. After the game, over coffee, Clinton noted that US and Singapore officials had been talking about a USSFTA. In a few sentences, PM Goh persuaded Clinton of the strategic importance of the USSFTA. Clinton responded that the USSFTA was "worth doing".

Over the next 18 hours, there was a flurry of activity, and interventions made at all levels, to turn President Clinton's verbal response that the USSFTA was "worth doing" into a formal joint announcement by both Leaders on the launch of the USSFTA in Brunei. I recount this incident briefly to show how critical it was to detect an opportunity and to seize it. History would have been very different if we had made a different assessment and adopted a different response during those critical five days in Brunei.

When I left MTI in 2001, to stand for election as a PAP candidate, MTI had completed or was negotiating FTAs with five partners: Australia, the European Free Trade Association, New Zealand, Japan and the US. I remember my many APEC counterparts expressing dismay to me: "How do you do it?" They had problems assembling even one FTA negotiating team, despite having an army of trade diplomats. I suppose being less endowed, we just have to try harder.

And this is indeed the story of Singapore. Given our limitations, we have to make extraordinary efforts to secure our place in the sun. This was so in the past; this will continue to be so going forward.

**Khaw Boon Wan**  
Minister for Health  
Singapore

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## LETTER

I was very pleased to be invited by Ambassador See Chak Mun to add some words of welcome to this excellent work. Its contents cover the whole range of international trade policy, multilateral, plurilateral and bilateral, bringing together the experience of the past with the perspectives of the future. This is all the more valuable coming from the standpoint of an open, trade-dependent economy that has always been one of the strongest supporters of the multilateral principle. Singapore generously hosted the First Ministerial Conference of the WTO in 1996, and I retain warm memories of the close co-operation I enjoyed with Singaporean Ministers and Officials, many of whom, including my old friend Ambassador K. Kesavapany, have contributed to this volume.

We are living through a critical time for the multilateral trading system, one of the main pillars of the post-World War II order. The challenges facing us are both old and new, with the latter — for instance climate change or resource depletion — being perhaps the most alarming since their impact is truly global and their nature so multidimensional. And yet we do not have new policy instruments or structures to help us tackle these challenges. Worse, in some cases we are actually eroding the existing multilateral foundations, as with the proliferation of preferential trade agreements. This is not only a trade issue. It is a global economic and social scenario with disturbing political implications. A world economy based on preferences would be a very different place from the one we have known for many decades.

That is why this book is so timely. The multilateral trading system has never been more essential than it is today to the promotion of peace, development and stability. In the crisis, the WTO has proved its worth as a bulwark against protectionism. It has been instrumental in preventing things from getting even worse. The task now is to ensure it makes a positive contribution not only to economic recovery but also to the long-term global challenges.

A clear and accurate diagnosis is the only basis for an effective remedy, and this book is a significant step in that direction. Its particular strength is to bring together academics and practitioners, intellectual depth and real-life experience. It covers all the main aspects of the trading system, always with clarity and a balanced judgement between achievements and outstanding problems. The historical presentation of the anti-dumping instrument, for example, is not only intrinsically interesting but also very relevant to maintaining a rules-based system.

In every chapter you will find an incentive for fresh thinking, which is what we urgently need. Times have changed substantially and so have the problems. The continuing unresolved problems of the Doha Round are only one aspect of the consequences of trying to move ahead without also taking account of a new agenda.

The analysis in this book of the strengths and weaknesses of the consensus principle is very important. In this connection, I would like to emphasise three points.

First, the need to add some flexibility to the way consensus operates in the WTO, without negating the fundamental principle. There have been many ideas and proposals advanced. None would be easy to implement. Perhaps one possibility is something we have already tried successfully: using plurilateral agreements to add an opting in and out dimension that would lessen the pressure created when everyone has to join the consensus at the same time. It is interesting to recall that the last substantive agreement concluded in the WTO, the Financial Services Agreement of 1997, was done on this basis.

Second, the proliferation of preferential agreements has already gone too far to be turned back. They are no longer the exception, as they were intended to be, but rather the rule. Over 400 have been notified to the WTO. And many more such agreements, covering all major trade areas, are in the pipeline — over 30 have been notified. But if it is not possible to go back, it is possible to create new incentives to bring preferential agreements into convergence with the multilateral system over time. This is another way in which to give flexibility to the consensus principle.

Third, the fuller integration with the multilateral process of the informal groupings and processes so well described in these pages would also help improve the balance between consensus and flexibility.

One final observation: this book is a testimony to the great importance of smaller players in working for solutions and improvements in the multilateral context. Singapore is in the front row of the “friends of the system”, and the multilateral system is fortunate to have such friends. I wish this work, and its authors, every success.

**Renato Ruggiero**

February 2010

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## PREFACE

This book is the result of collaboration between Singapore's practitioners, practitioner-scholars and scholar-practitioners. By necessity, it is interdisciplinary. In addressing the subject of Singapore's economic diplomacy, the book addresses not only the strategies and economic policies which underpin and inform economic diplomacy, but also the fact that such diplomacy is often treaty-bound and requires an appreciation of how trade rules work. Nonetheless, negotiation is its central focus and, more specifically, trade and trade-related negotiations — multilateral, plurilateral, regional, sectoral and bilateral.

Many people have contributed to the production of this book; without whose counsel, advice, criticism and frank observations we would not have had the courage to make it to print.

We thank Mr. George Yeo, Minister for Foreign Affairs, Singapore; Mr. Lim Hng Kiang, Minister for Trade and Industry, Singapore; and Mr. Khaw Boon Wan, Minister for Health and former Permanent Secretary at the Ministry of Trade and Industry, Singapore.

We are also grateful to Mr. Peter Ho, former Permanent Secretary, Ministry of Foreign Affairs, Singapore, for his support and encouragement and we are indebted to Mr. Renato Ruggiero, former Director-General of the WTO, for his kind letter which is reproduced in this book, as well as to Mr. Supachai Panitchpakdi, Secretary-General of UNCTAD, Mr. Stuart Harbinson, former Chairman of the General Council of the WTO, Mr. Tony Chew, Chairman of the Singapore Business Federation, and Professor Joel P. Trachtman of the Fletcher School of Law and Diplomacy at Tufts University, all of whom gave freely of their time to read various drafts. In the course of the book's preparation, we benefited significantly from the comments, support and advice of the editorial advisory committee, comprising Dean Barry Desker of the S. Rajaratnam School of International Studies, Ambassador Tommy Koh and Ambassador See Chak Mun of the Ministry of Foreign Affairs, Singapore, and Ambassador Ong Keng Yong of



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**C.L. Lim & Margaret Liang**

May 2010

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# SINGAPORE'S ECONOMIC DIPLOMACY: AN INTRODUCTION\*

*By Barry Desker, Margaret Liang, C.L. Lim and  
See Chak Mun*

## **I. Main Themes**

Singapore's experience with the General Agreement on Tariffs and Trade (GATT), the World Trade Organisation (WTO) and free trade agreements (FTAs) is the central concern of this book. This does not entail a narrow focus on "trade" where that term still conjures up the image of a narrow preoccupation with the global goods trade. The WTO and modern FTAs encompass a broad range of regulatory concerns. In addition to dealing with tariff and non-tariff barriers to the free movement of goods, trade facilitation, the pacific settlement of trade disputes and the surveillance of national trade policies, the WTO's remit extends to the global services trade, intellectual property rights, government procurement and some degree of regulation of trade-related investment measures.<sup>1</sup> FTAs are even

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\* Permission to reproduce material from the following earlier publications is gratefully acknowledged: Barry Desker, "Singapore", in Patrick F.J. Macrory, Arthur Edmond Appleton & Michael G. Plummer (eds.), *The World Trade Organization: Legal, Economic and Political Analysis* (Vienna: Springer, 2005), Vol. 1, Ch. 78; Margaret Liang, "Evolution of the WTO Decision-Making Process", (2005) 9 *SYBIL* 125; Barry Desker, "In Defence of FTAs: From Purity to Pragmatism in East Asia", (2004) 17 *Pacific Review* 3; Margaret Liang, "The *Realpolitik* of Multilateral Trade Negotiations: From Uruguay to the Doha Round", (2004) 8 *SYBIL* 149.

<sup>1</sup> As well as investment regulation by way of the regulation of services provided through the establishment (i.e. by way of foreign direct investment) of a physical commercial presence in the host state.

broader in coverage. In addition to the areas already mentioned, modern FTAs deal with competition policy and foreign investment. The essays in the present volume touch upon all these areas, giving greater coverage to some than to others. There is especially broad coverage of so-called “New Economy” issues — the regulation of the services trade, foreign investment and intellectual property rights — including a chapter on the inter-relationship between the work of the WTO and the World Intellectual Property Organisation (WIPO).

The book addresses a number of themes, including Singapore’s entry into the GATT; its experience during the Uruguay Round negotiations; Singapore’s participation in the WTO; the reflections of some of its policy and diplomatic practitioners on the current Doha Round; the emergence of new issues at the WTO; the reform of WTO negotiation and decision-making processes; Singapore’s pursuit of FTAs; and the experience of individual Singaporeans in multilateral economic institutions.

The purpose of this chapter is to introduce these varied issues and themes. It begins with a brief account of how Singapore entered the GATT following the *de facto* application of that treaty to Singapore and goes on to describe how Singapore became a founding Member of the WTO and its active support for, and participation in, the Uruguay Round negotiations. We then go on to describe the changes which occurred following the establishment of the WTO in the mid-1990s, first in Seattle in 1999 when the attempt to launch a new global round of trade talks failed. We describe how the debacle in Seattle, as well as subsequent and related events in global trade talks and the wider world of global economic diplomacy, tempered Singapore’s exclusive reliance on multilateralism and contributed to a new interest in regional and bilateral FTAs. Our aim is to provide the reader with a broad overview and understanding of the GATT/WTO, changes in the global trade policy environment and political landscape, and the importance of liberal trade flows to Singapore. Our hope is that this chapter will provide some useful background before the reader encounters the individual chapters written by a collection of authors, almost all of whom have had direct, and in many cases long-standing, experience of Singapore’s trade negotiations.

Finally, this introduction describes the origins of the book, its purpose and the arrangement of the individual chapters.

## II. Singapore's Entry into the General Agreement on Tariffs and Trade (GATT) and Its Objectives in the Uruguay Round<sup>2</sup>

### A. *Singapore Accedes to the GATT*

Singapore joined the GATT in 1973.<sup>3</sup> Following separation from Malaysia, the GATT had been applied to Singapore on a *de facto* basis under GATT rules.<sup>4</sup> The certification by the GATT Director-General of Singapore's admission, dated 20 August 1973, reads:<sup>5</sup>

On 19 October 1965 the Government of Malaysia informed the CONTRACTING PARTIES that as from 9 August 1965 Singapore had become a sovereign nation, separate from and independent of Malaysia. Thus, the Government of Malaysia has established the fact that the Republic of Singapore was qualified, in the sense of paragraph 5(c) of Article XXVI, to become a contracting party.

The Government of Singapore has been applying the General Agreement on a *de facto* basis, pursuant to the Recommendations of the CONTRACTING PARTIES of 18 November 1960 and of 11 November 1967, and has now advised by a communication dated 10 August 1973 that it wishes to be deemed a contracting party to the General Agreement under the provisions of Article XXVI:5(c). Since the conditions required by Article XXVI:5(c) have been met, Singapore has become a contracting party; its rights and obligations date from 9 August 1965.

Accession to the GATT became a valuable means of ensuring market access in key international markets. As Singapore had joined the GATT under its succession provisions (i.e. as a former territory of Malaysia, a contracting party), it was not required to make concessions. The process was therefore brief and relatively painless — essentially the only Agreement that needed to be implemented was the GATT 1947.

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<sup>2</sup> Permission to reproduce material which had originally appeared in Barry Desker, "Singapore", in Patrick F.J. Macrory, Arthur Edmond Appleton & Michael G. Plummer (eds.), *The World Trade Organization: Legal, Economic and Political Analysis* (Vienna: Springer, 2005), Vol. 1, Ch. 78, is hereby gratefully acknowledged.

<sup>3</sup> GATT Doc. L/3913, 20 August 1973.

<sup>4</sup> GATT Doc. L/2495, 5 November 1965.

<sup>5</sup> GATT Doc. L/3913, *op. cit.*

The Tokyo Round which took place between 1973 and 1979 occasioned Singapore's first direct, albeit limited, involvement in multilateral trade negotiations. Like other developing countries, Singapore supported the demand for more favourable treatment for developing countries, including an exemption from the need to reciprocate tariff concessions offered by developed countries. However, this also enabled developed countries to entrench GATT-inconsistent policies, for example, in textiles, which discriminated against imports from Singapore and other developing countries and allowed the developed countries to maintain higher duties on items of export interest to the developing countries, including Singapore.

In 1973, Singapore established an office of the Permanent Representative to the United Nations in Geneva to handle the UN agenda, multilateral trade negotiations and export promotion. However, exposure to the Tokyo Round negotiations demonstrated to Singapore the significance of GATT negotiations and the importance of effective representation in Geneva. It was only at the completion of the Tokyo Round in 1979 and the subsequent implementation of the resultant agreements that Singapore commenced active participation in the GATT.

By the 1982 GATT Ministerial Meeting in Geneva, Singapore had gained sufficient regard as a trading nation and as a participant in GATT negotiations to be invited to join the informal "Green Room" consultations (further discussed below). As a member of the Green Room, Singapore became even more actively involved in the subsequent Uruguay Round negotiations.

## **B. *Participation in the Uruguay Round***

### *1. Background*

The failure of the 1982 GATT Ministerial Meeting brought on a determined drive by major developed countries to launch a new round. The intention was for this new round (the Uruguay Round, as it was known subsequently) to include new areas such as services, TRIPS (trade-related intellectual property rights) and TRIMs (trade-related investment measures) and to bring greater discipline to agriculture. Taken together with the traditional issues of tariff and non-tariff barriers, as well as issues of special interest to the developing countries, the agenda for the proposed new round was far more complex than in previous trade rounds, and hence more difficult to agree upon.

In particular, the inclusion of services, pushed by the United States, was viewed by many developing countries with great concern. It was also an

area in which developing countries saw little benefit, given their preoccupation with traditional market access for their own goods such as textiles. On the other hand, without the inclusion of services, the new round would have been a “non-starter” for the US.

With the expected slowdown in the global economy and possible rise in protectionism in the mid-1980s, Singapore supported a new round of trade negotiations. At that time, Singapore was also experiencing its first post-independence recession. The need to keep the liberalisation of trade moving forward became imperative for Singapore's dependence on trade was substantial. Failure to agree to negotiate was seen as likely to lead to backsliding on market access commitments, especially by the OECD countries.

From Singapore's point of view, the inclusion of services on the negotiating agenda was not a problem *per se*. Their inclusion would be without prejudice to the negotiations, once the new round was launched, and to the individual positions of the GATT member countries. The battle would have to take place during the negotiations. This was a different position from that taken by some of the major developing countries which opposed the inclusion of services *ab initio*. On the whole, Singapore considered that the proposed new round, which would include discussion on agriculture, the clarification of trade remedy rules, and issues of interest to developing countries, would prove broadly beneficial. The range of issues for negotiation provided ample opportunity for trade-offs in light of the decision to take a package deal approach to the negotiations.

With this objective in mind, Singapore joined a group of about 50 developing and developed countries, led by Switzerland and Colombia, to negotiate a draft Joint Ministerial Declaration. Active in this group were Singapore, as well as the Republic of Korea, Argentina, Colombia, Chile, Uruguay and Mexico. That draft formed the basis for the Uruguay Round Declaration in Punta del Este, where ministers from all the GATT member countries met in September 1986. Several important developing countries such as India and Pakistan were initially not in favour of having a new round. However, they eventually joined in the consensus to launch a new round — dubbed the “Uruguay Round”.

## 2. *Policy Goals*

The Uruguay Round negotiations were a major exercise. They were aimed at expanding the major provisions of the GATT and the Tokyo Round Agreements, and at eradicating the existing shortcomings of the trading



system. These shortcomings included continued high tariffs in industrial products (as well as tariff peaks and tariff escalation), increasing use of non-tariff barriers, the exclusion of agriculture from the GATT disciplines, the exclusion of textiles and clothing from the “normal” GATT rules and the negative impact of the Multi-Fibre Arrangement, as well as the GATT’s weak dispute settlement machinery. The negotiations were also intended to counter growing protectionist pressures in the developed countries, especially in the US with the use of voluntary export restraints.

Singapore participated with the overall aim of further liberalising global trade and ensuring strengthened rules governing the conduct of such trade. This was essential to protect its interests as a small nation heavily dependent on a free, open and stable international trading system. Like other committed free traders, Singapore believed that a successful conclusion to the negotiations was essential to maintain the momentum in favour of further trade liberalisation if the multilateral system was to avoid the roll-back of concessions due to domestic political pressures. To this end, Singapore’s main policy objectives in the Uruguay Round negotiations were to:

- (a) secure benefits from the market access negotiations;
- (b) enhance transparency in global trade transactions;
- (c) ensure that rules in new areas (i.e. services and TRIPS) would provide a predictable legal environment conducive to world trade expansion; and
- (d) improve the dispute settlement system so that it would become more effective in resolving trade disputes.

Singapore views the overall results of the Round and the establishment of the World Trade Organisation in a positive light. The Uruguay Round Agreements have enabled GATT/WTO rules to adapt to changes in the international trading environment, for instance, in setting up the new framework governing trade in services. The wide-ranging agreements renewed confidence in the multilateral process, fostered the integration of the developing countries into the global trading system and diminished pressures for unilateralism, especially in the US.

Implementation of WTO commitments by member countries would result in improved market access for Singapore’s goods and services. The official estimate was that US\$ 333 million of accumulated potential tariff savings would result from Singapore’s exports to its major markets. The

conclusion of the negotiations in financial services and basic telecommunications reinforced unilateral liberalising initiatives in Singapore aimed at improving its global competitiveness.

However, it was observed that there were two drawbacks from the perspective of the multilateral trading system. First, despite expanded rules on trade remedies, there has been an increase in the use of anti-dumping and safeguard measures as additional protectionist instruments. Second, a number of developing countries, especially the least developed countries, have yet to derive real economic gains from the Uruguay Round Agreements while they face the immediate costs of implementing these agreements.

### **III. Global Trade Negotiations: From the Tokyo to the Doha Round**

#### **A. *The Tokyo Round (1973–1979)***

The Tokyo Round had resulted in six new Codes applying only to participating members as opposed to the whole GATT membership. These were elaborations of existing processes in the GATT, and the new Codes dealt with subsidies and countervailing duties, procurement, anti-dumping, customs valuation, technical standards and import licensing (hereafter, the “Tokyo Round Codes”). The developing countries had two reasons for not signing the Tokyo Round Codes. First, they could not yet compete in terms of auto-parts, chemicals and so on. They could compete in textiles but here the 1974 Multi-Fibre Arrangement (MFA) was already in place.<sup>6</sup> Second, because that period was the high point of a more developing-country oriented vision of the world economic order which the developing countries had strongly championed in the 1960s and 1970s.<sup>7</sup> These factors influenced the participation of the developing countries in the Round.

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<sup>6</sup> See Alan Sykes, *The WTO Agreement on Safeguards: A Commentary* (Oxford: Oxford University Press, 2006), 24.

<sup>7</sup> See Resolution on Permanent Sovereignty over Natural Resources, UNGA resolution 1803 (XVII), 14 December 1962; Declaration on the Establishment of a New International Economic Order, UNGA resolution 3201 (S-VI), 1 May 1974; Charter on Economic Rights and Duties of States, UNGA resolution 3281 (XXIX), 12 December 1974.

The Tokyo Round did have several weaknesses without the developing countries coming on board the various Codes. It led to a fractured system of international trade, legal inconsistency with the unconditional MFN rule and, most of all, failed to address voluntary export restraints. GATT Art. XIX requires compensation for safeguards, and no-one, including the US, wanted to pay.<sup>8</sup> So the US explored the use of so-called VERs on the part of its trading partners. This meant, in effect, that if Japan sold too many auto-parts to the US, the US would take safeguard action unless Japan agreed voluntarily to restrict its own market share.<sup>9</sup>

### **B. *The Uruguay Round (1986–1994)***<sup>10</sup>

In the early 1980s, there was widespread inflation, unemployment and monetary instability. Japan had agreed to voluntary export restraints in relation to its auto exports to the US, following Ambassador William Brock's visit to Tokyo in April 1981.<sup>11</sup> In 1982 there was a GATT Ministerial Conference which discussed the use of VERs. The four years spent trying to launch the Uruguay Round, between 1983–1986, were extremely difficult and controversial. A group of five GATT members, namely India, Brazil, Argentina, Egypt and Yugoslavia, opposed the round and claimed to speak for the community of developing countries. The basic positions of these five countries were very much similar to the complaints of developing countries today. The new round, especially the inclusion of new subjects like services and intellectual property rights, was unacceptable to

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<sup>8</sup> This has to do with the phenomenon of “upstart nations”, new exporters whose exports may represent a surge in imports in relation to which safeguard action may be directed, but because of the view that safeguards will have to be applied on an MFN basis, this may lead to action against traditional import sources whose imports have remained stable, but in relation to which large amounts of compensation may also now have to be paid; see Sykes, *op. cit.*, 21.

<sup>9</sup> Another reason why exporters will agree to this lies in the effect that while there is an agreement to restrict the volume of exports, this could have an upward effect on prices leading to the capture of quota rents as a trade-off; *id.*, 22–23.

<sup>10</sup> Permission to reproduce some material which had originally appeared in Margaret Liang, “The *Realpolitik* of Multilateral Trade Negotiations: From Uruguay to the Doha Round”, (2004) 8 *SYBIL* 149, is hereby gratefully acknowledged.

<sup>11</sup> See L. Mahshagian, “Orderly Marketing Agreements: Analysis of United States Automobile Industry Efforts to Obtain Import Relief”, (1982) 6 *Hastings Int'l & Comp L Rev* 161.

them when the Tokyo Round Agreements had yet to be fully implemented. The topic of safeguards was another such example of “unfinished business”. The general complaint then was that developing countries had not benefited from those agreements even though they had few obligations, as most of the Tokyo Round Codes did not apply to them. The strong opposition by the group of five and their strong influence on then GATT Director-General Arthur Dunkel almost paralysed the negotiating process. As a result, a group of nearly 50 countries, comprising both developed and developing countries which included Singapore, took the process out of the GATT building. They met day and night over several weeks in the European Free Trade Area (EFTA) building<sup>12</sup> and finally produced a draft Declaration that provided the basis for the launch of the Uruguay Round in Punta del Este (Uruguay) in 1986. Arthur Dunkel and the GATT Secretariat were brushed aside and the group of five was completely ignored.

In September 1986, the Uruguay Round was launched in Punta del Este. President Reagan announced that the US wanted services, intellectual property and investment to be negotiated in response to the demands of a coalition of industries formed by US banks and service industries such as the pharmaceuticals industry. This was opposed by the developing countries which demanded the inclusion of agriculture, tropical products and clothing/textiles which were of export interest to them.

Little progress was made by the time of the Montreal Mid-Term Review in 1988, even though the US had offered an “early harvest” including tropical products for the Round. In Europe, the problem was somewhat different. There was a turf war going on as European Community (EC) Member States did not wish to surrender trade negotiation authority over the new areas to the Commission. As for Singapore it had initially also opposed negotiations on trade in counterfeit goods, together with other developing countries at the time due to concerns about the possible impact on consumer welfare. Another contention was that producers in the computer industry had all along tolerated software piracy which had the effect of creating markets for their products. There was hence no agreement during the Mid-Term Review on counterfeiting, safeguards, textiles and agriculture. The results obtained at the Montreal Ministerial Conference in the other eleven negotiating groups were put

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<sup>12</sup> Office of the Members of the European Free Trade Area.

on hold pending agreement on these four outstanding areas by the extended deadline of April 1989.

In December 1990, the Brussels Ministerial Conference which was intended to conclude the Uruguay Round broke down. The apparent cause was the collapse of the agriculture negotiations, but the real reason was that the US had felt there was insufficient market access in the existing package to secure Congressional “fast-track” approval.

The Bush Administration was then also in the midst of the North American Free Trade Agreement (NAFTA) negotiations, apart from pre-occupations with the first Gulf War.

Nevertheless, the crisis in Brussels subsequently forced movement in the agriculture negotiations, paving the way for the conclusion of the Uruguay Round in 1994. The Uruguay Round was finally concluded in December 1993 after the Clinton Administration struck a deal with the EC on agriculture known as the Blair House Accord which took care of their mutual concerns. There was also powerful pressure from business interests on both sides of the Atlantic to bring services and TRIPS into the multilateral trading system.

The Uruguay Round’s principal results were:

- (a) The elimination of voluntary export restraints, as required under the new Safeguards Agreement. In addition, the country taking safeguard action would not need to compensate the exporting country for three years if safeguard measures were applied in accordance with the Agreement.
- (b) The agreement to phase out the Multi-Fibre Arrangement by the end of 2004 as a trade-off to obtain agreement on services from the developing countries.
- (c) Agreement on modalities to liberalise trade in agriculture.
- (d) Incorporation of services and trade-related intellectual property rights.

Even with the controversial inclusion of services and TRIPS as part of the Uruguay Round package, few realised the full significance; namely, that the trading framework for a new knowledge-based world economy was being created. The new trading framework would be especially important for the information technology, telecommunications and outsourcing sectors. In Punta del Este, many developing countries had initially resisted the inclusion of such new areas. One reason was concern on their part

that they would be outmanoeuvred by the developed countries in the negotiations, and that the new rules would perpetuate the dominant trading position and technological advantage of the developed countries. However, the developing countries eventually conceded because of what they would get in return in the form of future disciplines on agriculture (especially in relation to tropical products) and a phasing out of the Multi-Fibre Agreement.

### ***C. The Doha Round (2001–present)***

The Doha Round's starting point was the Uruguay Round's unfinished agenda. Examples include further reforms in agriculture, and the detailed rules contained in the General Agreement on Trade in Services (GATS). There are also various unresolved questions concerning the rules of GATT 1994.

However, the EU wanted a "Millennium Round" instead and the inclusion of the "Singapore issues" (i.e. investment, competition, transparency for procurement and trade facilitation) in the negotiations. Developing countries demanded that it should be a development-oriented multilateral trade round.

The plan was to launch the new round at the Seattle Ministerial Meeting in December 1999. However, two days before the Seattle Ministerial started, President Clinton announced that the US wanted enforceable workers' rights and the environmental issue to be considered in the WTO agenda. This had an electrifying effect on the developing country delegates who were already held under siege by demonstrators from NGOs and American steel workers. The US may also have been caught up in the upcoming Presidential elections, and was therefore not ready for the launch of the Doha Development Agenda.

The Doha Round was eventually launched in November 2001. The mood was sombre in that post-9/11 climate, and there was considerable uncertainty about the world economy. In the end, the delegations were prepared to accept an interim package for future negotiations. Singapore's Minister George Yeo served as the facilitator for agriculture and he was able to move the agriculture package forward. The European Commission was content with the idea of a future agreement and to negotiate on the Singapore issues. The Africans managed to secure the EC-ACP Cotonou Agreement, without which they threatened to walk out.

However, in 2003, the Ministerial Conference in Cancun failed to achieve further progress.<sup>13</sup> The African Members objected to negotiations on any of the so-called Singapore issues even though Pascal Lamy, who was then the EU Trade Commissioner, was prepared to drop three of those issues except for trade facilitation. In any event, the Mexican Chairman declared that the Round had collapsed even before any discussion had occurred on agriculture. The real reason was that the US could not agree with Burkina Faso, Benin, Mali and the Chad Republic on a cotton deal even though the US had expended considerable effort in working out a TRIPS package dealing with generic drugs in order to satisfy the demands of the developing countries. Agriculture was never raised in Cancun; and the WTO Members descended into a “blame game”.

President Bush’s “fast-track” authority expired in June 2007. At the time of writing, it is not clear whether the Obama Administration is ready with a new trade policy agenda that would meet the demands of a Democrat-controlled Congress. As for the EU, it is unlikely that it will be ready for a settlement on agriculture prior to its next Common Agricultural Policy review in 2012.

#### **D. *Impact of the Stalled Doha Talks***

The suspension of the DDA negotiations in 2006 highlighted the fact that with the expansion of WTO membership, consensus would be much harder to achieve and it would no longer be possible to ignore the interests and concerns of the major emerging economies like India, China and Brazil in any major decision-making process at the WTO. At the same time, there have been suggestions that the WTO should adapt its agenda to meet new concerns relating to the environment and climate change, currency manipulation and labour practices.

#### **E. *The Chapters in Part One of the Book***

Part One of the book addresses many of the issues relating to negotiations, new concerns and the reform of WTO decision-making, beginning with the chapter by Ambassador See Chak Mun (Chapter One). Three other chapters in the book deal with various aspects of the Uruguay Round negotiations. Dean Barry Desker’s chapter (Chapter Two) deals with

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<sup>13</sup> See further: Liang, “*Realpolitik*”, *op. cit.*

Singapore's inclusion in a key informal grouping, namely, the "Invisibles Group". Ms. Margaret Liang (Chapter Three) recounts the anti-dumping negotiations during the Uruguay Round, while Mr. S. Tiwari recounts the Uruguay Round intellectual property negotiations (Chapter Four). Three further chapters deal with the Doha Round. Ambassador Vanu Gopala Menon discusses the need to reform WTO decision-making (Chapter Five), while Mr. Peter Govindasamy provides an account of the current state of play in the Doha Round services negotiations (Chapter Six). Mr. Geoffrey Yu discusses future trends in intellectual property and how they impact trade and development more broadly (Chapter Seven). Finally, Mr. K. Kesavapany provides an account of the preparations for the first WTO Ministerial Conference in Singapore following the conclusion of the Uruguay Round and the establishment of the WTO (Chapter Nine).

#### **IV. Informal Groupings in the GATT/WTO**

A major topic of debate today has to do with the WTO's decision-making processes which remain largely unchanged from that of the GATT. WTO decision-making continues to be guided by four key principles: the consensus rule, "one member one vote", the "Member-driven" character of the organisation and the importance of informal processes. Ambassadors See's and Vanu Gopala Menon's chapters touch on the issues related to the first three of these principles in dealing with the reform of decision-making processes.

In addition, the formation of informal alliances and coalitions among members to influence decision-making, both inside and outside the so-called "Green Room" process, have long been central to negotiations. Forming informal alliances and coalitions has been the practice since the GATT, where members have defended their national interests on an issue-by-issue basis and avoided either general coalitions or a polarisation of debate along North-South lines. Since the establishment of the WTO, Cancun and the preparatory process in the run-up to Cancun saw an unprecedented manifestation of rhetoric and groupings along North-South lines.

Before the 1996 Singapore Ministerial, the US was able to convince the Quad to institute what was known as the "Invisibles Group" of capital-based senior officials comprising 15–20 key developed and developing country players in the WTO process. They would meet to discuss key issues, but not take decisions. Singapore was active in the Invisibles Group. That group



still meets outside of the WTO as “senior officials from the capitals”.<sup>14</sup> In his chapter, Dean Barry Desker provides an insider’s view of Singapore’s experience in the Invisibles Group (Chapter Two).

Other groupings included the “Friends of the New Round” (FOR) which was started by Singapore to move the WTO process forward pre-Seattle. The core members were Australia, New Zealand, Hong Kong and Singapore. The group discussed the tactics and strategy to be adopted, but not substantive issues. The FOR group provided a chorus of support at WTO meetings in which it sought to sway the mood in the room. Ultimately, the 1998 Geneva Ministerial Conference became the crowning success for the FOR group. The Ministerial Declaration which emerged from Geneva was based almost entirely on the text proposed by that group. However, several months before Seattle, the FOR group fell apart because of differences over substantive issues as each member had now to protect its own trade interests. Nevertheless, the group had already served its purpose. This was a normal occurrence in that every time a process reached the final stages of negotiations, each member would go its own way.

Coalitions, whether geographically based, politically based or allied around common substantive interests, will exercise increasing influence on the WTO decision-making process.

## **V. Singapore’s Free Trade Agreements<sup>15</sup>**

Singapore has moved from a purist adherence to multilateral approaches to trade liberalisation towards a pragmatic recognition that there has been a growing trend towards RTAs and bilateral FTAs, especially during the 1990s. First, the expansion of the EU and the establishment of the North American Free Trade Area (NAFTA) taken together with the Uruguay Round negotiations demonstrated that regional relationships did not detract from a commitment to the multilateral process. Second, the convening of the APEC Leaders’ Meeting in Seattle in November 1993 and fears of an Asia-Pacific FTA excluding Europe had contributed to the EU’s

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<sup>14</sup> Andrew Stoler, “The Current State of the WTO” (Workshop on the EU, US and the WTO, Stanford University, 2003).

<sup>15</sup> Permission to reproduce material which had originally appeared in Desker, “Singapore”, in Macrory, Appleton & Plummer (eds.), *op. cit.*, and Barry Desker, “In Defence of FTAs: From Purity to Pragmatism in East Asia”, (2004) 17 *Pacific Review* 3, is hereby gratefully acknowledged.

decision to concede on agriculture, therefore enabling the conclusion of the Uruguay Round. These developments led Singapore to conclude that RTAs could play a positive role, an observation reinforced by the agreement on sectoral liberalisation within APEC serving as a model for sectoral liberalisation in the WTO. Third, the East Asian financial and economic crisis of 1997–1998 and the stalemate at the WTO resulting in the failure of the WTO Ministerial Conference in Seattle in December 1999 to launch a new round of global negotiations led to a renewed interest by Singapore and other East Asian states in FTAs. These East Asian states felt that regional agreements could be reached more quickly and over a wider range of issues than might be possible in the WTO.

The recent proliferation of FTAs, amidst a backdrop of sputtering trade multilateralism and deadlock in the WTO, has provoked a highly vocal, and at times vitriolic, response from prominent economists specialising in international economics, such as Jagdish Bhagwati and Arvind Panagariya. In an article in the *Financial Times*, dated 14 July 2003, Bhagwati and Panagariya argue that bilateral trade deals undermine the most favoured nation (MFN) principle. They argue that FTAs result in a “spaghetti bowl” of rules, arbitrary definitions of which products come from where and a multiplicity of tariffs depending on the source”.<sup>16</sup> They accuse the US of using bilateral FTAs as a policy instrument that serve agendas unrelated to trade, and of using them as a vehicle to “introduce extraneous issues into the WTO for the benefit of narrow US domestic interests”. Elsewhere, Bhagwati points to the two-faced nature of FTAs, that is, “they free trade and they retreat into protection, simultaneously”.<sup>17</sup> Furthermore, the discriminatory dimension of an FTA creates concentrations of benefits among a narrowly defined group of interests, and leads to incentives to resist the transition to genuine free trade.<sup>18</sup>

While Bhagwati and Panagariya are purists in focusing on the optimal solution of multilateral trade agreements at the WTO, governments will adopt pragmatic approaches (even if they are sub-optimal) if pragmatism

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<sup>16</sup> Jagdish Bhagwati & Arvind Panagariya, “Bilateral Trade Treaties Are a Sham”, *Financial Times*, 14 July 2003.

<sup>17</sup> Jagdish Bhagwati & Ross Garnaut, “Say No to This Free Trade Deal”, *The Australian*, 11 July 2003.

<sup>18</sup> See further: Henry Gao & C.L. Lim, “Saving the WTO from the Risk of Irrelevance”, (2008) 11 *Jo Int'l Econ L* 899, also in Debra Steger (ed.), *Redesigning the World Trade Organization for the 21<sup>st</sup> Century* (Waterloo: Laurier, 2009) 389.

provides the only realisable solutions available in the course of their tenure of office while they continue to participate in global trade negotiations with a longer timeframe. Following the breakdown in Cancun, trade negotiators in East Asia have placed greater emphasis on bilateral and regional negotiations. George Yeo, then Singapore's Minister for Trade and Industry, observed that: "Countries will make their own arrangements. FTAs, bilateral and regional, will become more important. And the result will be growing regionalism".<sup>19</sup>

Singapore's current approach is to seek "WTO-plus" agreements in its FTA negotiations. While multilateral agreements are Singapore's preferred option, policy-makers regard bilateral and regional FTAs as complementary arrangements that reinforce a commitment to open markets, expanded international trade and the promotion of foreign direct investment. Singapore believes that FTAs complement the multilateral trading system in several ways. First, bilateral and regional FTAs can serve as building blocks towards multilateralism as they are easier to conclude than multilateral agreements involving 153 members. FTAs are perceived as sustaining the momentum of global trade liberalisation, allowing WTO members willing to move ahead of their WTO commitments to do so. This creates a strong incentive for the WTO to "catch up". Second, FTAs can be a test bed for new and innovative models of rules governing economic activity. Such innovations may subsequently be adapted for global use. FTAs can therefore provide positive complementary pressures for the evolution of WTO agreements. Third, since FTAs are formed between a small number of partners and at a pace that is comfortable to all parties, they are an effective means of preparing societies for greater trans-border exposure at the multilateral level. Such FTAs provide an important demonstrative effect of the benefits of trade liberalisation.

Part Two of this book addresses the subject of Singapore's FTAs. Mr. Ong Ye Kung takes the reader through the services disciplines in the US-Singapore FTA (Chapter Ten). Professor C.L. Lim surveys past trade disputes which have arisen under various FTAs, and the lessons they may contain (Chapter Eleven). Mr. David Chin provides a close, directly informed account of ASEAN's journey towards free trade (Chapter Twelve). Ms. Ng Bee Kim and Mr. Minn Naing Oo discuss Singapore's reasons for embarking upon the negotiation of FTAs (Chapter Thirteen), while Mr. Michael Ewing-Chow discusses the larger tension between multilateralism and regionalism

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<sup>19</sup> Roger Mitton, interview with BG (NS) George Yeo, Minister for Trade and Industry of Singapore, "FTAs Will Be the Way to Go", *Straits Times*, 17 September 2003.

(Chapter Fourteen). Ms. Ng Bee Kim also recounts the negotiation of the China-Singapore FTA (Chapter Fifteen), while Mr. Pang Kin Keong describes the experience of the Singapore team which had negotiated the Japan-Singapore FTA (Chapter Sixteen).

## **VI. Individual Singaporeans in Multilateral Economic Diplomacy**

Although the majority of the authors in the present volume have engaged in economic diplomacy on Singapore's behalf, the instances in which Singaporeans have also contributed to multilateral efforts in an individual capacity should not be overlooked. Ambassador Tommy Koh gives the reader an insight into the handling of WTO disputes in his personal recollections of the work of three WTO dispute panels on which he had served as a panellist (Chapter Eight),<sup>20</sup> while Mr. Geoffrey Yu, who had served as Deputy Director-General of the World Intellectual Property Organisation (WIPO), writes on the future trends in intellectual property, and their impact on trade and development (Chapter Seven).

## **VII. Origins and Arrangement of the Book**

The idea for this book originally came from Ambassador Tommy Koh. Ms. Margaret Liang from Singapore's Ministry of Foreign Affairs and Professor C.L. Lim were subsequently invited to serve as editors, with the assistance of an editorial advisory committee comprising Dean Barry Desker of the S. Rajaratnam School of International Studies, Ambassador See Chak Mun of the Ministry of Foreign Affairs, Ambassador Ong Keng Yong of the Institute of Policy Studies and Ambassador Tommy Koh. In consultation with the editors and members of the editorial advisory committee, invitations were sent to various colleagues in the Singapore government and elsewhere to write for the book, and the editors and the editorial committee subsequently proceeded to review each manuscript received. Following the Institute of Policy Studies' decision to publish the book, Ms. Chang Li Lin provided invaluable guidance and assistance in securing the arrangements with our commercial publisher.

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<sup>20</sup> Ambassador Koh has not been alone as others such as Ambassador K. Kesavapany, Mr. S. Tiwari and, not least, Ms. Margaret Liang have also served as panellists in WTO disputes. In this regard, it is fair to say that individual Singaporeans have themselves made an important contribution to the WTO's work.

*Economic Diplomacy: Essays and Reflections by Singapore's Negotiators* is divided into Part One, which deals with multilateral economic diplomacy centred in and around the GATT and the WTO, and Part Two, which deals with Singapore's pursuit of bilateral and regional free trade agreements.

While we did not produce this book with the professional scholar or an academic audience in mind, we nonetheless wanted to adopt a disciplined, scholarly approach in recounting Singapore's experience in economic diplomacy as the editors and the editorial advisory committee considered that the book could also serve as a useful written record and resource for future generations of negotiators, officials and diplomats, in addition to readers who may have an interest in the history, evolution and current practice of Singapore's economic diplomacy.

In terms of the organisation and arrangement of the book, we simply hope that it is a fair reflection of the editors' attempt to offer a collection of informative writings which convey some appreciation of the craft, techniques and disciplines of the trade diplomat, negotiator, lawyer and economic policy professional, while also providing the reader with the benefit of personal recollections of discrete events and individual negotiations. In this regard, we further sub-divided each of the book's two parts into "Essays" which focus on the techniques and disciplines of trade policy, law and diplomacy and "Reflections" which contain personal recollections of events.<sup>21</sup>

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<sup>21</sup> Such personal reflections constitute a growing body of Singapore diplomatic writing which have included coverage of individual experiences in economic diplomacy. Readers of the present volume may also wish to turn to K. Kesavapany, "The Politics of Trade: Singapore and the World Trade Organisation", in Tommy Koh & Chang Li Lin (eds.), *The Little Red Dot: Reflections by Singapore's Diplomats* (S'pore: Institute of Policy Studies/World Scientific, 2005), 191; Burhan Ghafoor, "Learning with Master Chefs: Cooking a Treaty", Vanu Gopala Menon, "Intellectual Property and Public Health: Negotiating at the World Trade Organisation", and Karen Tan, "From Lan Xang to Lac Lemman", in Tommy Koh & Chang Li Lin (eds.), *The Little Red Dot: Reflections by Singapore's Diplomats*, Volume II (S'pore: Institute of Policy Studies/Lee Kuan Yew School of Public Policy/World Scientific, 2009), 43, 97 and 123; Tommy Koh & Chang Li Lin (eds.), *The United States-Singapore Free Trade Agreement: Highlights and Insights* (S'pore: Institute of Policy Studies/S'pore Business Federation/World Scientific, 2004). Lee Khoo Choy, *Diplomacy of a Tiny State* (S'pore/NJ/London/HK: World Scientific, 1993), and M.C. Wee, *Economic Diplomacy in the Land of the Cherry Blossom* (S'pore: MPH, 1977) are notable, early examples of the genre.

**PART ONE**

**ESSAYS AND REFLECTIONS ON  
MULTILATERALISM**

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## **(A) Essays**



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## CHAPTER 1

# THE WTO INSTITUTIONAL REFORMS: ISSUES AND PROSPECTS

*By See Chak Mun*

### I. Background

Since 1958, there have been three major reports commissioned by the GATT/WTO on how to improve the international trading system and in particular the GATT/WTO system. **First** was the Haberler Report of March 1958, “Trends in International Trade”, which examined especially why the trade of the developing countries failed to develop as rapidly as that of the industrialised countries.<sup>1</sup> It recommended stabilisation of commodity prices and urged Europe and North America to moderate their agricultural protectionism. The **second** was the Leutwiler Report’ “Trade Policies for a Better Future”, commissioned in late 1983 after the 1982 Ministerial Meeting failed to launch a multilateral trade round. Published in March 1985, the Report helped shape the broad agenda of the Uruguay Round which was eventually launched in Punta del Este in September 1986.<sup>2</sup> Most of the Leutwiler Report’s recommendations were reflected in the Uruguay Round final outcome. The **third** was the Sutherland Report, “The Future of the WTO: Addressing Institutional Challenges in the New Millennium”, in early 2005.<sup>3</sup> It examined the functioning of the WTO institutions, especially “how well equipped it is to carry the weight of future responsibilities

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<sup>1</sup> Sales No. GATT/1958-3.

<sup>2</sup> See Arthur Dunkel, *Trade Policies for a Better Future: the Leutwiler Report, the GATT and the Uruguay Round* (Dordrecht: Martinus Nijhoff, 1987).

<sup>3</sup> *The Future of the WTO: Addressing Institutional Challenges in the New Millennium, Report by the Consultative Board to Director-General Supachai Panitchpakdi (Sutherland Report)*, 2004.

and demands”.<sup>4</sup> It suggested a number of recommendations such as the issue of external transparency and the engagement of civil society, the problems relating to judicial activism and implementation of dispute settlement, and decision-making in the WTO. For example, the Sutherland Report suggested that “there should be a re-examination of the principle of plurilateral approaches to WTO negotiations by providing opt-out or opt-in choices. This should pay particularly sensitive attention to the problems that those not choosing to participate might face”.<sup>5</sup> This was to prevent the WTO negotiations from being paralysed by an ideological adherence to the WTO consensus principle.

In a recent article, Peter Sutherland, the GATT Director-General who oversaw the conclusion of the Uruguay Round, noted that the Uruguay Round had failed to include a number of items in its final package which, in retrospect, seemed to have “sowed some of the seeds of recent difficulties in the multilateral trading system”. There were failures (i) to provide coherent disciplines to oversee the establishment of free trade areas; (ii) to seek some rational process that would secure the graduation of at least some of the richer developing nations; and (iii) to think through the institutional arrangements of the new World Trade Organisation especially with regard to the decision-making process and transparency to allow for a growing and more active WTO membership.<sup>6</sup>

Worthy also of mention is a recent Report of the Warwick Commission published by the University of Warwick in December 2007. It reviewed a number of institutional matters covered by the Sutherland Report, and addressed such issues as: What policy domains should be included and excluded from the WTO’s mandate, like labour and the environment? Could critical mass decision-making take the place of consensus? How could small developing countries deal with non-compliance and retaliation by the larger members?<sup>7</sup> Other trade legal experts have similarly raised the issue of insufficient remedies as well as the need to ensure greater and

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<sup>4</sup> *Id.*, 2.

<sup>5</sup> *Id.*, 82. For a fuller discussion, see 66–67.

<sup>6</sup> Peter D. Sutherland, “Leadership and Vision: Some Lessons From the Uruguay Round”, in Merit E. Janow, Victoria Donaldson and Alan Yanovich (eds.), *The WTO: Governance, Dispute Settlement, and Developing Countries* (NY: Juris Publishing, Inc, New York, 2008), 54–55.

<sup>7</sup> Report of the First Warwick Commission, “The Multilateral Trade Regime: Which Way Forward?”, (Warwick: University of Warwick, Dec 2007).

earlier compliance with panel findings and Appellate Body rulings. For instance, a WTO member which is deemed to have violated WTO law would only be required to bring the violating measure into conformity with WTO law; and “no other compensatory or correction action is due”. Another perceived shortcoming is that the “current dispute settlement system applies exclusively to disputes on *measures taken*, not to proposed or imminent measures”. Thus it is not possible for a WTO member to seek a legal ruling or even an advisory opinion from the WTO on a legislation that is yet to come into force.<sup>8</sup>

More recently, there have been suggestions that the WTO should adapt its agenda to meet the new challenges of globalisation, such as adjusting the trading rules to meet the concerns of global warming, currency manipulation, regulatory abuse or neglect (e.g. cartel control of the oil markets) and labour market practices.<sup>9</sup> Some writers have even argued that the Doha Round’s agenda is of limited relevance as it does not address such issues like volatility in commodity prices, food security, energy trade, climate change, financial instability and even political concerns about sovereign funds. Indeed, a new round of Bretton Woods talks is being advocated which should involve international institutions other than just the WTO, like the International Monetary Fund, environmental agencies, The International Energy Agency, together with OPEC, in order to start working on a new agenda, instead of “trying to resuscitate an inconsequential organisation”.<sup>10</sup>

While there is no dire shortage of such ideas on WTO reforms (what they are and how they are to be achieved), very few of them have succeeded in securing a place in the WTO negotiating agenda. This is not because of their lack of intellectual rigour and pertinence, but rather due to a resistance to change that often stems from the belief among WTO members that there has to be a balance between contractual rights and obligations which can only be derived through negotiations. Thus no amount of political or intellectual persuasions in favour of enhancing the public good for humanity

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<sup>8</sup> See Frieder Roessler, “The Scope of WTO Law Enforced through WTO Dispute Settlement Procedure”, in Janow *et al.*, *op. cit.*, 331–334.

<sup>9</sup> See for example Jeffrey J. Schott, “The Future of the Multilateral Trading System in a Multi-Polar World”, Discussion Paper (Bonn: Deutsches Institut für Entwicklungspolitik, 2008).

<sup>10</sup> Aaditya Mattoo and Arvind Subramaniam, “From Doha to the Next Bretton Woods: A New Multilateral Trade Agenda”, *Foreign Affairs*, January/February 2009.

such as the protection of the environment would prevail upon WTO members to accept a new WTO agenda item, least of all an outcome which could put them in an economically disadvantaged position.

## **II. The WTO Agenda**

For years, the OECD countries have tried to get core labour and environmental standards accepted as part of the GATT formal agenda. On the day of the opening of the WTO Ministerial Meeting in Seattle in November 1999, President Clinton told the press that the US would want to include core labour standards in the WTO coupled with sanctions against countries in breach of such provisions. Although President Clinton's public announcement might have been intended to help Vice President Al Gore's bid for the Democratic nomination in the US presidential election, it had an electric effect on the developing countries present in Seattle, especially when the conference delegates were already under siege by the NGO demonstrators, with promise of a massive march by American steel workers to the conference venue. Although the Seattle Ministerial Meeting had to be aborted in anticipation of violent street protests, it was also clear that a package deal was simply not possible in view of this last-minute proposal by President Clinton to include core labour standards.

The political reality is that the developing countries have already been resisting the inclusion of the so-called "Singapore issues" in the WTO agenda, viz. investment, competition policy, transparency in government procurement, and trade facilitation, which were introduced by the EC at the 1996 Singapore Ministerial Conference. The debate on those issues has often reflected the rhetoric of the North-South political divide. Whereas the developed countries argued that those new items would make the WTO more in tune with international economic and social developments (or, as some have put it more bluntly, ensure that the WTO avoids "social dumping"), the developing countries perceived such new proposals as either Trojan Horses or bargaining chips in negotiations. This was fairly obvious at the September 2003 Cancun WTO Ministerial Meeting when then EC Commissioner Pascal Lamy indicated his readiness to drop the Singapore issues (except for trade facilitation) in an attempt to salvage the ministerial meeting. Although this had not prevented the Conference Chairman from suspending the meeting, albeit for different reasons (namely the failure to cut a deal on US cotton subsidies), it nevertheless raised serious doubts about whether the

Singapore issues were simply intended to gain negotiating leverage in matters of real concern to the EC.

If intellectual arguments do not sway the ground, one should perhaps look at where the pressure is coming from which would compel a change to occur, such as in expanding the WTO agenda, or allowing broader interpretations of existing WTO clauses to accommodate new demands and pressing concerns. One direction would probably come from the rulings and interpretation of WTO provisions by the dispute panels and the Appellate Body. One example was the acceptance of *amicus curiae* briefs by the Appellate Body which remained controversial. In another instance, environmental concerns were given due recognition in the *Shrimp-Turtle* case.<sup>11</sup> In early 1997, a joint complaint was brought by India, Malaysia, Pakistan and Thailand against the US Endangered Species Act of 1973 which prohibits importation of shrimp caught by trawlers not equipped with “turtle excluder devices” in their nets. Whereas the panel and the Appellate Body reports ruled against the US government for its discriminatory action, they nevertheless recognised as legitimate the environmental objective behind the US Act under Article XX(g) of the GATT 1994 relating to the conservation of exhaustible natural resources. Such Appellate Body interpretations of WTO provisions have been criticised for their judicial activism, especially among those who hold the belief that the authority for rule-making in the WTO should reside among the WTO members, and that neither the dispute panels nor the Appellate Body have law-making rights through their rulings and interpretations. This is especially so as Article 19.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) clearly states that “... in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements”.

There is indeed a WTO Committee on Trade and Environment which has been examining the relationship between trade and environmental concerns. One issue is the duality of trade measures undertaken under the GATT/WTO and those provided for in other international treaties. The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer,<sup>12</sup> for example, has clearly provided for trade sanctions by prohibiting imports of chlorofluorocarbons (CFCs) from non-complying states.

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<sup>11</sup> Report of the Appellate Body, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 Oct 1998).

<sup>12</sup> 1522 UNTS 3 (No. 26369); ILM (1987) 1550.

However, thus far no WTO member, especially among those which are non-signatories to the Montreal Protocol, has raised a formal complaint against this discriminatory treatment among WTO members. A probable reason is that the Montreal Protocol has been accepted universally as an instrument that acts for the good of mankind, that is, in preventing further depletion of the ozone layer in the earth's atmosphere.

Two developments may force a faster pace of change in the WTO agenda debate. The first is the worldwide concern about the adverse effects of global warming and climate change. It could be envisaged that the successor treaty to the current Kyoto Protocol on Climate Change<sup>13</sup> (which will expire in 2012) would contain mandatory provisions entailing trade sanctions or extraterritorial controls for non-compliance. For example, there could be import bans on forest products which are in breach of forest conservation conventions. Proposals relating to carbon taxes would impact on WTO tariff regimes and, together with cap-and-trade systems, could raise the economic costs of production and give rise to concerns about economic competitiveness and possible relocation of manufacturing activities from one set of countries to another.

There is already an intense debate on the environmental costs and benefits of biofuels which will have spillover effects at the WTO. A simpler issue is that of classification. Are biofuels to be treated as agricultural products or industrial fuels? How should farm subsidies for biofuels be treated? Depending on the definition used, tariff and protection level treatment could vary. A more controversial proposal is an environmental goods and services agreement which has been put forward by the EU and the US that would accord preferential tariff treatment to products and services which carry clean technology or emission reduction content. The economic rationale for such a proposal is that free trade flows will facilitate the propagation of clean technology and emission efficient products that would help towards climate change mitigation and adaptation. A difficulty is how to reach an agreed definition of such environmental goods and services as such goods could have dual or multiple uses. Moreover, the developing countries contend that such a proposal would subject their more pollutive manufactures and service exports to higher border taxes, and this could force them into an economically disadvantaged position. This is reminiscent of the adverse "terms of trade" debate during the 1960s started by the Argentinian economist Raúl Prebisch who argued that due to rising

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<sup>13</sup> 1997 UNTS Reg. No. 30822; ICM (1998) 22.

technology, the developing countries would have to export more of their primary products to get the same value of industrial exports from the developed countries.<sup>14</sup>

The second source of pressure seems to come from the increasing use of export controls which have been partly spurred on by the drastic rise in the prices of basic foodstuff and commodities starting from late 2006 and lasting until early 2008. It has been estimated that from 2006 to 2008, the average world price for rice rose by 217%, maize by 125% and soya beans by 107%.<sup>15</sup> The reasons for such drastic increases are varied and several. One factor was the rise in income and consumer demand for meat and dairy products by a rapidly growing middle class in such major countries like India and China. Other factors were: a shortage of supply due to natural disasters like floods and droughts; a sharp increase in oil and natural gas prices which drove up the cost of fertilisers; and the diversion of agricultural production from food crops to energy to meet increasing demand for biofuels (e.g. ethanol from sugar cane and biodiesel from palm oil). Speculative activities have certainly fed into this soar in food and commodity prices. As a result, some of the net food-importing countries like Morocco, Turkey and India have unilaterally reduced their import tariffs on food in order to contain the inflationary impact of rising prices. By early 2009, food and commodity prices witnessed a sharp decline largely due to the worldwide economic downturn started by the US subprime crisis. While this has brought relief to the net food-importing countries, what is significant from the WTO perspective is an increasing tendency to introduce export controls on strategic and essential commodities, either by banning export outright or imposing new export taxes. For example, countries like India, Vietnam, Egypt, Ethiopia and Zambia have imposed export bans on main cereals like rice. More ominously, the use of export controls seems to extend beyond the need to ensure domestic supply of essential materials. In early 2009, Russia suspended its export of natural gas to Ukraine over a pricing dispute. This was one clear instance where export controls have been exercised in order to apply diplomatic pressure.

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<sup>14</sup> See further, for the report written under Prebisch's direction, "Industrial Exports from the Developing Countries and Preferences", in *Towards a New Trade Policy for Development: Report of the Secretary-General of UNCTAD*, E/CONF.46/3, Part 2, Chapter II (NY: UN, 1964), 59–78.

<sup>15</sup> Stefan Steinberg, "Financial Speculators Reap Profits from Global Hunger", 24 April 2008, available at <[www.globalresearch.ca](http://www.globalresearch.ca)>.



Export restrictions are prohibited in the GATT except with good reasons such as the need to relieve critical shortages of foodstuff.<sup>16</sup> So far, instances of export restrictions have rarely been challenged at the WTO unless there is a clear breach of WTO rules such as blatant discrimination among WTO members. This laxity might have encouraged the temptation to resort to export controls to ensure domestic supply, cushion against volatility in food and commodity prices, or even to exert diplomatic pressure. Clearly, export restrictions would have an adverse impact on the food security of importing countries, apart from creating a spiralling effect on prices and market sentiments. In this respect, Article XI (relating to quantitative restrictions) of the GATT and other related provisions would deserve closer scrutiny to ensure a higher level of discipline governing the use of export restrictions that would reflect a proper balance between a genuine need to ensure the critical supply of basic food and essential commodities, and blatantly discriminatory measures.

As far as the Doha Round is concerned, it would seem that the recent rise in basic food and commodity prices has had little impact on the ongoing WTO negotiations on agriculture even though, logically, rising food prices would reduce the need for high protective tariffs and farm subsidies to safeguard the interests of domestic farm producers. On the contrary, they have hardened positions and revived political arguments in defence of food security. It has everything to do with accepting binding commitments at the WTO. Clearly, the European farmers as well as subsistence farmers in the developing countries are unwilling to accept tariff and subsidy bindings that will entail a high political price for their reversal in the future and which might jeopardise their long-term economic livelihood.

Given the deal-making nature of WTO trade negotiations under the ambit of a single undertaking (i.e. “nothing is agreed until everything else is agreed”, thereby allowing trade-offs), it is highly unlikely that intellectual arguments alone will prevail in rendering new proposals more acceptable. The reality is that trade negotiators would concede to new agenda proposals only in the context of what they perceive to be an overall balance of economic costs and benefits, which in “WTO tautology” means a balance of rights and obligations. An example is the broad trade-offs during the Uruguay Round. The developing countries had accepted the inclusion of

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<sup>16</sup> See GATT Article XI (General Elimination of Quantitative Restrictions) of the GATT.

new issues, viz. services, trade-related investment measures (TRIMs) and trade-related intellectual property rights (TRIPS) in the belief that in exchange, they would be compensated by an agreement to liberalise trade in agricultural and tropical products and a phasing out of the Multi-Fibre Arrangement (MFA) on textiles and clothing.

### **III. Decision-Making: Efficiency Versus Transparency**

There is a recurrent debate on whether the so-called Green Room process is democratic and conforms to the transparency expectations among the WTO members. The Green Room process was started by former GATT Director-General Arthur Dunkel during the Uruguay Round, when he regularly invited some 20-odd delegates for closed-door sessions. The room has green wallpaper; hence, it was nicknamed the “Green Room”. By including key members which represented a majority share in world trade, the Green Room process would have provided a fairly equitable and representative participation. Successive WTO Directors-General have taken up this practice though the actual format of the Green Room might vary. Arguably, the main rationale behind the Green Room process is that it would be difficult or near impossible for negotiations to be effectively conducted through an open debate among all WTO members, especially during the crucial and final stages. For similar reasons, it is deemed perfectly normal practice at major international conferences for the conference chairman to hold closed meetings with the key delegations either privately or with the tacit approval of the Plenary meeting. Unlike the United Nations where General Assembly resolutions tend to be more exhortative in nature, WTO negotiations are about trade concessions and binding commitments which, if reneged or breached, would lead to retaliations by the aggrieved member. This can be authorised by the WTO general membership, such as the withdrawal of an equivalent value of trade concessions. The reality is that even if the Green Room process is disbanded, the key players will find ways to negotiate among themselves somewhere else. It was no coincidence that a group of some 20-odd capital-based trade negotiators, who called themselves the ‘Invisibles’, met regularly to settle among themselves the key agreements prior to the Singapore Ministerial Meeting in December 1996. Surprisingly, no WTO member has formally challenged the legitimacy of the Green Room process. The reason could be that the outcome of any Green Room negotiation would have to be conveyed to the Plenary or the general WTO membership for final endorsement. Hence, it would appear that the real

complaint about the so-called Green Room process was not so much the issue of legitimacy but whether a WTO member had been unjustifiably or unreasonably kept out of the Green Room. It is arguable whether the establishment of an Executive Board like that in the Asian Development Bank or IMF to replace the Green Room process would enhance the legitimacy of WTO decision-making. One key difference is that whereas the function of an IMF Executive Board is to approve *ad hoc* standby loan arrangements for its members in need, the Green Room process has to deal with ongoing negotiations.

In fact, an effort to improve transparency in the GATT decision-making process was made in 1975 when a Consultative Group of Eighteen (CG-18) was established, which was to be fairly representative of the developed and the developing countries. However, it had no decision-making responsibilities; and its main task was merely to discuss issues and trends in the international trade situation such as “sudden disturbances that could represent a threat to the multilateral trading system and to international trade relations generally”. Its membership was meant to rotate from time to time, but the same composition had remained the same since its establishment. As it did not seem to be useful, the CG-18 was suspended in 1990, and it has not met since then.

Whatever the process, the final negotiated package will have to be adopted by consensus among the WTO members. The reason is relatively straightforward. Under the most favoured nation (MFN) principle, the rights as well as the obligations of a final package would have to apply to all WTO members (with the exception of, say, some time-bound exemptions for the least developed countries [LDCs]).

A problem would arise if a few members continue to hold out. This has led to the question of whether WTO members should resort to a vote in the event of an impasse; and if voting is accepted, whether the votes should be weighted or be counted on the basis of one member, one vote. In fact, voting is already provided for in Article IX.1 of the WTO Agreement. However, since the GATT days, voting has rarely been used except for the approval of granting of waivers. An obvious reason in avoiding decision by voting, as cited in the Sutherland Report, is that there is “a larger sense of legitimacy for proposals adopted by the consensus approach”.<sup>17</sup> Moreover, voting has an inherent weakness which gives rise to its own set of problems.

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<sup>17</sup> Sutherland Report, *op. cit.*, 63.

Why should a member state accept the obligations when it has voted against them, particularly when they would jeopardise its own trade interests? Unlike the United Nations, there is no Security Council equivalent at the WTO that could impose and enforce obligations among its member states. Worse, decisions by voting could lead to intense political lobbying, thus risking further politicisation of the WTO. Some members may decide to vote out of political expediency, or according to their regional affiliations like what has long been embedded as common practice among the various geographical groupings at the United Nations. If decision by regional affiliations is extended to the judicial bodies like the Appellate Body, as opposed to the current practice of election based on individual merit, it would inevitably erode confidence in the legal standing of the WTO dispute settlement system. Contracting parties may then choose to settle their trade disputes among themselves, or once again resort to bilateral arrangements such as voluntary export restraint agreements (VERs) that had been outlawed as part of the Uruguay Round final package.

If consensus-seeking at the WTO continues to be hindered by the determined efforts of a few, one practical solution could be to negotiate plurilateral agreements among a critical mass of WTO members which have a substantive interest in a specific category of goods or a service sector. Such plurilaterally negotiated agreements would be quite akin to the 1979 Tokyo Round Codes, but with one major difference.<sup>18</sup> Whereas the Tokyo Round Codes applied only to member countries which had accepted the Codes, the benefits of such plurilateral agreements would be extended to *all* WTO members on an MFN basis. One clear example is the Information Technology Agreement (ITA-1) which was among the positive outcomes of the 1996 Singapore Ministerial Conference. The ITA-1 was negotiated among a critical mass of producing and consuming member states which had agreed on a list of ITA products for duty-free treatment, and its benefits were extended to all WTO members. In such an instance, some free-riding by minor producers and consumers cannot be avoided. Nevertheless, this plurilateral negotiating approach would have a far better chance of success than a dogmatic adherence to the consensus principle based on a single undertaking which became the hallmark of the Uruguay Round negotiations.

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<sup>18</sup> The nine plurilateral Tokyo Round plurilateral agreements dealt with: technical barriers to trade, government procurement, anti-dumping, subsidies and countervailing duties, customs valuation, import licensing procedures, bovine meat, dairy and trade in civil aircraft.

#### IV. Special and Differential Treatment (S&D)

The development debate in the GATT/WTO has so far centred on two issues. **First**, the developing countries, particularly the African and the least developed countries (LDCs), have argued that there has been a lack of serious implementation of Uruguay Round provisions which are intended to provide the developing countries with greater flexibility in adjusting to new disciplines such as services or TRIPS and assist them in their development efforts. The implementation issues have been exhaustively listed in a document which was submitted to the Doha Ministerial Conference in December 2000. Examples are: advancing the annual quota growth rates in the Multi-Fibre Arrangement on Textiles and Clothing, special regard for the situation in the developing countries when considering anti-dumping actions by the developed countries, and their need for longer transitional periods. The developed countries in response raised a number of systemic issues such as the definition of S&D, graduation and the need to differentiate among the developing countries. They argued that too much emphasis had been placed on the issue of development, as S&D provisions were intended to provide flexibility and longer transitional periods for the developing countries so that they would eventually be fully integrated into the international trading system.

The **second** development issue is the more controversial debate about the *design* of the GATT/WTO provisions on S&D.<sup>19</sup> In the 1950s, due to endemic balance of payments difficulties, some developing countries had to take protective measures such as quantitative restrictions affecting imports in order to preserve their foreign reserves, or to protect their infant industries from foreign competition. Article XVIII (Governmental Assistance to Economic Development) of the GATT was therefore intended to provide flexibility for the developing countries to raise tariff protection and re-negotiate their tariff bindings in order to promote local industrial development, i.e. the so-called infant industry protection argument. In 1979, one of the Tokyo Round results was the “Enabling Clause” which provided a MFN waiver to allow the developed countries to grant trade preferences (such as the Generalised System of Preferences or GSP) to the developing countries. However, by the 1980s, there had been a mindset

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<sup>19</sup> These S&D provisions are contained in Part IV of the GATT and the Enabling Clause adopted by the 1979 Tokyo Round; BISD, 26th Supplement (1980), 203–204.

change among some developing countries regarding the relevance of the economic ideas of Argentinian economist Raúl Prebisch, particularly his dependence theory. The so-called NICs (newly industrialised countries) like Korea, Taiwan and Singapore began to shift away from import substitution to an export-oriented policy as their industrial development strategy. More trade instead of less trade; and integration into the world economy became a more viable option. This mindset change was reflected during the Uruguay Round, when the emphasis of S&D began to shift to agreement-specific provisions that would allow flexibility and longer transitional periods for the developing countries in view of their limited capacity to implement new disciplines, viz. services and TRIPS.<sup>20</sup>

However, one major weakness of the GATT/WTO S&D provisions is that they are not binding in nature, as they are essentially best endeavour clauses. Critics have also argued that trade preferences such as those accorded by the European Community to the African, Caribbean and Pacific (ACP) countries under the Lomé Conventions have not only led to an unhealthy concentration in a narrow range of export products in the recipient countries but also a psychology of dependence on those trade preferences. For example, it was pointed out that the export share of ACP countries in the EU markets had witnessed a steady decline since the first Lomé Convention was signed in 1975.<sup>21</sup>

More specifically, Michael Hart and Bill Dymond in a joint article have argued that past GATT/WTO policy on S&D has been poorly conceived because its emphasis was mistakenly placed on rule avoidance and exemption from GATT/WTO disciplines.<sup>22</sup> Except for a few LDCs such as Bangladesh which have built up a sizeable export base in garments, most of the LDCs have played a marginal role in international trade largely due to their limited export capacity. Hence, the intended beneficial impact of past S&D on them has been inconsequential. Other WTO Members have been willing to open up their markets to the LDCs on a tariff-free and quota-free basis simply because the LDCs would be unable to avail themselves of these economic opportunities anyway. Or except where it matters. For instance,

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<sup>20</sup> For a historical account, see John Whalley, "Special and Differential Treatment in the Millenium Round", (1999) 22 *World Economy* 1065–1093.

<sup>21</sup> See Carol Cosgrove, "Has the Lomé Convention Failed ACP Trade?", (1994) 48 *Journal of International Affairs* 224–249.

<sup>22</sup> Michael Hart and Bill Dymond, "Special and Differential Treatment and the Doha Development Round", (2003) 37 *Journal of World Trade* 395–415.

the WTO Ministerial Conference held in Hong Kong in December 2005 agreed to grant duty-free and quota-free market access to at least 97% of goods originating from the LDCs, which obviously would not include textile and clothing. In addition, the two authors argue that it is also a wrong policy for the LDCs to insist on having rights but no obligations. In so doing, they have fewer incentives to build up their trade development capacity. In short, “S&D in the form of rule avoidance is counter-productive”.<sup>23</sup> Similar conclusions were also made by the Sutherland Report earlier. While the Report agreed that extended periods of implementation were needed by the developing countries to improve their limited institutional capacities, it also counselled that “the longer the time taken to introduce reform ... the longer the time that the gains from trade liberalisation will be delayed”.<sup>24</sup>

Instead, the joint article suggests that the emphasis should be to “enhance their trade policy-making capacity and to implement WTO rules and disciplines more fully into their domestic regimes”.<sup>25</sup> S&D should be granted not *carte blanche* or on a self-selection basis, otherwise the advanced developing countries can also claim such rights even though they no longer require them. S&D should be granted via a WTO country-specific waiver based on individual country merits. Finally, the article concludes that the WTO should adopt “a co-ordinated and comprehensive strategy of training and capacity building programmes”.<sup>26</sup>

Undoubtedly, these are radical ideas. Given the current atmosphere of the Doha Round when some of the major developing countries like India, Brazil and China are under pressure to open up their industrial sectors, or when the African cotton producing countries are striving to preserve their traditional export market share, attempts to overhaul the WTO S&D policy could be perceived as a further attempt to roll back the rights of the developing countries.

Nonetheless, a fundamental question still remains: why have the LDCs so far failed to take full advantage of past development assistance and S&D exemptions granted to them, and pull themselves out of the poverty trap? This is evidently so as, since 1994, only Cape Verde and Botswana have graduated from the list of LDCs, which number 49 as classified by the

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<sup>23</sup> *Id.*, 413.

<sup>24</sup> Sutherland Report, *op. cit.*, 26.

<sup>25</sup> Hart & Dymond, *op. cit.*, 410.

<sup>26</sup> *Id.*, 414.

United Nations. Professor Paul Collier in his book has highlighted that these countries are caught in a downward spiral of economic and social decline by four development traps, namely:<sup>27</sup>

- civil war (e.g. diamond wars in Africa);
- dependence on the export of a narrow base of natural resources which is entrenched by special trade preferences in the developed countries (e.g. under the Lomé Conventions);
- disadvantages associated with being landlocked with bad neighbours; and
- bad governance in a small country.

Obviously, breaking out of the vicious cycle of economic underdevelopment is a complex issue which would require far greater concerted efforts both at the country and international level than what the existing S&D provisions or even a remodelling of them could hope to achieve.

## **V. Conclusion**

The key question is whether the WTO, despite its perceived institutional imperfections, has served the international trading system well, i.e. in promoting progressive trade liberalisation, adapting its rules to changes in the world economy and being responsive to new concerns like climate change. IMF statistics show that from the formal conclusion of the Uruguay Round in April 1994 until 2008, world trade in goods and services has increased 7–12% annually except for two recessionary periods, namely 1997–98 (due to the Asian financial crisis) and 2001–2 (as a result of the dotcom bust). During the same period, world GDP has also steadily grown annually (except for the two periods mentioned) with 2–3% for the advanced countries and 4–8% for the emerging and developing countries. More significantly, the successful negotiation of the two new issues of services and TRIPS during the Uruguay Round has put in place the trading framework for a new knowledge-based world economy. Even developing countries such as India have benefited from their export service industry in the outsourcing of business processing (BPO), engineering and medical services.

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<sup>27</sup> Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It*. (NY: Oxford University Press, 2007).



The Doha Round was launched in 2001 to continue negotiations on the unfinished agenda such as agriculture and some technical aspects of the services agreement (e.g. the type of safeguard mechanism that could be adapted to trade in services). The EU also wanted to pursue the “Singapore issues” of competition policy, investment, transparency in government procurement and trade facilitation as part of a Millennium Round. The agriculture negotiations have remained difficult and protracted because of the political sensitivity of the rural vote. Accounting for only 8.3% of total world merchandise trade, agriculture has a disproportionate political importance in WTO negotiations while resulting in an uneven distribution of potential welfare benefits worldwide. According to a US Department of Agriculture study in 2001, if all agricultural support were to be removed, the net gains share (including consumer welfare) would be 92% for the developed countries, and only 8% for the developing countries.

The developing countries in general remain wary of the developed countries’ attempts to introduce new items like core labour and environmental standards into the WTO negotiating agenda either through political pressure or surreptitiously via judicial rulings and interpretations. However, their concerns about judicial activism or an overzealous Appellate Body seem to be largely unfounded as there is a prescribed limit to how the dispute panels and the Appellate Body can interpret the covered agreements beyond the ordinary meaning of the language of the WTO provisions in a manner that would add to or diminish the rights and obligations of the contracting parties. In fact, the Appellate Body rulings have thus far helped to clarify or give a specific meaning to textual language which has often been deliberately kept vague or ambiguous by the WTO negotiators in their efforts to reach a compromise solution.

However, change may come sooner than one would expect. The December 2009 Copenhagen negotiation on climate change and the post-Kyoto Protocol arrangements could lead to the introduction of carbon taxes and extraterritorial control schemes that would impinge directly on a whole host of WTO norms and disciplines with regard to border tax adjustments, import prohibition, energy and emission standards and labelling, environment-related agricultural subsidies, government procurement, etc. Depending on how universally future post-Kyoto arrangements are accepted, they may give rise to a potential conflict between WTO provisions and measures undertaken under a new climate change regime. The precedent of the Montreal Protocol on CFCs may point to a possibility that this potential

conflict would be less of a challenge if the great majority of the WTO members are likely to simply accept the final package of a post-Kyoto regime. Otherwise, the conflict between such negotiated commitments and those of the WTO provisions would most probably have to be settled via the WTO dispute settlement process. Nonetheless, the pressure to impose new norms and disciplines on the WTO from external agencies would invariably complicate the negotiating agenda of the Doha Round while the eventual trade-offs will also have to take into account the overall balance of costs and benefits that would still need to be worked out in the aftermath of the Copenhagen negotiations.

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## CHAPTER 2

# INFORMAL CAUCUSES WITHIN THE WTO: SINGAPORE IN THE “INVISIBLES GROUP”

*By Barry Desker*

### **I. Introduction**

Attention on the role of the WTO as a negotiating forum tends to be focused on ministerial conferences, the work of the General Council and its committees and working groups. However, there has been insufficient attention paid to the process of informal consensus building within the WTO system. This is a weakness in both academic as well as media accounts of the WTO negotiating process. From a policy perspective in Singapore, the lack of attention to this aspect could lead policy-makers based in Singapore responsible for WTO decision-making to regard the holding of informal ministerial meetings, participation at a senior level in forums such as the OECD Trade Committee as well as loosely structured groupings such as the Friends of the New Round as a waste of scarce time and resources. Given the scarce manpower resources available in Singapore, the tendency would be to decline invitations to participate in informal discussions, brain-storming sessions and non-binding exchanges of views among negotiators. In reality, WTO consultation processes are built on the understandings developed through such informal engagements. As Rubens Ricupero observed in recalling the Uruguay Round negotiations, during periods of tremendous stress, uncertainty and contradictory rumours, informal group

meetings were held daily amongst delegates to exchange information and share opinions.<sup>1</sup>

This chapter focuses on the informal exchanges which occurred among senior capital-based officials through meetings of the informal Invisibles Group which met from 1995 to 1999. It was not a unique grouping in the WTO/GATT context. The negotiations in the grouping known as the Green Room (after the colour of the wallpaper in the GATT secretariat conference room) are the best known but there have been other key informal groups such as the Buick Group, Friends of the New Round (FOR — a lobby group which linked advocates of a new round of trade negotiations from 1994), Beau Rivage Group, de la Paix Group (the latter two groups named after the hotel where the first meeting was convened), a grouping of larger developing countries which formed the Group of 20 and the Indonesian-led Group of 33 on Special Products essential for food security which formed at the WTO Ministerial Conference in Cancun in September 2003. There are also more formal groupings such as the Group of 77 comprising developing countries (later expanded to include China) and the Cairns Group of major agricultural exporters.<sup>2</sup> These groups differ because they were recognised within the WTO system by having their meetings noted in the daily WTO journal of events and with provision made for their participation in discussions of WTO issues of interest to them. There are also regional groupings such as ASEAN and MERCOSUR, for example, whose status was recognised by seating them together as a group and the adoption of the practice of speaking through a single representative on some issues. The membership of these groupings was publicly known, as was the criteria for membership.

Table 1 below provides an indicative listing of the main groupings which were established and functioned within the GATT/WTO.

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<sup>1</sup> Rubens Ricupero, "Integration of Developing Countries into the Multilateral System", in J. Bhagwati and M. Hirsch (eds.), *The Uruguay Round* (Ann Arbor: The University of Michigan Press and Springer, 1998), 20. Rubens Ricupero was Brazil's Permanent Representative to the GATT during the Uruguay Round. He later served as Secretary-General of UNCTAD.

<sup>2</sup> For a study of these groupings, see Amrita Narlikar, *International Trade and Developing Countries: Bargaining Coalitions in the GATT & WTO* (London/NY: Routledge, 2003).

**Table 1.** Groups within the GATT/WTO

<b>Timeline</b>	<b>Coalition Formation</b>
Tokyo Round (1973–1979)	ASEAN Group (1973); Informal Group of Developing Countries (1982); Cafe au Lait Group (1983).
Pre-Uruguay (before 1986)	
Uruguay Round (1986–1994)	Developing Countries on Services (1986); Air Transport Services (1986); Food Importers’ Group (1986); Latin American Group (1986); MERCOSUR (1991).
Post-WTO (1995–2007)	Pre-Doha Round (1995–2001): Like-Minded Group (LMG) (1996); Small Vulnerable Economies (SVEs) (1996); African Group (1997); Caribbean Community (CARICOM) (1997); Friends of Fish (1998); Friends of Geographical Indications (1998); Friends of the Development Box (1999); G-24 on services (1999); Least Developed Countries (LDC) Group (1999); Paradisus Group (2000). Doha Round (2001–2007): African, Caribbean and Pacific (ACP) Group (2001); Core Group on Singapore Issues (2001); Recently Added Members (RAM) (2003); Cotton-4 (2003); G-10 (2003); Friends of Anti-Dumping (2003); G-11 (2005); G-20 (2003); G-33 (2003); G-90 (2003); Core Group on Trade Facilitation (2005); NAMA-11 (2005).

*Source:* [http://trade.wtosh.com/english/forums\\_e/public\\_forum2007\\_e/session1\\_briefing\\_note\\_e.pdf](http://trade.wtosh.com/english/forums_e/public_forum2007_e/session1_briefing_note_e.pdf). A Governance Audit of the WTO: Roundtable Discussion on Making Global Trade Governance Work for Development Briefing Note, Global Economic Programme, University College Oxford, 2007.

**II. The Invisibles Group**

Our discussion goes beyond such groupings to consider the role of informal consultations without any formal status within the WTO system but which could have a significant impact on the WTO negotiations such as the meetings of the “Invisibles Group” of senior capital-based officials. From 1995 to 1999, these officials met periodically in Geneva to informally exchange views on the WTO agenda. These meetings were not decision-making forums. Previously, such capital-based participants (especially those from developing countries) had minimal opportunities to discuss and exchange views with

their counterparts from other regions. Participation in the meetings of the Invisibles Group therefore provided an opportunity to present their countries' perspectives and highlight their concerns as the WTO moved towards implementation of the Uruguay Round agreements and considered a future-oriented agenda. The participants considered possible means of overcoming critical differences on issues being taken up at the WTO and aimed at creating a sense of mutual confidence and shared understandings of the best way forward. While Geneva-based negotiators at the GATT/WTO formed an epistemic community who shared a strong commitment to WTO processes and the desirability of further trade liberalisation, capital-based officials tended to focus on the domestic and regional environment in most cases and were concerned about the domestic impact of liberalisation measures. This created the risk of divergent perspectives between these two sets of officials. By encouraging a regular dialogue involving capital-based officials as well as Geneva-based officials, a narrowing of such differences resulted. More significantly, capital-based officials across the developed/developing countries spectrum became aware of the organisational dynamics of these negotiations as well as the need to bridge divergent positions. Their informal interactions with capital-based officials from other member states and economies helped to create an awareness of the interests and concerns of other parties involved in these negotiations.

With insights gained as a participant in these closed-door meetings (as the representative of Singapore), it is assessed that such informal cross-cutting networks which include developed as well as developing countries with divergent economic interests and broad geographical representation are critical to the process of global negotiations. The successful negotiation of international agreements requires the development of shared interpretations of major issues, the establishment of mutual trust and confidence, a willingness to go beyond one's own perspectives on an issue so that the concerns of other parties can be factored into the negotiating process and an awareness of whether preferred options are possible in the current negotiating environment. Informal networks therefore play an important role in facilitating the development of a consensus and the conclusion of international agreements. Because of the significance of informal groupings in the WTO process, the GATT/WTO forms a useful case study of the role of such groupings in creating a consensus resulting in international agreements. Conversely, there is also evidence that such informal groups can play the role of blocking coalitions, especially when they are composed of participants with shared perspectives opposed to trends in such negotiations.

Nevertheless, the establishment of the WTO as an inter-governmental organisation on 1 January 1995 was not initially accompanied by the recognition among key participating delegations which had been active in the GATT, especially among the Quads,<sup>3</sup> that there had been a fundamental change in the approach taken by WTO members. These delegations regarded the WTO as continuing with the GATT's traditions but strengthened by its establishment as an international organisation. The GATT had been a temporary replacement following the failure of the United States in 1950 to ratify the Charter establishing the International Trade Organisation, the third "leg" of the Bretton Woods institutions, together with the International Monetary Fund and the World Bank. However, the difference with the formation of the WTO was that as the WTO reached beyond the border to consider issues previously within the domestic jurisdiction of states, its members demanded direct participation in decision-making. The implementation of the single undertaking in the Uruguay Round resulted in member states and economies having to support the entire package, without the freedom to selectively apply the range of agreements concluded during the negotiations. This change resulted in the WTO membership seeking greater involvement in the negotiating process. Unlike the GATT, no longer would the membership of the WTO be prepared to accept that key participating members could decide on issues, reach agreement on major developments or determine the trade liberalisation agenda without the involvement of the larger WTO membership. However, the premise of the Invisibles Group was that the process of negotiations would follow well-established precedents in the GATT and that the dominant power relationships during almost 50 years of the GATT's existence centred on the domination of negotiating processes by the Quads would continue. This mistaken perception undermined the effectiveness of the Invisibles Group from its inception.

### **III. Origins of the Invisibles Group**

The Invisibles Group owed its name to the Deputy United States Trade Representative, Jeffrey Lang, who coined the term at the first meeting to describe the periodic informal consultations of a group of 15–20 senior capital-based officials who met in Geneva or the locations of WTO

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<sup>3</sup> Canada, European Union, Japan and the United States.



Ministerial Conferences from 1995–1999.<sup>4</sup> It was initially casually named the La Reserve Group after the hotel in Geneva where the first meeting was convened in December 1995 until Jeffrey Lang’s suggestion was widely adopted. Although Lang’s successor, Susan Esserman, sought to change the name to the WTO Consultative Group in May 1999 to dispel the air of secrecy and intrigue,<sup>5</sup> the earlier name stuck. The grouping was initiated by the US and subsequent meetings were chaired by the US or other Quad members (European Union, Japan and Canada). Key constituencies were invited, including the WTO Director-General, the Chairman of the WTO General Council, India, Brazil, Nigeria and South Africa (representing the developing countries), Australia and New Zealand (Cairns Group), Switzerland (location of the WTO Secretariat as relations with the host country were sometimes discussed), Norway (European Free Trade Association/EFTA), Poland, Mexico (North American Free Trade Agreement/NAFTA), Argentina (MERCOSUR), South Korea (newly industrialised countries/NICs), Morocco (Lomé Convention), Hong Kong (FOR),<sup>6</sup> Indonesia/Thailand (rotating ASEAN chair in Geneva) and Singapore (host of the first WTO Ministerial Conference). Sometimes, one or two other delegations were included on a one-off basis if the host among the Quads felt that they could contribute to the agenda for the meeting which was to be held. The lack of influence on decisions regarding participation can be seen in the exclusion of states which saw themselves as active players in the WTO process. When Singapore was excluded for the first meeting held in 1997 after the 1996 WTO Ministerial Conference in Singapore, significant efforts were made by our delegation in Geneva as well as senior officials in Singapore to ensure participation in future meetings. Other WTO members such as Hong Kong, New Zealand and Poland also lobbied effectively to participate in these meetings.

US policy-makers engaged in creating the Invisibles Group highlighted that there was a need to differentiate between WTO members with major trading interests and those who were peripheral to international trade. As former Deputy US Permanent Representative to the WTO, Andrew Stoler, observed:

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<sup>4</sup> Personal notes, 14 December 1995.

<sup>5</sup> Personal notes, 25 May 1999.

<sup>6</sup> Hong Kong represented the informal grouping of supporters of a new round of negotiations, the Friends of a New Round (FOR).

The Uruguay Round was supposed to be the last “Round” of its kind. We were not supposed to rely on huge multilateral rounds of negotiations to get things done in the WTO. In 1993, negotiators wanted to avoid a repeat of the long-running agony of the Uruguay Round. In 1996 and 1997, we successfully completed three major sectoral multilateral trade negotiations in the Information Technology Agreement, and the Agreements on Basic Telecoms and Financial Services. The Maritime Services negotiation failed, but not because it was being conducted outside the context of a “round”.<sup>7</sup>

Stoler argued:

The inapplicability of the “one size fits all” model has created problems for negotiations, for implementation and for decision-making. If the current situation degenerates much more, I am afraid that the major trading partners will lose patience with the WTO. If we want the organisation to stay relevant, we have to address these problems. I’m not sure I have an answer. Some think that the decision-making problem can be addressed by involving fewer countries. Certain observers have argued for the recreation of the Consultative Group of 18. Pre-Singapore, the US convinced the Quad to institute what was known as the Invisibles Group... a CG-18 type group of senior officials from capitols who would meet and discuss key issues, but not take decisions.<sup>8</sup>

The leadership role of the Quads was self-evident. The host of each meeting decided on the agenda and the invitation list. To maximise the usefulness of the meetings, issues which were currently being discussed at the WTO were taken up at these meetings. Either the host or a designated participant kicked off the discussions.

#### **IV. The 1995 Inaugural Meeting**

The inaugural December 1995 meeting reviewed the status of the ongoing negotiations on basic telecommunications and maritime transport services, discussed the role of the WTO in ensuring that rules of origin were not tightened by the World Customs Organisation on narrow technical grounds in view of the growing trend towards outsourcing and distributed manufacturing and considered implementation issues arising from the

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<sup>7</sup> Andrew Stoler, “*The Current State of the WTO*”, Paper presented at the Workshop on the EU, the US and the WTO, Stanford University, 28 February–1 March 2003.

<sup>8</sup> Stoler, *ibid.*

Uruguay Round agreements. The consultations also covered the criteria for new issues to be included in the WTO agenda. The issue was significant as the European Union was pressing for the inclusion of investments, competition policy, labour standards, government procurement and trade facilitation. As expected, there was strong opposition from developing countries to the EU initiative which was perceived as intended to stonewall initiatives for further trade liberalisation, especially in agriculture, which most participants regarded as unfinished business from the Uruguay Round. The informal meeting also discussed the functioning of the WTO, including the boundaries to be set for initiatives by the WTO Director-General, staff management issues and changes in WTO organisational structures to meet the need for representation of a wider range of WTO members. One issue which elicited considerable discussion was the belief that with regular WTO ministerial meetings, the practice of “negotiating rounds” would be superseded. Nevertheless, several participants were concerned that a continuous negotiating process would prevent the reciprocal trading of concessions. There were also prescient worries expressed that the global environment would be increasingly difficult for trade negotiations aimed at global trade liberalisation. The Swiss representative, for example, highlighted the more heterogeneous agenda of the WTO as it moved from tariff liberalisation to a more intrusive role examining “behind the border” issues. Participants also exchanged views on preparations for the first WTO Ministerial Conference in Singapore in December 1996. There was considerable discussion on the need for democratisation of the WTO by ensuring that a larger number of members could be drawn into the decision-making process. These exchanges continued during lunch when there was a debate over whether the conference should be a negotiating conference or whether negotiators in Geneva should reach an agreement, allowing the ministers to spend time on developing a forward-looking agenda for the WTO. The Canadian representative highlighted the need for political inputs into the decision-making process and the desirability of more frequent informal ministerial meetings in the lead-up to the Singapore conference. There was support for the idea of open-ended informal Heads of Delegation meetings in Geneva before issues were raised formally at the WTO General Council.

As the representative of Singapore, the Permanent Secretary of the Ministry of Trade and Industry, Khaw Boon Wan, took the floor to brief the participants on preparations for the Singapore Ministerial Conference. I followed up by highlighting issues likely to be taken up at the Singapore

Ministerial Conference, including the implementation of the Uruguay Round agreements, outstanding issues leftover from the negotiations, further liberalisation including agriculture, as well as new issues on the WTO agenda such as investment and competition policy. I also raised the possibility of informal as well as formal sessions for the ministers to enable freer exchanges and sought reactions to a reduction in the time of ministerial speeches, which diverted attention from the focus on negotiations at such meetings. In discussions on substantive issues, Singapore's approach was broadly to act as an institutional supporter of the WTO process, arguing for the need for continuing trade liberalisation, for example, in maritime transport services and civil aviation, the need to lower expectations in the basic telecommunications negotiations if developing countries were to join the negotiations and the necessity of establishing criteria for new issues which were proposed for the WTO agenda.<sup>9</sup> Informal breaks were utilised to express Singapore's concerns on positions taken by WTO members that could result in a deadlock at the conference. Significant speaking roles were obtained for Singapore's Minister for Trade and Industry at forthcoming informal ministerial meetings such as the May 1996 meeting hosted by Switzerland, while participants were invited to join the conference hosted by Singapore jointly with the *International Herald Tribune* in April 1996 to raise an awareness in Asia of the future agenda of the WTO.

## **V. Five Meetings Before the Singapore Ministerial Conference**

Five meetings of the Invisibles Group were held in the months preceding the first WTO Ministerial Conference in Singapore in December 1996. These meetings discussed substantive as well as procedural issues such as whether to continue with the GATT practice of negotiations within a smaller group of about 20 members along the GATT Green Room model or the formation of a larger, more representative negotiating group. There was an exchange of views on the possibility of simultaneous meetings of several drafting groups dealing with Uruguay Round implementation

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<sup>9</sup> For an assessment of Singapore's role and policy goals in GATT/WTO, see Barry, Desker, "Singapore", in Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds.) *The World Trade Organization: Legal, Economic and Political Analysis* (New York: Springer, 2005) Vols. 1–3, 335–349.

issues, agriculture and “new” issues such as investment, competition policy, government procurement and labour standards. However, developing country participants highlighted the inability of small delegations to participate in simultaneous meetings. One idea which was adopted at the Singapore Ministerial Conference was the appointment of “Friends of the Chair”, comprising participating ministers who helped to forge a consensus on divisive issues facing the conference by mediating between interested parties and formulating proposals which could be supported by the broader membership.

## **VI. What these Meetings Achieved**

While the Invisibles Group was not a decision-making body, the inputs during these discussions allowed delegates to take up these ideas at the General Council, aware of the sentiments of significant elements of the WTO membership, while it alerted the WTO Director-General to the concerns of these members. Most significantly, it sensitised capital-based officials to the negotiating environment in Geneva and allowed such officials an opportunity to exchange views with their counterparts and to develop mutual confidence and trust, key elements in undertaking successful negotiations. This factor was important as the intention of the founders of the WTO was to eliminate the need for lengthy rounds of negotiations lasting for almost a decade by engaging in continuous negotiations through the Permanent Representatives in Geneva and with decision-making at ministerial conferences held every 18 to 24 months. As governments worked within four- to five-year electoral cycles, ministers were keen on the conclusion of negotiations during their current term of office rather than drawn-out negotiations. The adoption of such agreements during their term of office was perceived as demonstrating the effectiveness of ministers and enhanced the legitimacy of governments. The involvement of ministers and senior officials in these informal meetings ensured that the position of negotiators in Geneva and the perspectives at their capitals was more synchronised and was intended to facilitate smoother and easier negotiations.

## **VII. Opportunity Lost and the Proliferation of Free Trade Agreements**

One feature of the Invisibles Group and other informal meetings from 1995 to 1998 was the tension between proponents of continuous negotiations

and those who felt that a new round of negotiations was necessary. The supporters of a new round felt that successful negotiations could only occur with a package deal which took into account the need for balance between the interests of the diverse membership of the WTO. On the other hand, the proponents of continuous negotiations recognised that the expanding membership resulted in increasing difficulties in concluding ambitious rounds of negotiation and they argued that the WTO should focus on specific deliverables which could be achieved within the electoral timeframes of governments. My assessment is that the failure of these plans for continuous negotiations, with periodic ministerial conferences at which decisions could be reached and agreements concluded, and the return to the GATT model of “rounds” of negotiations which increasingly lasted a decade or more provided the seeds for the turn to preferential trading arrangements (free trade agreements) after the failure of the 1999 Ministerial Conference in Seattle.

### **VIII. Singapore's Inclusion in Key Informal Groupings**

In the lead-up to the WTO Ministerial Conference in Singapore, the influence of Singapore's Permanent Representative to the WTO, Ambassador K. Kesavapany, who served as the first Chairman of the WTO General Council, resulted in Singapore's inclusion in key informal groupings in Geneva such as the Invisibles Group and the Buick Group. Singapore also obtained observer status in the Trade Committee of the OECD, a significant decision as it represented a shift away from our assertions that Singapore was a developing country, without requiring a timeframe for membership in the OECD and developed country status. Participation in the meetings of the OECD Trade Committee was useful because these meetings provided insights into the views of developed country representatives and enabled Singapore to put across its concerns to the OECD membership. Participation in informal meetings gave policy-makers in Singapore an early alert on issues likely to be raised at formal meetings as well as trends in the thinking of participating delegations. Similarly, Ministers and senior officials travelled to various capitals to lobby their counterparts, participated in informal ministerial and senior officials' meetings and engaged in intensive bilateral consultations with a range of delegations so that the concerns of these delegations could be reflected in the decisions and ministerial declaration adopted by the ministerial

conference. While attention is focused on the high drama of WTO ministerial conferences which result in breakthroughs, the key to success in such exercises in trade diplomacy lies often in the quiet, unspectacular process of bridge building and consensus shaping through informal meetings and small group discussions.

### **IX. Ensuring a Central Role for the WTO Director-General**

However, such informal groupings could also be effectively used by the WTO Secretariat to ensure a central role in the negotiating process for the WTO Director-General. At the sidelines of a meeting of the Invisibles Group in Singapore immediately preceding the first WTO Ministerial Conference, key WTO Secretariat officials expressed concern that the Director-General would be sidelined in the negotiations. This led the WTO Secretariat to successfully push for a “unitary” process chaired by the chairman of such ministerial conferences, with the full involvement of the WTO Director-General. The proposal was raised in a meeting of the Invisibles Group and broad support obtained which prepared the ground for subsequent implementation at the Ministerial Conference.

### **X. Influence of the Quads and the Absence of a Developing Country Agenda**

The influence of the Quads in shaping the agenda of the Invisibles Group was apparent from the attention devoted to the EU-initiated consideration of the new issues including investment, competition policy, government procurement and core labour standards as well as the less sensitive issue of trade facilitation. The US, supported by the EU, also pushed for agreement on an Information Technology Agreement. While developing countries in the Invisibles Group raised the issue of implementation of the Uruguay Round Agreements, early consensus in the drafting group involved in the Geneva preparatory process on the formulation of the sections on Uruguay Round implementation in the ministerial declaration resulted in the issues raised by the EU becoming the focus of attention from September 1996. Similarly, the Invisibles Group was preoccupied with issues of concern to the Quads such as the role of NGOs in the ministerial conference, the conclusion of the negotiations on basic telecommunications services and financial services and the issue of transparency of WTO processes (with the

irony of such discussions taking place in a grouping known as the Invisibles Group escaping the initiators of this discussion). The striking feature was the absence of a positive agenda by the developing countries in these negotiations which resulted in a reactive approach to the discussions, a trend noticeable during the Green Room negotiations later in Singapore.<sup>10</sup>

## **XI. Accomplishing the Information Technology Agreement**

From a Singapore perspective, the most significant breakthrough at the first WTO Ministerial Conference was in the conclusion of the Information Technology Agreement (ITA).<sup>11</sup> The ITA eliminated customs duties on five main categories of products: computers, telecommunications products, semiconductors, semiconductor manufacturing equipment and scientific equipment. Again, the Invisibles Group did not engage in negotiations on this Agreement but participants were involved in exchanges of views on the issue at Invisibles Group meetings in October and December 1996. The initiative was taken by the United States, supported by participants from the Asia-Pacific Economic Cooperation (APEC) forum economies which had called for the elimination of customs duties on IT products at the Singapore WTO Ministerial Conference during the APEC Leaders' Meeting in the Philippines in November 1996. As these capital-based officials had met on several occasions during the course of 1996 at meetings of the Invisibles Group as well as at informal ministerial meetings, mutual confidence had developed and there were frank exchanges between these officials on the sidelines of the Ministerial Conference. This enabled participating states to recognise the benefits of an early conclusion of the agreement. India, for example, initially opposed conclusion of the ITA when the subject was discussed in the Invisibles Group meeting in October 1996 as it wanted a focus solely on Uruguay Round implementation issues (a position consistent with its opposition to the new issues raised by the EU

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<sup>10</sup> I felt so strongly about this point that one of the first articles I published after moving to an academic/think-tank role was an essay outlining such a positive agenda. See Barry Desker, "Asian Developing Countries and the Next Round of WTO Negotiations" (IDSS Working Paper No. 18, Institute of Defence and Strategic Studies, Singapore, October 2001).

<sup>11</sup> Ministerial Declaration on Trade in Information Technology Products, WTO Doc. WT/MIN96/16 (16 December 1996).



in the lead-up to the Singapore Ministerial Conference which later became known as the “Singapore issues” in the WTO). However, when other delegations highlighted that India was likely to be one of the major beneficiaries of the ITA since it was a major centre of outsourcing of software requirements in the IT industry and could be a major IT manufacturing and services centre, a shift in the Indian position occurred. East Asian participants led by Singapore were early supporters of the American initiative as they recognised that distributed manufacturing of parts and components in the electronics industry in East Asia meant that their electronics manufacturers would be more competitive in global markets. As leading members of the G-77 group of developing countries joined the coalition in support of conclusion of the ITA at the Singapore Ministerial Conference, a critical mass developed which resulted in the conclusion of this plurilateral agreement at the meeting even though the subject had not been taken up as an item for inclusion in the WTO ministerial declaration during the WTO preparatory process in Geneva.

For Singapore, the Information Technology Agreement (ITA I) resulted in \$1.49 billion of accumulated tariff savings for Singapore-based companies when the elimination of tariffs was fully implemented by 1 January 2000.<sup>12</sup> As Singapore companies directly benefited from these negotiations, it reinforced domestic political support for Singapore’s role in global trade liberalisation. Moreover, as these negotiations were concluded during a ministerial conference held in Singapore, the outcome attracted considerable attention from electronics manufacturers and multinational corporations in Singapore. Since electronics products comprised more than two-thirds of non-oil domestic exports, Singapore also actively supported the ITA II negotiations which followed subsequently. These negotiations were aimed at extending product coverage, given the rapidly changing technologies and the convergence of consumer electronics with other interactive media products. In my interventions at the Invisibles Group meetings, I pushed for an early conclusion to these negotiations. However, progress was slow.

## **XII. The Second WTO Ministerial Conference**

In May 1998, the second WTO Ministerial Conference was held in Geneva on the 50th anniversary of the General Agreement on Tariffs and Trade. This conference was primarily a commemorative conference with

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<sup>12</sup> Desker (2005), *op. cit.*, 339.

addresses by high-profile leaders including heads of government led by President Bill Clinton of the United States, who called for “a standstill on any tariffs to electronic transmissions sent across borders”.<sup>13</sup> On the sidelines of the conference, the US representative initiated a discussion by members of the Invisibles Group on the role of the WTO in promoting electronic commerce, including the desirability of continuing with the practice of not imposing customs duties on electronic transmissions. The response was positive although there were concerns expressed by some delegations about the lateness of the proposal. The Norwegian participant, for example, raised procedural issues as the subject had not been taken up earlier through the General Council. However, recognising that the American lead could spur an early agreement, Singapore and other East Asian participants supported the proposal and helped to convince the Indian and other representatives of its benefits. The proposal to continue their current practice of not imposing customs duties on electronic transmissions was put forward formally during the ministerial conference and adopted while the ministers decided to instruct the General Council to adopt a comprehensive work programme to examine all trade-related issues related to global electronic commerce.<sup>14</sup>

### **XIII. The Issue of NGO Participation**

The role of groupings such as the Invisibles Group in discussing issues on the WTO agenda is seen in the considerable attention given at its meetings to the role of non-governmental organisations (NGOs) in WTO ministerial meetings and within the WTO structure. The interest of the United States in a visible role for NGOs shaped discussions in the lead-up to the 1999 Seattle Ministerial Conference. The WTO Director-General Mike Moore highlighted at an Invisibles Group meeting in October 1999 that NGOs comprised two broad groups: those who felt that any trade liberalisation and WTO-initiated economic development was inherently bad and those which were part of broader civil society and wanted to influence the WTO agenda such as labour and environment groups. Their objectives were different — the anti-WTO groups sought an extreme situation which would

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<sup>13</sup> Address by William J. Clinton, President of the United States, 50th Anniversary of GATT/WTO, Geneva, 18 May 1998.

<sup>14</sup> Ministerial Declaration on Global Electronic Commerce, WT/MIN(98)/DEC/2 (25 May 1998).

attract media attention while those who wanted to influence the WTO agenda wanted to shape the WTO as an institution.<sup>15</sup> This sparked a major debate on the approach to be taken towards NGOs with the US emphasising the need for the WTO to connect with the people, possess a strong agenda and show a willingness to listen. Speaking as the representative of Singapore, I highlighted that

given the large presence of NGOs and the media, ...if we limit ourselves to the arcane language of trade diplomats as in the draft Declaration, we will lose the public debate. Anyone going into the websites of critics/opponents of the WTO will realise that they are media-savvy, with excellent graphics and effective one-liners. My concern is that we have a strong case but may be drowned in the carnival atmosphere in Seattle.

I therefore urged that the WTO Director-General consider releasing “a two-page Vision Statement in crisp, punchy language to be issued on Sunday, 28 November” so that the WTO drew attention to its members’ perspectives on the issues before the Seattle meeting.<sup>16</sup>

#### **XIV. End of the Invisibles**

Within the Invisibles Group, there was considerable concern about the US focus on public participation and lack of attention to the risks arising from the mobilisation of WTO opponents and plans for disruption of the conference by self-proclaimed anarchists, such as an Oregon-based collective, Ruckus. These fears were expressed at an informal dinner meeting of the Invisibles Group in Seattle on 28 November 1999. The lack of inclusiveness and the opposition of those who were not part of the consultation process, through their omission from informal groupings such as the Invisibles Group and the Green Room process, resulted in an unwillingness to accept decisions reached as a result of horse-trading within the smaller group. As the WTO agenda moved beyond tariff liberalisation and focused increasingly on issues of domestic governance such as government procurement, the upholding of intellectual property rights and trade procedures, its growing membership became unwilling to accept decisions reached by smaller groupings in which they were unrepresented. At the same time, the Byzantine negotiating structure in the WTO which was inherited from the

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<sup>15</sup> Personal notes, 8 October 1999.

<sup>16</sup> *Id.*

GATT meant that effective decision-making was impossible as the membership expanded from about 60 active members of the GATT during the Uruguay Round negotiations to the current 153 members of the WTO.<sup>17</sup>

## **XV. Conclusion**

The collapse of the Seattle Ministerial Conference led to the demise of the Invisibles Group. However, the need for a smaller, more effective negotiating group which could bring consensus drafts for the consideration of the wider membership will result in the resurrection of the idea of such an informal grouping if agreements are to be concluded. This explains the continuing significance of informal ministerial meetings involving selected ministers, meetings of smaller groupings representing specific interest groups and informal caucuses in Geneva bringing together participants with different interests and concerns in the course of the current Doha Round of negotiations which was inaugurated at the 4th WTO Ministerial Conference held in Doha in November 2001. The trend in the WTO is for more of such groups to be established as participants in the WTO process attempt to shape and influence outcomes even though no overarching group has emerged along the lines of the Invisibles Group. There is a broad consensus that it is impossible to negotiate in a group of 153 members in which every participant has a veto and “nothing is agreed until everything is agreed”. Nevertheless there will be a continuing debate between proponents of the desire for representation and those advocating the need for effectiveness. One approach which could marry these conflicting objectives would be for a re-constitution of the Consultative Group mechanism in which there will be a combination of members included because of their significance in international trade and others elected as representatives of regions or interested parties in these negotiations. Such a Consultative Group would possess legitimacy as well as the capacity to reach agreements.

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<sup>17</sup> 153 WTO members as at 23 July 2009.

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## CHAPTER 3

# ANTI-DUMPING NEGOTIATIONS IN THE URUGUAY ROUND: REFLECTIONS OF A SINGAPORE NEGOTIATOR

*By Margaret Liang*

### **I. Introduction**

I was posted as Counsellor to the Singapore Permanent Mission in Geneva from 1985 to 1992 and then as Minister-Counsellor/Deputy Permanent Representative from 1999 to 2002. The former posting was particularly challenging as this was the period in the run-up to the launch of the Uruguay Round in September 1986, followed by seven intensive years of multilateral trade negotiations that finally culminated in the Uruguay Round Agreements and the establishment of the World Trade Organisation (WTO) in January 1995.

I was Singapore's negotiator during the Uruguay Round for the series of subjects pertaining to "rule-making" which included the negotiations on anti-dumping, safeguards, subsidies/countervailing measures, GATT Articles and dispute settlement. Much has been written about the anti-dumping negotiations by academics and lawyers, but little by those who had been directly involved in the negotiations during the Uruguay Round. This chapter is intended to provide some personal insights from a Singapore negotiator's perspective on the dynamics of the anti-dumping negotiations: what the negotiating modalities were, who the key players were, what their game plan was, what the key issues were during the negotiations, and how compromise was reached to achieve the final outcome, namely the Agreement on Implementation of Article VI of the General

Agreement on Tariffs and Trade 1994, commonly known as the WTO Anti-Dumping Agreement.

There were roughly four stages in the negotiating process. I will discuss the issues according to these four stages:

Stage One, 1986–1988: This represents the period from the launch of the Uruguay Round in September 1986 to the Mid-Term Review at the Ministerial Conference in Montreal in December 1988.

Stage Two, 1989–1990: The period of negotiations following the Montreal Mid-Term Review in order to meet the deadline for concluding the Round at the Ministerial Conference in Brussels in December 1990 (the Brussels Conference, however, failed to conclude the Round).

Stage Three, 1991: The negotiations on the Draft Final Act.

Stage Four, 1992–1993: These were the final stages of the anti-dumping negotiations leading to compromise, and subsequently agreement on the final Uruguay Round package of results.

## **II. Brief History of Anti-Dumping Rules**

The history of anti-dumping goes back to the beginning of the 20th century. The first Anti-Dumping Law was enacted by Canada in 1904, followed by New Zealand in 1905, Australia in 1906 and several other countries like Great Britain and France over the following two decades. The United States enacted in 1916 an Anti-Dumping Law that paralleled US anti-trust (i.e. competition) law. This United States Anti-Dumping Act of 1916<sup>1</sup> was intended to address the problems of “dumping” that was born out of the fear that after the end of World War I, European, and especially German, firms would threaten American industries through predatory selling practices. The Anti-Dumping Act of 1916<sup>2</sup> made it illegal to sell imported goods at prices substantially lower than market value in the exporting country “with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolising any part of trade and commerce in such articles in the United States”. This 1916 Anti-Dumping Law is a criminal

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<sup>1</sup> Philip De Keyser, “Exploring WTO Dispute Settlement in US Antidumping Act 1916: An Easy Case?”, Paper presented to the Jean Monnet Seminar at Harvard Law School, Spring 2001.

<sup>2</sup> Douglas A. Irwin, “Explaining the Rise in US Antidumping Activity”, Paper presented at Symposium at University of Michigan, 12 March 2004.

statute. The antitrust approach of the 1916 Act was later amended to produce the Anti-Dumping Act of 1921, which formed the basic framework for subsequent United States anti-dumping laws. Whilst the 1916 Act focused on the intent of the exporter with regard to predatory pricing, the 1921 Act simply required a finding of price differentiation and injury. Under the 1921 Law, dumping occurs simply if foreign firms charge lower prices on products sold in the United States than in their home market, regardless of whether there is predatory pricing. In the aftermath of World War II, in the drafting of the General Agreement on Tariffs and Trade (GATT), the United States was the main proponent of including antidumping rules into the GATT. Thus Article VI of GATT was created, which was based on the United States 1921 Anti-Dumping Law.

In comparison, European Community anti-dumping legislation was enacted after the inception of the GATT 1947. In 1957, the Treaty of Rome<sup>3</sup> identified anti-dumping as one aspect of trade to be covered by the European Community's new common external trading policy. In 1968, the European Community formally introduced an anti-dumping legislation, under which the European Commission would have responsibility for acting on behalf of all the member states in dealing with dumping complaints.

The General Agreement on Tariffs and Trade has since its inception in 1947 allowed contracting parties to apply anti-dumping measures in the form of anti-dumping duties to offset dumping when it causes or threatens to cause material injury to the domestic industry. "Dumping" as defined under GATT Article VI<sup>4</sup> is a situation where the export of a product occurs at a lower price than the product's "normal value", i.e. the price normally charged in the producing country's market. If prices cannot be ascertained in the country of export, two alternatives are provided for; namely, (i) a

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<sup>3</sup> Nigel Grimwade, "Anti-Dumping Policy, An Overview of Research", London South Bank University.

<sup>4</sup> Under Article VI of GATT, dumping occurs if "the products of one country are introduced into the commerce of another country at less than the normal value of the products..." Article VI:1 further states that normal value is:

- (a) "the comparable price, in the ordinary course of trade for the like product when destined for consumption in the exporting country, or ..."
- (b) "in the absence of such domestic price, either
  - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
  - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit".



third country price, or (ii) a price based on the cost of production, other expenses and a normal profit margin.

Following the inception of the GATT, negotiations elaborated on GATT Article VI to produce rules that would govern the use of anti-dumping policy. The Kennedy Round produced the first Anti-Dumping Code in 1967, which was subsequently revised during the Tokyo Round in 1979. The Tokyo Round Code was substantially revised during the Uruguay Round which led to the existing WTO Anti-Dumping Agreement. Whilst anti-dumping procedures were elaborated upon under the Codes and the WTO Anti-Dumping Agreement, the definition of dumping has remained unchanged as provided for under GATT Article VI, i.e. a simple price differentiation test without the need to establish predatory intent.

The WTO Agreement on Anti-Dumping provides for the application of anti-dumping duties when an investigation has established that goods are being dumped and that they are causing or threaten to cause material injury to a domestic industry. The duty is designed to offset the advantage afforded through dumping. The Agreement provides relatively detailed rules on the standards that WTO Members must meet in making a dumping and injury determination. It lays down rules on how investigations should be carried out, how evidence is to be gathered, as well as how and for how long anti-dumping duties should be applied.

In the 1980s, prior to the conclusion of the WTO Anti-Dumping Agreement, the main users of anti-dumping measures were the developed countries, specifically, the United States, European Community, Australia and Canada. Between 1980 and 1984,<sup>5</sup> 97% of anti-dumping complaints were filed by these four countries. From the mid-1980s, some developing countries, namely, India, Argentina, Mexico and South Africa began to use anti-dumping measures. Recent years have seen an increase in the frequency with which anti-dumping duties are applied by developing countries.

### **III. Anti-Dumping Negotiations During the Uruguay Round**

At the outset of the Uruguay Round, it was not certain that anti-dumping would be included as a subject for negotiations. There was strong resistance

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<sup>5</sup> Thomas J. Prusa, "Antidumping: A Growing Problem in International Trade", (2005) 28.5 *The World Economy* 683.

from the major users of anti-dumping (i.e. developed countries), in particular the United States and European Community. The first two years from 1986 to 1987 were spent seeking clarification on the anti-dumping laws/practices of the major users of anti-dumping measures and to present arguments as to why there should be negotiations on a new Anti-Dumping Agreement to replace the 1979 Tokyo Round Code. It was only after the Mid-Term Review at the Montreal Ministerial Conference in December 1988 that anti-dumping assumed a “separate track” in the negotiating process. Negotiations from 1989 onwards proceeded slowly on the basis of proposals tabled by various parties. It was a long and tortuous path, through several drafting stages and Chairman’s Texts before agreement on a new Anti-Dumping Agreement was finally reached in December 1993. It was accepted as part of the overall package of the results of the Uruguay Round negotiations.

The negotiators were broadly divided into two main camps, with divergent and competing positions: namely, the users of anti-dumping measures, (the United States, European Community, Canada and Australia) which strongly resisted negotiations from the outset, and a group of small and medium-sized developing and developed countries which had been targets of anti-dumping actions. This included countries like Japan, Korea, Hong Kong, Singapore, Brazil, Norway, Sweden, Finland and Switzerland.

#### ***A. From Punta del Este to Montreal: 1986–1988***

The 1986 Ministerial Declaration launching the Uruguay Round stated that:

“Negotiations shall aim to improve, clarify, or expand, as appropriate, agreements and arrangements negotiated in the Tokyo Round of Multilateral Negotiations.”

There was no specific mention of anti-dumping as a separate subject for negotiations. The only basis for renegotiating the Tokyo Round Anti-Dumping Code was the general mandate governing negotiations of the agreements and arrangements concluded at the Tokyo Round. The discussions on anti-dumping were thus taken up together with the other Tokyo Round Codes (such as Import Licencing, Standards, Customs Valuation and Government Procurement) under the “Negotiating Group on MTN

Agreements and Arrangements”.<sup>6</sup> Whilst two separate Negotiating Groups on Safeguards and Subsidies/Countervailing Measures were established, there was no such treatment for anti-dumping. The Chairman of the Negotiating Group on MTN Agreements and Arrangements was Mr. Chulsu Kim, a senior trade official from Korea, who later became the Minister of Trade, Industry and Energy.

During the initial years of discussions on the Anti-Dumping Code, the United States, European Community, Australia and Canada (then major users of anti-dumping measures) were of the view that the Tokyo Round Anti-Dumping Code had proven to be an effective instrument for remedying dumping practices, and at the same time had provided adequate safeguards for exporting countries. They were not particularly interested in strengthening the existing disciplines for anti-dumping measures as this would reduce their flexibility and limit the scope for taking anti-dumping measures. Instead the United States and European Community were keen to expand the 1979 Tokyo Round Code to deal with what they described as “new situations”, such as circumvention, input and recidivist or repeat dumping. On the other hand, the group of small and medium-sized exporting countries, namely Hong Kong, Korea, Japan, Brazil, the Nordic countries (Finland, Norway and Sweden), Switzerland and Singapore, which had either been targets of anti-dumping action, or had concerns about the prevalent misuse of anti-dumping provisions as a disguised protectionist tool, shared a common view that there was a need to establish strict and precise rules to govern the use and limit the scope of anti-dumping action. The Kennedy Round and Tokyo Round Anti-Dumping Codes, which had been negotiated among the main users in 1967 and 1979 provided general guidance but did not contain clear and precise rules on the standards for making a dumping or injury determination. Furthermore, the Code provisions had generally reflected the national anti-dumping laws of the main user countries, and codified the practices and procedures of these user countries.

According to a factual compilation by the WTO Secretariat in 1988,<sup>7</sup> based on responses from 27 participants, 1,365 investigations were initiated between 1 July 1980 and 31 December 1987. Australia took the lead with 449 investigations, followed by the European Community with 316, the United States with 295 and Canada with 251. The exporting countries

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<sup>6</sup> “MTN” refers to the Tokyo Round of multilateral trade negotiations which gave rise to the various Codes.

<sup>7</sup> See MTN.GNG/NG8/W/38.

that had been targets of these anti-dumping actions included Japan with 126 cases, Korea with 81, Brazil with 52, Singapore with 20, Hong Kong with 10 and India with 7 cases. Finland, Sweden, Norway and Switzerland were also targeted. Developing countries also began to use anti-dumping measures in the late 1980s, with Korea initiating 6 investigations between 1986 and 1987 and Mexico with 20 in 1987.

Although Hong Kong had relatively fewer cases initiated against it, the impact on its targeted industry, i.e. the textiles/clothing industry, was devastating as this was Hong Kong's main industrial base. Singapore's offensive interests in the anti-dumping negotiations were first to preserve its export interests in its major markets. The numerous anti-dumping investigations on Singapore's exports of ball-bearings, semi-conductors, plastics/chemicals, colour picture tubes, etc. in the 1980s had caused concern. Second, Singapore's interests from the systemic perspective were to achieve strengthened anti-dumping rules that would curb the misuse and arbitrary application of anti-dumping measures as a disguised protectionist tool. Anti-dumping duties had increasingly been imposed on non-injurious or artificially created dumping during the 1980s.

This group of "like-minded" exporting countries had from the outset pressed for the need to negotiate a new Anti-Dumping Agreement. Korea was the first to table a proposal<sup>8</sup> in May 1987 which outlined possible improvements to the Anti-Dumping Code. This was followed by another proposal<sup>9</sup> in November 1988 with a text on several issues for negotiation, such as the definition of "like product" for determining "normal value" (the price comparisons in anti-dumping investigations are comparisons of "like products"), the way the injury determination is made, a "sunset" (i.e. limited duration) clause, etc. Japan followed suit with its proposal in September 1987, followed thereafter by India and the Nordic countries.<sup>10</sup> They all shared the same objective, to elaborate and make more precise the rules for determining the "dumping margin" (necessary price difference), "injury" and the investigation procedures.

The first proposal from the United States and the European Community came later in December 1987 and March 1988. The United States' proposal<sup>11</sup> was intended to address what it perceived as two increasingly prevalent forms

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<sup>8</sup> See MTN.GNG/NG8/W/3 and 10.

<sup>9</sup> See MTN.GNG/NG8/W/40, 22 November 1988.

<sup>10</sup> See MTN.GNG/NG8/W/15, 16 November 1987.

<sup>11</sup> See MTN.GNG/NG8/W/22, 14 December 1987.

of injurious dumping, which in its view were not adequately addressed in the Anti-Dumping Code. These were recidivist dumping (i.e. repeated acts of dumping) and certain diversionary practices such as circumvention and input dumping. The European Community proposal<sup>12</sup> in fact attempted to incorporate into the Code its own anti-circumvention laws.

Notwithstanding the significant number of proposals tabled in the first two years, there was neither real engagement nor negotiations given the divergent positions between the United States and European Community, on the one hand, and the group of exporting countries on the other. The Mid-Term Review at the Ministerial Conference in Montreal in December 1988 was a stock-taking exercise, and hence no decision was required of the Ministers. A factual Report by the Negotiating Group on MTN Agreements and Arrangements concerning the state of discussions was simply endorsed by the Ministers. There was neither reference nor direction given to the anti-dumping negotiations.

### **B. *From Montreal to Brussels: 1989–1990***

Discussions on anti-dumping gradually intensified during 1989, as delegations worked through a Secretariat checklist of issues that had been raised during the first two years of the negotiations, supplemented by a series of proposals from various delegations. By December 1989, comprehensive proposals had been submitted by Korea,<sup>13</sup> Japan<sup>14</sup> and the Nordic countries.<sup>15</sup> These contained specific draft texts to amend different provisions of the Anti-Dumping Code. Hong Kong<sup>16</sup> tabled a “theological paper” on general concepts, going back to the origins of anti-dumping rules and attempting to identify divergence and convergence on basic problems. This was followed up by specific draft texts to amend the Anti-Dumping Code.

In October 1989, Singapore<sup>17</sup> tabled a paper entitled “Proposed Elements for a Framework for Negotiations: Principles and Objectives for Anti-Dumping Rules”. The rationale was to provide a negotiating framework

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<sup>12</sup> See MTN.GNG/NG8/W/28, 21 March 1988.

<sup>13</sup> See MTN.GNG/NG8/W/40/Add 1 and Add 2, 20 December 1989.

<sup>14</sup> See MTN.GNG/NG8/W/48, 3 August 1989.

<sup>15</sup> See MTN.GNG/NG8/W/64, 22 December 1989.

<sup>16</sup> See MTN.GNG/NG8/W/46, 3 July 1989; MTN.GNG/NG8/W/51, 12 September 1989, and MTN/GNG/NG8/W/51/Add.1, 22 December 1989.

<sup>17</sup> See MTN.GNG/NG8/W/55, 13 October 1989.

so that the Negotiating Group could re-examine the Anti-Dumping Code in light of current practices and problems in a comprehensive manner and not in a piecemeal way. In spite of the many specific proposals that had been presented by that time, the discussions had been one-sided without any real dialogue from the main user countries. In fact, Canada had earlier pointed to the absence of a negotiating framework to focus and structure the discussions. It also pointed out that the existing Secretariat checklist of issues was insufficient to provide for such a structured discussion.

The Singapore paper proposed that some broad agreement should first be reached on the basic principles and objectives to be covered in any improved anti-dumping rules. Proposals in the form of specific drafting changes to the Anti-Dumping Code could be examined subsequently. The areas proposed for consideration included:

- (i) The scope of anti-dumping action;
- (ii) A "Public Interest Clause";
- (iii) The distinction between Predatory Price Discrimination and Normal Business Pricing Practices;
- (iv) Initiation and conduct of anti-dumping investigation;
- (v) Modalities to determine Normal Value and comparisons between Normal Value and Export Price;
- (vi) Material Injury determination;
- (vii) Imposition and collection of anti-dumping duties;
- (viii) Duration and review of anti-dumping measures.

In January 1990, in an attempt to achieve a compromise package, the Chairman of the Negotiating Group, Mr. Chulsu Kim, put forward a proposal,<sup>18</sup> on his own responsibility, for a framework which could provide for a structured agenda for further work. His paper on "Objectives and Principles of Rules on Anti-Dumping Practices" was based on the proposals which had been made by the participants. It covered all the subject headings of the anti-dumping negotiations, ranging widely from how dumping and injury should be established through investigation procedures, the application of anti-dumping measures, the questions of circumvention and

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<sup>18</sup> See Note from Chairman Chulsu Kim dated 19 January 1990 to participants in the Negotiating Group on MTN Agreements and Arrangements; and John Croome, *Reshaping the World Trading System, A History of the Uruguay Round* (Hague: Kluwer Law International Publishers, 1995), 179.

repeated dumping to dispute settlement procedures and the treatment of least developed countries. This was used to guide structured discussions in early 1990, exploring each issue in turn. An informal negotiating group on anti-dumping comprising 14 delegations,<sup>19</sup> and which included Singapore, was established under Charles Carlisle, Deputy Director-General of GATT, in early 1990 to work through all the issues. As no agreement could be reached on these issues, Carlisle submitted on 6 July 1990 in his capacity as acting Chairman of the Informal Group on Anti-Dumping and on his own responsibility a first draft text<sup>20</sup> (Carlisle I) that incorporated the United States and European Community proposals on circumvention and repeated dumping as well as several changes proposed by the exporting countries. Carlisle's first draft was rejected by both camps. His second revised draft<sup>21</sup> (Carlisle II) presented in August 1990 was likewise rejected. The 14 delegations continued to negotiate in the Carlisle informal group until October 1990 when negotiations finally broke down.

The situation had become serious as GATT Director-General Arthur Dunkel had called for a draft anti-dumping text to be worked out in time for the Ministerial Conference in Brussels in December 1990. It was expected that the Brussels Ministerial would conclude the Uruguay Round. Hence, in November 1990, Hugh McPhail, a senior official from New Zealand, was tasked to work out a compromise text with help from Australia, Mexico and Switzerland. The Informal Negotiating Group on Anti-Dumping, under new Chairman McPhail, held intensive negotiations in November 1990 with the aim of coming up with an agreed text for Ministers' consideration in Brussels. The group worked through two revisions of a draft text produced by McPhail, but failed to reach agreement on a common text. The first text (McPhail I) and a subsequent revised McPhail II draft dated 15 November 1990 was considered by the majority of participants to have been finely balanced. Though it was a rather modest and minimal text they could accept the text as a basis for further negotiations. However, the McPhail II draft was opposed by the United States and European Community on the ground that it was not balanced, and hence could not serve as a basis for negotiations. Thus in a note to GATT Director-General Arthur Dunkel on 23 November

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<sup>19</sup> US, EC Canada, Australia, New Zealand, Japan, Korea, Hong Kong, Brazil, India, Mexico, Finland (Nordics), Switzerland and Singapore.

<sup>20</sup> See MTN.GNG/NG8/W83/Add 5, 23 July 1990.

<sup>21</sup> See Circular Note from Charles Carlisle to the Negotiating Group on MTN Agreements and Arrangements, dated 14 August 1990.

1990, McPhail submitted a third draft text (McPhail III with “square brackets”) on his own responsibility, which in his view would provide a basis for finalising negotiations on anti-dumping. His third draft was comprehensive and took on board most of the United States’ and European Community’s concerns on the issues of sales-below-cost, injury determination, standing of petitioners and third-country circumvention. This time round the exporting countries could not accept the McPhail text as a basis for further negotiations. Whilst the European Community could go along with the text, it was still unacceptable to the United States. Under these circumstances, no agreed draft text on anti-dumping was submitted for the Ministers’ consideration at the Brussels Conference.

### **C. *The Ministerial Conference in Brussels: 3–7 December 1990***

A single working document of the Trade Negotiations Committee (TNC), described as the “first approximation to the Final Act embodying the Results of the Uruguay Round of Multilateral Trade Negotiations” that was submitted to the Brussels Ministerial Conference did not contain any text on anti-dumping.

In the absence of an agreed anti-dumping text that could be used as a basis for negotiations in Brussels, a Commentary Paper<sup>22</sup> produced by GATT Director-General Arthur Dunkel was submitted to Ministers, setting out the fundamental anti-dumping issues and key questions where Ministerial decisions and directions would be needed, in order to achieve a balanced outcome. The following questions were posed:

- (i) What changes need to be made in the way that anti-dumping margins are calculated?
- (ii) What changes need to be made in the way material injury is established? In particular, to what extent, if any, should small margins of dumping and small import quantities be ignored?
- (iii) What anti-circumvention provisions are needed? In particular, to what extent, if any, should third-country manufacturing be covered?

The anti-dumping commentary paper also made reference to the four draft texts so far produced by Charles Carlisle and Hugh McPhail.<sup>23</sup>

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<sup>22</sup> See MTN.TNC/W/35, 43.

<sup>23</sup> The two draft texts by Charles Carlisle, dated 9 July and 14 August 1990, and the two draft texts by Hugh McPhail, dated 15 and 23 November 1990.



Canadian Trade Minister John Crosbie, as Chairman of the Rules Negotiating Group in Brussels, directed that a small drafting group of officials be formed to discuss the anti-dumping issues that had been put to Ministers in the Commentary Paper and to come up with agreed texts. This drafting group which comprised eight delegations,<sup>24</sup> again including Singapore, held intensive negotiations from 3 to 5 December 1990 under the chairmanship of Rudolf Ramsauer, a Swiss senior official. The group started with the easiest questions first and the most difficult questions last. An agreed text<sup>25</sup> on a short list of less contentious issues concerning evidence, provisional measures, price undertaking, notice of determination and judicial review was submitted to the Green Room meeting on rules on 5 December. Thereafter, the drafting group proceeded to discuss the list of more contentious issues and worked into the early hours of 7 December. It was apparently not aware that a crisis was looming ahead in the agricultural negotiations. Hence, when the agricultural negotiations broke down on the evening of Thursday, 6 December, and delegates started to withdraw from the meetings, the anti-dumping drafting group continued for several hours until word reached the group about the breakdown of the Brussels Ministerial Conference. By then the drafting group had agreed on some incomplete textual language on a few of the contentious issues. This draft text prepared by the drafting group on the second tranche of issues was submitted to Minister Crosbie as Chair of the Rules Negotiating Group, but it was not circulated to the Green Room. This second tranche contained subjects on which incomplete texts were produced or which were left open. Overall the drafting group in Brussels achieved a limited outcome on the less contentious anti-dumping issues, but no agreement on the contentious issues.

#### ***D. From Brussels to the Conclusion of the Uruguay Round: The Draft Final Act: 1991–1993***

With the collapse of the Brussels Ministerial Conference, GATT Director-General and TNC Chairman Arthur Dunkel was tasked to continue intensive negotiations in Geneva during the early months of 1991, with the aim of reaching agreement in all the areas of the Uruguay Round negotiating mandate. The TNC agreed in February 1991 to put the Uruguay Round

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<sup>24</sup> US, EC, Canada, New Zealand, Japan, Mexico, Hong Kong and Singapore.

<sup>25</sup> See MTN.GNG/RM/W/4.

negotiations back on track. The various negotiating groups began to meet again from mid-June 1991. Dunkel's aim was to conclude the package containing the results of all the 15 negotiating groups by early November 1991.

A new Negotiating Group on Rule-Making was established under the chairmanship of George Maciel, a senior Brazilian diplomat who had previously chaired the Safeguards Negotiating Group, to cover negotiations on the GATT Articles, the Tokyo Round Codes, safeguards, subsidies/countervailing measures, and TRIMs (trade-related investment measures).

In the meantime, the anti-dumping negotiations continued to be difficult. Rudolf Ramsauer, who had chaired the informal drafting group in Brussels, was asked to chair the anti-dumping negotiations for the sake of continuity and to pick up from where he had left off during the Brussels process. An informal anti-dumping drafting group<sup>26</sup> comprising 14 countries, including the same eight delegations who were involved in the drafting of the Tranche 1 issues in Brussels, was thus established to try to achieve a compromise outcome. However, the negotiations during the whole month of October did not make much progress given that the other major groups on agriculture, TRIPS (trade-related intellectual property rights) and services were still not in their final stages. The United States and European Community were thus not ready to concede on anti-dumping. On 26 November 1991, Ramsauer submitted a draft working paper, which in his view reflected the state of the anti-dumping negotiations. His paper was an updated version of the draft McPhail text of 23 November 1990 which had been the primary basis for the drafting work at the Brussels Ministerial Meeting, and which also included the results of the drafting process in Brussels. The Ramsauer draft included language on "importing-country circumvention" and "country hopping" but left open the issue of "third-country circumvention". The United States and European Community remained dissatisfied with the anti-circumvention provisions and rejected the Ramsauer text. Multilateral negotiations on anti-dumping literally came to a halt at the end of November 1991.

The drafting group could not reach agreement on a negotiated text by end November 1991. Consequently, the TNC Chairman and GATT Director-General Arthur Dunkel had to prepare on his own responsibility

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<sup>26</sup> US, EC, Canada, Japan, New Zealand, Mexico, Hong Kong, Singapore, Australia, Finland, Brazil, India and Yugoslavia. (Since each delegation was allowed to bring in two persons, Singapore brought in Malaysia).

an anti-dumping text. In December 1991, he submitted a Draft Final Act<sup>27</sup> covering all the areas of negotiations in the Uruguay Round, including a draft anti-dumping text. Thus, the draft Anti-Dumping Agreement that went into the Draft Final Act was not concluded on the basis of a text directly negotiated among the negotiators, but on the basis of a Chairman's Text. The draft agreement contained new rules to address circumvention in the importing country, in third-country assembly and "country hopping" (on which see further below). It had effectively incorporated United States and European Community practices and national legislation aimed at countering circumvention. Although there were also some improvements in the rules relating to the determination of dumping and injury, as well as initiation and conduct of investigations that were demanded by the exporting countries, the latter nevertheless viewed the Dunkel Text as being skewed in favour of the United States and European Community. Their main concern was with the expansion of the Code to include the three forms of circumvention.

The three anti-circumvention provisions were essentially United States proposals which were strongly supported by the European Community. The United States negotiators insisted on including all the following three types of anti-circumvention provisions if they were to concede in areas that were being demanded by the exporting countries:

- (i) "Importing-country circumvention" which would allow an importing country to automatically apply anti-dumping duties on parts or components that will be used in assembling a product which is already subject to an existing anti-dumping duty in the importing country. The proposal was clearly meant to prevent exporters from circumventing an existing anti-dumping duty by assembling the parts into a finished product in the importing country. The Exporting countries' concern was with the broadening of the scope of anti dumping investigations whereby anti-dumping duties could be automatically imposed on parts/components as long as the original finished product was found to be dumped. Components were not "like products" to the finished product. Levying an anti-dumping duty on components/parts when the original anti-dumping duty was on the finished product moved away from the "like product" requirement under the Anti-Dumping Code.

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<sup>27</sup> See MTN.TNC/F/FA, 20 December 1991.

- (ii) “Third-country circumvention” which would allow an importing country to extend the anti-dumping duties that it applied on a finished product imported from a particular country to a like product from a third country. The proposal was based on the presumption of dumping of assembled products from third countries. Such a third-country circumvention provision would, for example, allow the extension of an original anti-dumping duty on a Japanese finished product to a like product assembled in Singapore by the same Japanese subsidiary or an unrelated producer in Singapore without the normal full investigations on dumping and injury. This would have implications for multinational companies that had subsidiary production facilities in Singapore.
- (iii) “Country hopping” which would allow the application of retroactive anti-dumping duty: “Country hopping” was described by the United States as a shifting of sourcing from one country to another in order to circumvent an existing anti-dumping duty. For example, the United States could allege that a Japanese company had circumvented an original anti-dumping duty on a finished product by shifting its source of supplies of the like products to a related Singapore subsidiary. Unlike the first two types of circumvention, in this case there would be a normal investigation to determine dumping and injury before an anti-dumping duty could be imposed on the Singapore product. However the anti-dumping duty would be imposed retroactively up to the point of initiation.

Exporting countries were particularly concerned with “third-country circumvention” and “country hopping” provisions because of the possible negative impact on foreign investments.

The submission of the Draft Final Act to the Trade Negotiations Committee on 21 December 1991 by GATT Director-General Arthur Dunkel provided the final push towards the conclusion of the Uruguay Round in December 1993. The TNC was tasked to address some of the outstanding issues and gaps that remained in the Draft Final Act pertaining to agriculture, market access issues and anti-dumping. Peter Sutherland, who became the new GATT Director-General after Arthur Dunkel left office on 30 June 1993, set the deadline of 15 December 1993 to finalise the Uruguay Round package.

In the later part of 1992 and early months of 1993, the United States made serious attempts to reopen the anti-dumping text by submitting

11 proposals some three weeks before the 15 December 1993 deadline. Sutherland appointed Michael Cartland, a senior official from Hong Kong, as the “Friend of the Chair”, to handle the outstanding issues in the rules areas, including anti-dumping. The Cartland Group, which met at the technical level, made little progress as some of the exporting countries could not accept the re-opening of the text. Recognising that a resolution of the anti-dumping issues was more political than technical in nature, Sutherland took over the negotiating process by convening a small group of Ambassadors<sup>28</sup> to make last-minute trade-offs. The United States had apparently indicated that it would not insist on acceptance of all its 11 proposals if some of its principal concerns were met. Finally, a compromise was reached on 13 December in which the United States, proposals on seven issues were accepted, with some modifications.<sup>29</sup>

John Croome, a former GATT Secretariat official described the last stages of the negotiations as follows:<sup>30</sup>

A first critically important breakthrough came on Sunday (12 December 1993). Agreement was reached on the Anti-Dumping Agreement. The United States had asked for eleven changes. It won several, but not all. Most important was the agreement on “standards of review” which provided that dispute settlement proceedings could look at *how* dumping cases had been handled by national authorities, but not at the facts of the case. The rights of United States labour unions to initiate dumping complaints was recognised, but the sunset and de-minimis margins were changed only marginally. The anti-circumvention clause, far from being strengthened as both the United States and European Community would have liked, was removed altogether, leaving the issue for fresh negotiations after the Round.

Apparently, as the United States did not get the anti-circumvention language it wanted, it suggested that the whole section of the anti-circumvention provisions in the Draft Final Act be dropped. As a compromise, the Group agreed to a Ministerial Declaration that the whole

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<sup>28</sup> Comprising the US, EC, Canada, Japan, Brazil, India, Mexico, Korea, Hong Kong, Norway and Singapore.

<sup>29</sup> The seven issues were: standard of review, cumulation, standing, termination of investigation (*de-minimis* and negligibility), price averaging, below-cost sales and sunset clause.

<sup>30</sup> Croome, *op. cit.*, 326–327.

matter of anti-circumvention would be referred to the Committee on Anti-Dumping for further discussion.

#### **IV. Overall Assessment and Singapore's Role**

The United States and the European Community had maintained broadly common negotiating positions on anti-dumping. They generally sought to broaden the scope for the application of anti-dumping measures, and to tighten control on attempts to circumvent anti-dumping measures. On the opposing side were countries with exporter interests, which included Japan, Korea, Hong Kong, Singapore and the Nordic countries which were keen to have tighter disciplines on the application of anti-dumping measures and to minimise the scope for harassment via national anti-dumping procedures.

The Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement), concluded on 15 December 1993, was a significant improvement over the 1979 Tokyo Round Anti-Dumping Code. It was essentially a compromise between the conflicting demands presented by the two major groups of countries in the course of the negotiations: the United States and European Community on the one hand and Japan, Korea, Hong Kong, Singapore and the Nordic countries on the other.

Singapore was proactive from the outset of the negotiations and made significant contributions by working closely with the group of like-minded exporting countries at all stages of the negotiations. Singapore had to ensure that the new anti-dumping rules emerging from the Uruguay Round would not by default become new instruments to constrict the competitiveness of new entrants such as the NIEs because of overprotective anti-dumping rules.

Perhaps the key lesson learnt was that it was wrong to believe that Singapore was too small to play a part in the Uruguay Round. Admittedly, it was the key players (the United States, European Community, Canada and Japan, i.e. the so-called "Quads")<sup>31</sup> which in the final analysis determined the outcome. However, by working with like-minded groups,

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<sup>31</sup> The origin of the term lies in the "quadrilateral" trade policy talks between the four countries; Walter Goode, *Dictionary of Trade Policy Terms* (Cambridge: CUP 4th ed., 2004), 287.

Singapore contributed in no small measure to the Final Act of the Uruguay Round in terms of ideas and textual improvements such as in the areas of services, TRIPS and anti-dumping. As Singapore was included in all the small anti-dumping drafting groups, we were able to influence to some extent the drafting of the anti-dumping texts.

## V. The Way Ahead

Prior to the adoption of the WTO Anti-Dumping Agreement in 1995, the use of anti-dumping measures was mainly the domain of a few largely developed countries, e.g. the United States, the European Community, Australia, Canada and Mexico. However, since the implementation of the WTO Agreement, the number of countries with anti-dumping laws has increased dramatically. There are now about 101 countries with anti-dumping legislation in place. This, as well as increased trade liberalisation, has contributed to a marked rise in the use of anti-dumping measures around the world. Many developing countries like India, Argentina, Brazil and South Africa have become prolific users of anti-dumping measures. In fact, developing countries, which were the main targets of anti-dumping measures, are now the principal users of anti-dumping. From the establishment of the WTO in 1995 to December 2008, 2,190 anti-dumping measures were in place with developing countries accounting for 67% and developed countries 33% of these measures as user countries. During this period, India initiated 564 investigations and was thus the number one user of anti-dumping measures. The United States held second position with 418 investigations, followed by the European Community (391), Argentina (241), South Africa (206), Australia (197), Brazil (170), China (151), Canada (145), Turkey (137) and Korea (108).

China remained the most frequent target of anti-dumping investigations between 1995 and 2008, with 678 investigations directed at its exports. Korea was the second most frequent target with 252 investigations, followed by the United States with 189 investigations. Chinese Taipei, Indonesia, Japan, Thailand, India, Russia and Brazil were the subject of 187, 145, 144, 142, 137, 109 and 97 investigations respectively, in the list of top ten targeted countries.<sup>32</sup> The data also shows a concentration of anti-dumping investigations and measures on certain products and industries.

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<sup>32</sup> WTO Secretariat Rules Division Anti-Dumping Measures Database.

The majority of the anti-dumping actions taken during this period were concentrated in the base metals sector, especially in the iron and steel industries, followed by chemicals, plastics, machinery/electrical equipment and the textiles/clothing sectors.

What has gone wrong? Has the WTO Anti-Dumping Agreement become inadequate to deal with current behaviour in international trade? Most of the anti-dumping investigations seem to have been initiated at the request of politically vulnerable industries such as textiles and steel, especially where there is strong trade union activism such as in the steel industry in the United States. It could be an indication of the inefficiency and lack of competitiveness among these domestic industries that they seek protection from government anti-dumping authorities. Have anti-dumping measures been used as a strategic protectionist tool in order to protect industries deemed to be sensitive or politically vulnerable, regardless of whether or not the exporters are dumping?

When the Doha Round was launched in 2001, WTO Ministers mandated negotiations aimed at “clarifying and improving” the “disciplines” of the Anti-Dumping Agreement. If anti-dumping measures have been prompted by political considerations, then no amount of more precise rules will help restrain misuse of anti-dumping measures. Apart from being a burden on countries to implement intricate anti-dumping laws and to comply with the WTO’s anti-dumping rules, such political use may add to the difficulties which WTO panels face in ferreting out evidence of misuse of anti-dumping measures. Further changes to the Anti-Dumping Agreement may in fact create more and not fewer loopholes. The Anti-Dumping Agreement as it stands is already a very complex agreement. More rules would merely increase the potential to manipulate the results of anti-dumping investigations and thus lead to even greater misuse of anti-dumping measures.

It will be politically difficult to dispense with anti-dumping provisions in the WTO, as not only the United States but other developed and developing countries will strongly resist this. The only justification most economists would agree upon in defending the need for anti-dumping law is to combat *predatory* pricing. This is an extreme form of price discrimination exercised by dominant firms by lowering the price (i.e. “dumping” in foreign markets) to such a degree so as to drive competitors out of business. A longer-term alternative approach may be to consider blending anti-dumping rules with competition laws to bring



back the core element of predatory pricing into focus, and in order to curb monopolistic practices.

Future research would be needed to examine how the use of anti-dumping fits into the larger domestic political-strategic policy picture, and explore how competition rules could be used to restrain the rampant misuse of anti-dumping measures.

**CHAPTER 4**

**INTELLECTUAL PROPERTY RIGHTS  
IN THE URUGUAY ROUND**

*By S. Tiwari\**

**I. The Uruguay Round**

Prior to the coming into being of the World Trade Organisation (WTO), world trade came under the purview of the multilateral instrument known as the General Agreement on Tariffs and Trade (GATT).

The GATT was established on a provisional basis after World War II together with other new multilateral institutions connected with international economic cooperation. Notwithstanding its provisional nature, the GATT was the only multilateral instrument governing international trade from 1948 till the establishment of the WTO.

The most extensive forward movements in world trade liberalisation have come about through multilateral trade negotiations under the auspices of the GATT. These negotiations have been referred to as the “trade rounds”. The key rounds have been the Kennedy Round in the mid-1960s, the Tokyo Round during the 1970s and the Uruguay Round during the 1980s. The Uruguay Round has so far been the most extensive and productive in terms of liberalisation.

**II. Intellectual Property Increases in Importance**

How did intellectual property rights become part of the international trading system? The story unfolds in the paragraphs which follow.

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\* The views in this paper are those of the late author.

Until the 1970s intellectual property attracted very little interest in most countries. Whilst it was important to creators, it is doubtful if most other people understood it fully or appreciated its economic significance.

A change came about in the 1980s. Competition in the international marketplace increased greatly. Being in the forefront of world trade, the competition was felt even more intensely by the firms and companies of the developed world, especially the United States. Looking to maintain their edge, these business entities realised that possession of advanced technology would give them an advantage over their competitors. Thus information and technology became key tools of economic competition between countries. Together with these, intellectual property rights became a valuable resource as countries moved forward to improve their competitiveness.

With a view to protecting their intellectual property rights, the businesses in the United States and other developed countries began to push aggressively for better intellectual property protection in all parts of the world. From these developments, there appears to have arisen the need for international intellectual property rights standards and enforcement and consequently the pressure by the developed countries to include intellectual property rights as part of the Uruguay Round negotiations.

### **III. The International Conventions**

Intellectual property protection has a long international history. For over 100 years intellectual property conventions have provided rules and standards intended to protect the interests of creators and users of intellectual property.

Some of the important intellectual property multilateral treaties in existence are:

- a. The Paris Convention for the Protection of Industrial Property (“Paris Convention”);
- b. The Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”);
- c. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (“Rome Convention”);
- d. Treaty on Intellectual Property in Respect of Integrated Circuits (“IPIC Treaty”).

The above and other intellectual property conventions and treaties are administered by the World Intellectual Property Organisation (WIPO). The body handles intellectual property matters internationally. The convention establishing it came into being in 1967 and entered into force in 1970. WIPO became a specialised United Nations agency in 1974.

In spite of the existence of the above conventions, the developed countries felt it necessary to agitate for intellectual property rights to be made a part of the Uruguay Round negotiations. Why was this so? Why were the existing intellectual property rights instruments felt to be inadequate?

A number of reasons are usually advanced as to why the developed countries felt the multilateral conventions not to be wholly satisfactory. First, the membership of the conventions was a problem. The membership of the Berne Convention was broad; in comparison, few countries were members of the Rome Convention. Second, even though the text of the various conventions had been revised, the standards of protection provided were felt by the developed countries to be insufficient to prevent unfair competition. Third, it was felt that the conventions did not have enforcement mechanisms which were effective.

Though conversant with these inadequacies, the United States at first did not join in or initiate any international attempts to improve the multilateral conventions. It instead chose to adopt, since the 1980s, aggressive bilateral and unilateral means to achieve its objective.

One method adopted was using its domestic legislation. Its Trade Act of 1974 was amended to allow the intellectual property situation in a country to be taken into account under the United States Generalized System of Preferences (GSP), which allows trade preferences to be given to imports from listed developing countries.

Another method adopted by the United States caused even greater unhappiness. This was the infamous Section 301 of the United States Trade Act 1974 (as amended by the Omnibus Trade and Competitiveness Act of 1988) which was used by the United States to pressure countries to conform to its requirements. Under this legislation, the Office of the United States Trade Representative was given authority to designate countries to a variety of blacklists: "watch list", "priority watch list", "priority foreign country", etc. These designations served as a warning to the countries concerned to improve the intellectual property situation in their countries, failing which sanctions would be applied against them.

#### **IV. The Move for a New Trade Round**

Soon after the completion of the Tokyo Round in 1979 there was talk about having another round of trade negotiations. It was felt that services — which had begun to assume greater importance in the economies of countries — should be brought under a GATT-type discipline. There was also discussion between businesses and policy people about having an institutional structure outside the WIPO for new intellectual property agreements.

There was at first reluctance about a new round. Thus countries devoted much time at the 1982 ministerial meeting to pushing for it. Developing countries were greatly concerned about the possible new intellectual property norms. Their worry was that these norms would be used to protect intellectual property rights without regard to the interests of developing countries.

Somehow the reluctance of countries was overcome at the ministerial meeting held in September 1986 in Punta del Este, Uruguay, and the Uruguay Round was launched. The agenda of the new round included both services and intellectual property.

#### **V. Intellectual Property Negotiations in GATT: Misgivings, Opposition and Eventual Inclusion**

The Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS Agreement) now occupies a very important position in the realm of intellectual property protection and enforcement, together with other conventions. However, the placing of intellectual property rights as part of the Uruguay Round agenda gave rise to much misgiving and suspicion — in some cases even alarm — amongst countries, intellectual property bodies and interest groups who held differing perspectives as to the need for a new agreement and the institutional structure in which it would be sited.

A variety of questions were raised about the GATT's involvement in relation to intellectual property. The underlying theme of the concerns raised was whether it was appropriate for the GATT to be involved in intellectual property issues. The first point raised was whether the GATT was moving into areas demarcated for WIPO. Was the GATT attempting to take over the work of WIPO? A concern was how the two bodies would work together or delineate their activities to avoid overlap and friction. There

was also the issue of how the TRIPS Agreement and the existing intellectual property instruments would relate to each other.

The argument advanced by those in favour of TRIPS was that the GATT could deal with “trade-related” intellectual property issues. The problem was that there was no common understanding as to which intellectual property issues were trade-related and which were not. This gave rise to a further question: What should the ambit of TRIPS be? Should it confine itself to setting standards or, as some advocated, harmonising specific areas of the laws?

There was the additional worry about the balance between creators and innovators on one hand and producers and investors on the other. The concern was that if TRIPS got too involved with intellectual property this might upset the balance to the disadvantage of the creators and innovators. Creativity and rights for creators and writers might be subordinated to the interests of producers and investors.

Mr. Emory Simon, one of the trade negotiators from the United States, summarised the position succinctly in a paper delivered at a meeting in Geneva on 27–28 June 1984:<sup>1</sup>

For some, the pressure for integrating intellectual property and trade is a threat: an unspeakable mistake which diminishes and soils copyright, patent and other intellectual property laws. For others, it is a logical step in the evolution of both disciplines: a recognition of the fact that commerce and economics play a central role in the creative process.

There was opposition too from developing countries. They felt that intellectual property issues should be left to WIPO. Their concern was that too much stress on trade-related issues might change international perceptions regarding intellectual property and be disadvantageous to their interests.

In May 1990, 12 developing countries (Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay) stressed that the Uruguay Round negotiations should recognise the special needs of the developing countries to enable them to lay proper foundations in relation to technology. This demand followed reports by two United Nations agencies (the UN Conference on Trade and Development [UNCTAD], 1990, and the UN Centre on Transnational Corporations

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<sup>1</sup> S. Tiwari, personal notes (on file).

[UNCTNC], 1990) that strong intellectual property rights might tempt the development of restrictive business practices and these in turn could especially affect developing countries adversely.

I was Singapore's negotiator for intellectual property during the Uruguay Round. The TRIPS negotiations were conducted in a small working group of key countries. I was fortunate to be included in the working group. As the TRIPS Agreement would require almost all developing countries — including ourselves — to revamp their intellectual property regimes completely, a number of us like-minded countries fought hard to preserve leeway under the fair use provisions, the conditions for issue of compulsory licenses and to be allowed a regime for parallel imports, whilst realising that cross deals were being made elsewhere. The parallel import provision is very important to us as a trading nation. If an intellectual property right holder sells his product — either himself or under license — at a lower price in country A, our traders should have the freedom to purchase — if they so choose — the product so sold and sell it in Singapore.

The drafting of Article 6 of the TRIPS Agreement reflects the tough fight over parallel imports. It indicates that the issue of intellectual property rights exhaustion was considered but that no agreement could be reached over the matter. However, the language makes it clear that each WTO member is free to define its own laws regarding intellectual property rights exhaustion.

It is interesting to note that the developed countries did not give up on the issue of parallel imports. Through threats of action by their right holders and provisions in bilateral free trade agreements, they continued their attempts to whittle down the hard fought position on parallel imports won by the trading nations and other developing countries under the TRIPS Agreement. The developing countries were greatly upset by that behaviour and this state of affairs continued until it had to be corrected through a reiteration of the TRIPS Article 6 position through the Doha Declaration on TRIPS and Public Health in 2001.

The TRIPS negotiations were, of course, part and parcel of the Uruguay Round negotiations. Thus they were affected by both matters peculiar to intellectual property and also by the overall negotiations. These problems persisted for a number of years. Gradually the positions of the developed and developing countries converged and the developing countries came round to the idea of including the TRIPS Agreement within the GATT. It is generally felt that the factors which helped to bring this about were: the effect of a lack of agreement on investments; the concession by

the developed countries that the developing countries would have a longer transitional period for phasing in the TRIPS requirements; the continuous unilateral pressure by the United States under its Section 301 mechanism; their own interests in protecting intellectual property against piracy and counterfeiting; and that the package worked out towards the end of the Uruguay Round where the less advantageous parts of the TRIPS Agreement were seen to be in some ways balanced by gains in other areas.

## **VI. The Informal Working Group on TRIPS**

The TRIPS negotiations during the Uruguay Round were of interest to a large number of those attending the negotiations. Apart from country representatives, the intellectual property negotiations were important to large corporations, especially those from the developed world. These corporations sent high-powered lobbyists and lawyers and intellectual property professionals to push for their interests. The non-governmental representatives, of course, had their own agenda.

The large gathering of interested individuals, of course, created much friction and heat. Notwithstanding the tension created, the Informal Working Group on TRIPS (“IWGT” for short) developed — over the years — a close camaraderie. This was not surprising in view of the many days and very late nights (very often till midnight) spent together negotiating the TRIPS texts. Many a time the only dinner that the IWGT had was WTO Secretariat-ordered sandwiches and orange juice. The Secretariat staff felt that if the IWGT broke up for dinner in the cold weather of Geneva, a large part of the Group members would not come back in view of their tiredness.

The IWGT was a very focused group. It did its best to complete the TRIPS work by the requisite deadlines. The strong evangelical-like focus of the IWGT is illustrated by what transpired at the Brussels Round which collapsed. Like other Working Groups, the IWGT was trying very hard to finish its work so that the Uruguay Round could be completed by the end of the Brussels session. With this strong concentration, the IWGT members were, very often, oblivious to what was happening in the other parts of the Brussels meeting. One of the funniest stories of the Brussels Round is that so focused were we in our work that we did not even know that the Uruguay Round had collapsed. More than two hours after all the delegates had gone back to their hotels — in view of the failure of the Round — a Latin delegate walked into the IWGT negotiations and asked what the IWGT was doing when the Brussels session had collapsed and everyone had gone back two hours earlier.



## VII. TRIPS in the WTO: An Overview

It is intended to highlight here some of the overarching changes brought about by the TRIPS Agreement.

As a result of the TRIPS Agreement, intellectual property has become an integral part of the international trading system. It could be said to be one of the three anchors of the WTO, the other two being goods and services.

All countries would like to become WTO Members and benefit from the market access it provides. To obtain the benefit, they have to become parties to the main WTO Agreements, including the TRIPS Agreement. It follows from this that over time there will be close to universal acceptance of the TRIPS Agreement.

Making the TRIPS Agreement a part of the WTO was a remarkable achievement for the countries and businesses pushing for it. Through a single instrument they succeeded in achieving minimum standards of substantive intellectual property rights protection that each WTO Member must provide as regards the key areas of intellectual property: copyrights and related rights; trademarks (including service marks); geographical indications; industrial designs; patents; the layout designs of integrated circuits; and protection of undisclosed information.

The scheme adopted to achieve this worldwide increase in standards of substantive protection was a simple one — spelling out the subject matter to be protected, the rights to be provided and the permitted exceptions to those rights, and the minimum duration of protection. The standards were set by:

- a. requiring that the most recent Conventions in the relevant areas (e.g. The Berne Convention for the Protection of Literary and Artistic Works and the Paris Convention for the Protection of Industrial Property) had to be followed;
- b. providing additional obligations in areas where the Conventions were felt to be deficient.

The TRIPS Agreement itself provides the standards of protection for trade secrets, layout designs of integrated circuits, trademarks, industrial designs and geographical indications.

Intellectual property protection, of course, also requires a good enforcement mechanism. However, enforcement was a problem area in

the pre-existing intellectual property instruments. It was hardly mentioned in them. The TRIPS Agreement, has, on the other hand, a comprehensive arrangement for enforcement. Article 41 of the TRIPS Agreement states:

Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements...

Apart from Article 41, the TRIPS Agreement goes on to indicate the nature of civil and administrative procedures and remedies which are to be provided in the domestic systems of countries to allow for the enforcement of intellectual property rights. These include rules in relation to civil judicial procedures, evidence, injunctions, damages, provisional procedures, etc. Members are also to provide criminal procedures and penalties at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Apart from judicial procedures, the TRIPS Agreement also lays down special requirements in relation to border measures.

Another key change brought about by the TRIPS Agreement is that it makes disputes between governments as to whether the obligations under the TRIPS Agreement have been complied with subject to the dispute settlement mechanism of the World Trade Organisation. Prior to TRIPS there was no recourse of any kind to governments which felt that other governments were not living up to their obligations.

As indicated above, as TRIPS negotiators, we realised that for almost all developing countries there would be a need to revamp their intellectual property regimes completely after the TRIPS Agreement was completed. Much work would have to be done and it was necessary to allow time for this to be completed. Thus, we pushed for reasonable transitional periods.

It was finally agreed that the transitional periods to be allowed to countries would depend on their level of development. Thus, developed countries were given one year from the date of entry into force of the WTO Agreement before they needed to apply the TRIPS obligations. They had to do so by 1 January 1996. The transitional period for developing countries was generally five years, i.e. until 1 January 2000. For the least developed countries a period of 11 years was agreed.

### **VIII. The Domestic Implementation of TRIPS**

Following the acceptance of the TRIPS Agreement at Marrakesh on 15 April 1994, I became involved in its implementation domestically. The implementation of the TRIPS Agreement into domestic law was a massive effort. The exercise impinged on matters within the purview of various Ministries and agencies. It was thus decided to form an Inter-Ministry Committee on TRIPS Implementation. I was appointed to chair the Committee. The Inter-Ministry Committee started work immediately as we had to complete the work in four years — instead of five — as a result of an undertaking Singapore had given.

A great deal of work was involved in translating the new TRIPS instrument into domestic legislation but we kept to our promise given in APEC. We went further by enforcing each legislation as soon as it was completed. The sequence of the preparation of the legislation was as follows:

- a. Patents: amendments to conform to TRIPS were brought into operation with effect from 1 Jan 1996.
- b. Copyright: the copyright legislation was amended and enforced with effect from Apr 1998.
- c. Trademarks: a new Trade Marks Act was finalised and brought into force in 1998.
- d. Geographical Indications: a new Geographical Indications Act was drafted, passed by Parliament in Nov 1998 and brought into force with effect from 15 Jan 1999.
- e. Layout Designs of Integrated Circuits: a new Layout Designs of Integrated Circuits Act was prepared and came into force with effect from 15 Feb 1999.

Apart from the above, amendments were made to legislation to discourage illegal replication by licensing optical disc manufacturers.

### **IX. The Subsequent Developments: Singapore Moves Ahead**

As the world moved towards a knowledge-based economy, Singapore's outlook in relation to intellectual property changed. It adopted policies and strategies for an innovation-driven environment. It began to develop a

dynamic intellectual property regime suitable for its economic needs. Thus, it became a party to the WIPO internet treaties so as to adopt an intellectual property regime suitable for the digital age. It also entered into a free trade agreement with the United States which required it to further increase its levels of intellectual property protection and enforcement.

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## CHAPTER 5

# A NEW APPROACH TO TRADE NEGOTIATIONS?

*By Vanu Gopala Menon*

### **I. Introduction**

The Doha Round of multilateral trade negotiations or the Doha Development Agenda (DDA), as it is officially known, is not making any progress. There have been numerous meetings — big and small, official and informal — to try to break the impasse and inject momentum into the negotiations. However, the logjam remains. We cannot continue like this. We need a new approach to the negotiations if we are to complete it. This will also probably require us to scale back the level of our ambitions for the Doha Round. We are not likely to embark upon another round of multilateral trade negotiations for a very long time. Bilateral and plurilateral trade deals are likely to take the place of multilateral trade negotiations. Whether we like it or not, this is probably the only realistic way to deal with new and advanced areas of trade in goods, services and knowledge products.

### **II. WTO Ministerial Meeting Deferred**

On 12 December 2008, WTO Director-General Pascal Lamy informed the General Council that he had decided to put on hold his plans to convene a Ministerial Meeting (the following week) to push for an outline deal on the Doha Development Agenda. He told the WTO membership that his consultations had not revealed “a readiness to spend the political capital” needed to reach an agreement and that a Ministerial Meeting at this stage “would be running an unacceptably high risk of failure which could

damage not only the (Doha) round but also the WTO system”.<sup>1</sup> Lamy’s announcement probably did not come as a surprise to most members of the WTO.

### III. G20 Rhetoric Not Matched by Reality

The G20 Summit meeting held in Washington, DC, in November 2008 to coordinate responses to the global financial crisis had not only rejected protectionism but issued an unanimous call to “refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions, or implementing WTO-inconsistent measures to stimulate exports” for the next 12 months. But as soon as the ink had dried on the communiqué issued at the G20 meeting, several of its participants announced their intention to raise import tariffs and impose other trade restrictions. As the highly regarded newsletter on international trade *Bridges* put it, “While (G20) participants may not have (adopted) WTO-inconsistent measures, they certainly have raised new barriers to trade in goods”.<sup>2</sup>

Under these circumstances, Lamy’s decision to put on hold a Ministerial Meeting of the WTO was both sensible and pragmatic. Why risk souring the atmosphere further and causing a complete breakdown of the Doha Round when there was clearly little prospect of making any serious progress at this stage?

In fact, a month after Lamy’s announcement, protectionist sentiments gained further ground when the EU announced in January 2009 that it was going to reinstate export refunds for dairy products after having scrapped them in 2007. The huge subsidies for inefficient US companies and the calls within the US Congress to include “Buy America” clauses in industry bailouts also did not help matters. As Fareed Zakaria, editor of *Newsweek International*, wrote in his column in the magazine dated 30 March,

Rich countries tend not to raise tariffs, because they do protectionism another way: by subsidizing domestic companies. ... The U.S. government’s direct subsidies to Detroit since the crisis began are (US)\$17.4 billion. Canada, France, Germany, Britain and Sweden have also

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<sup>1</sup> *Bridges*, Year 12, No. 6, December 2008–January 2009, 1.

<sup>2</sup> *Bridges*, Year 12, No. 6, December 2008–January 2009, 2.

announced transfers to their companies. In total, worldwide governments are providing (US)\$48 billion in direct subsidies to carmakers. And then there are agricultural subsidies, which are set to rise as the price of food falls. In America, this means an additional (US)\$1.8 billion for agrobusiness this year. ... Every action by one government is producing a countermove by another, in a classic and depressingly predictable spiral.<sup>3</sup>

According to the World Bank, since the G20 Summit in Washington, DC, in November 2008, 17 members of the G20 and other countries have implemented a total of 47 measures that restrict trade. This compelled the President of the World Bank, Robert Zoellick, to state pointedly on 17 March 2009 that

Leaders (of the G20) must not heed the siren-song of protectionist fixes, whether for trade, stimulus packages or bailouts... Economic isolationism can lead to a negative spiral of events such as those we saw in the 1930s, which made a bad situation much, much worse.<sup>4</sup>

WTO Director-General Pascal Lamy echoed these sentiments on 23 March 2009 when he called on G20 leaders not to raise trade barriers, saying, "The risk is increasing of such (protectionist) measures choking off trade as an engine of recovery".<sup>5</sup>

A fundamental problem is that while there may be wide acceptance that international trade in general is a positive-sum game, almost everyone is looking at it from their own narrow national perspective. Given that the benefits of trade are not equally distributed, protectionist pressures are likely to grow, especially during the current economic and financial crisis.

#### **IV. What Should We Do?**

What should we do under these difficult circumstances? Should we suspend formal negotiations for a period of time to allow delegations to reflect and revise their positions? Or will this adversely affect the momentum and scuttle the talks for good with delegations losing their appetite to continue? Or should we keep on trying as we have been doing for the past

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<sup>3</sup> Fared Zakaria, "The Trouble With Subsidies", *Newsweek*, 30 March 2009.

<sup>4</sup> *Business Times* (Singapore), 19 March 2009.

<sup>5</sup> "WTO Predicts 9% Fall in World Trade", *Financial Times*, 24 March 2009.



almost seven and a half years? Giving up on the Doha negotiations is not seen as a real option. As the *Bridges* newsletter of December 2008–January 2009 put it,

Few would disagree that it would be a mistake to abandon the round altogether. Although the economic gains resulting from its conclusion now appear far smaller than what seemed possible when the round was launched seven years ago, a new multilateral trade deal still potentially offers the best bulwark against rising protectionism around the world. Talks should continue to keep that possibility alive.<sup>6</sup>

## **V. Revisiting the Approach to the Doha Negotiations**

But should we not at least revisit some of the underlying principles guiding the Doha Round, with a view to making some pragmatic changes to the approach we have taken thus far in these trade negotiations? In this regard, I propose that we revisit the following three areas:

- (i) the notion of a single undertaking for the DDA;
- (ii) reducing the scope and ambition of the DDA; and
- (iii) the need for plurilateral agreements as opposed to a multilateral approach.

## **VI. Single Undertaking Versus Early Harvest**

Paragraph 47 of the Doha WTO Ministerial Declaration (14 November 2001) states:

With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.

Although there is technically room for the early implementation of agreements reached before the conclusion of the Doha Round, in reality

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<sup>6</sup> *Bridges*, Year 12, No. 6, December 2008–January 2009, 1.

“virtually every item of the negotiation is part of a whole and indivisible package and cannot be treated separately”.<sup>7</sup> As the WTO website puts it, “Nothing is agreed until everything is agreed”.<sup>8</sup>

The principle of a single undertaking in multilateral trade negotiations is not new or peculiar to the Doha Round. The principle was adopted during the Uruguay Round (which preceded the current Doha Round). There are many, in both the developed and developing world, who believe that we should adhere firmly to the principle of a single undertaking. In their view, unless we do so, we are not going to arrive at an equitable outcome. As one participant at the WTO Public Forum in Geneva in 2007 put it, the value of the single undertaking “is that it facilitates some trade-offs across very different issues and we have seen some very difficult ones in the Doha Round”<sup>9</sup> Another participant pointed out that the single undertaking had provided WTO members with

the opportunity to actually get into the questions that are really calling for the... reform of agriculture policy. ...if it was not for the single undertaking, we would not be in a position to construct on the so-called built-in agenda... which is precisely the continuation of agricultural policy reform.<sup>10</sup>

However, I am of the view that we should revisit the principle of a single undertaking. The situation during the Uruguay Round was different from that in the current Doha Round. At the time, the number of issues on the negotiating agenda was far fewer than under the Doha Round. There were also fewer members in the GATT as compared to its successor organisation, the WTO. As such, it made a lot of sense to look at the issues on the negotiating agenda in a holistic manner rather than issue by issue or a few issues at a time. Slightly more than a decade later, the principle of a single undertaking is neither helping the cause of trade liberalisation nor the Doha

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<sup>7</sup> “How the Negotiations are Organized”, available at: <[www.wto.org](http://www.wto.org)>.

<sup>8</sup> *Ibid.*

<sup>9</sup> Simon Evenett, Professor of International Trade and Economic Development, St. Gallen University, Switzerland. Available at: <[www.wto.org/english/forums\\_e/debates\\_e/debate10\\_transcript\\_e.doc](http://www.wto.org/english/forums_e/debates_e/debate10_transcript_e.doc)>.

<sup>10</sup> Guillermo Valles, Permanent Representative of Uruguay to the UN and WTO (Geneva). Available at: <[www.wto.org/english/forums\\_e/debates\\_e/debate10\\_transcript\\_e.doc](http://www.wto.org/english/forums_e/debates_e/debate10_transcript_e.doc)>.

Round agenda. If anything, with an enlarged WTO membership and agenda, it has aggravated matters by allowing the negotiating process to be held hostage by members unwilling to liberalise or wanting to do so only if they can extract a concession in a different sector of the negotiations.

My own preference is to go for the early harvest of agreements reached during the negotiations. In short, implement what has been agreed to in one area and not wait for everything to be agreed before starting the implementation process. That way, we give trade liberalisation a push and help sustain the momentum of the negotiations. Moreover, let us not forget that the private sector and businesses cannot afford to wait indefinitely. The longer the delay in completing the Doha Round, the less relevant the WTO and the DDA become. An early harvest would also go some way towards restoring confidence in the WTO system. Otherwise, the WTO risks being reduced to nothing much more than a dispute settlement mechanism.

Those who disagree with this suggestion of an early harvest are likely to point out that such an approach will only encourage delegations to hold back their cards in every area and not negotiate in good faith. After all, why give away one's bargaining chips in one area and get nothing in return in another sector? They have a point. But it is also a fact that notwithstanding the principle of a single undertaking, there is broad agreement in the area of trade facilitation, one of the issues on the Doha Round agenda. This is one area where agreement can not only be reached fairly quickly but possibly implemented outside of the single undertaking. Imagine the boost trade facilitation will give to trade liberalisation. As Professor Simon Evenett, Professor of International Trade and Economic Development at St. Gallen University, pointed out at the WTO Policy Forum in 2007,

One might wonder whether or not the trade facilitation negotiations could have gone ahead on their own given the level of goodwill and consensus that appears to have emerged in that area ... I think we have to accept there are going to be some issues we need to put into a single undertaking because they are difficult and there might be some issues from time to time which could proceed on their own in which case we have to think carefully about how to structure an initiative to do that.<sup>11</sup>

Trade facilitation might be an exception but my point is that unless we are prepared to look at the entire negotiation in a less rigid and more creative

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<sup>11</sup> Available at: <[www.wto.org/english/forums\\_e/debates\\_e/debate10\\_transcript\\_e.doc](http://www.wto.org/english/forums_e/debates_e/debate10_transcript_e.doc)>.

manner, we will remain stuck in the current rut. As Professor Evenett has correctly pointed out, there might be some core issues which will probably have to remain part of the single undertaking that we have all signed up to. But there may be other issues (trade facilitation being one) on which we can possibly make progress without holding hostage the rest of the negotiations.

## **VII. A More Limited Doha Negotiating Agenda**

A related question is whether we have packed too many issues onto the negotiating agenda of the Doha Round. I believe this is the case. I attended my first WTO Ministerial Conference in Doha in November 2001, exactly two months after the September 11 terrorist attacks in New York and Washington, DC. While the tragic events of September 11 galvanised our collective will to launch the Doha Round, the final outcome including the necessary compromises did not come about easily. The meeting went down to the wire with the Ministers agreeing on a negotiating package only hours before the meeting was scheduled to end officially. In the process, many compromises had to be made in order to get the Doha Round launched. This included “over-loading” the agenda so that some if not all the major players had some chips to play with during the subsequent substantive negotiations. Sticking to the traditional agenda — trade in agriculture, goods and services — would have disadvantaged some of them, given their reluctance to liberalise their heavily protected agricultural sector in particular.

In this regard, the inclusion of the four Singapore issues (trade and investment, trade and competition policy, transparency in government procurement and trade facilitation), trade and environment and geographical indications on the Doha Round agenda guaranteed that negotiations would be extremely contentious and difficult. The “decision” at the WTO Ministerial Conference in Cancun to drop three of the four Singapore issues (with the exception of trade facilitation) was a belated acknowledgment of how overloaded the WTO agenda had become. It also reflected the growing realisation that unless we are able to streamline the agenda to focus on the core issues and what is generally considered to be the most important to the vast majority of the WTO membership, we are not going to get anywhere in the negotiations.

I believe much more needs to be done to streamline the Doha Round agenda. It is still overloaded and some of the issues which were added in

Doha and which still remain on the negotiating agenda should be removed if we are serious about making some progress in the Doha Round. In this regard, I was struck by the suggestion of Aaditya Mattoo and Arvind Subramaniam that in order to revive the Doha Round,

a new round of Bretton Woods talks is needed to develop a more ambitious agenda than Doha has and to involve a broader set of institutions than just the World Trade Organisation (WTO).<sup>12</sup>

Their proposal to broaden the agenda to include food prices, biofuel policies, energy, currency valuation, multilateral regulation of sovereign wealth funds (SWFs), the global regulation of finance and climate change, while interesting, will certainly complicate the already difficult multilateral trade negotiations and in all probability knock the final nail into the coffin of the Doha Round. Instead of adding new issues and bringing new institutions into the negotiations, we should be aiming to reduce the already crowded agenda and to complete the Doha Round by a specific deadline.

### **VIII. Bilateral and Plurilateral Versus Multilateral Deals**

With the Doha Round sputtering, more and more countries are turning to bilateral, plurilateral or regional trade deals (or free trade agreements for short) to secure their trade interests as opposed to working through the WTO to conclude a multilateral deal which would encompass all of its 153 members. Following the collapse of the WTO Ministerial Conference in Cancun in 2003, Singapore's then Minister for Trade and Industry George Yeo noted, "Countries will make their own arrangements. FTAs, bilateral or regional, will become more important. And the result will be growing regionalism".<sup>13</sup>

Several economists and trade experts have argued against the proliferation of these regional trade agreements (RTAs) and free trade agreements (FTAs) on the ground that they undermine the cornerstone of the multilateral trading system, which is the most favoured nation (MFN) rule.<sup>14</sup>

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<sup>12</sup> Aaditya Mattoo and Arvind Subramaniam, "From Doha to the Next Bretton Woods: A New Multilateral Trade Agenda", *Foreign Affairs*, January/February 2009.

<sup>13</sup> *Straits Times* interview with Singapore Minister for Trade and Industry George Yeo by Roger Mitton, "FTAs will be the way to go", *Straits Times*, 17 September 2003.

<sup>14</sup> Under the MFN rule, the lowest tariff applicable to one Member should be similarly applied to all other WTO Members; GATT Article I.

However, this is debatable. Under the transparency mechanism (TM) for all FTAs/RTAs, the Committee on Regional Trade Agreements or the Committee on Trade and Development is expected to “consider” all FTAs/RTAs on the basis of a “factual presentation” of the FTAs/RTAs prepared by the WTO Secretariat. While such an examination is unlikely to resolve all doubts about the consistency of the RTA/FTA in question with the relevant provisions of the WTO, it is at the very least a significant step in that direction.

Whatever the case, RTAs and FTAs are here to stay. The trend towards more RTAs and FTAs is probably irreversible. The reason for this is simple. There is a growing realisation that with 153 members in the WTO and with all decisions being taken by consensus, we are unlikely to see much progress in the already complicated and highly technical Doha Round negotiations. Unless the rules of decision-making are changed, progress will be on the basis of the lowest common denominator. All it takes is for one WTO member to raise an objection and bring the negotiations to a halt. This is clearly an unacceptable way of doing business, especially for those countries which are major trading nations and whose livelihood is almost entirely dependent on their trade flows. It is no wonder that the WTO website describes RTAs and FTAs as having “become in recent years a very prominent feature of the Multilateral Trading System (MTS)”. According to the WTO website, up to December 2008, some 421 RTAs — which also encompass FTAs — have been notified to the GATT/WTO.

I expect FTAs and RTAs to assume an even greater role in world trade in the years to come, not only for the reasons mentioned above but also because we are moving into new areas of international trade which go beyond the capacity of the current WTO system. The future of world trade may no longer just be in agriculture or manufactured goods but is likely to be heavily denominated in knowledge products and intellectual property and the trade in services that go with these new areas. Singapore’s Foreign Minister (former Trade Minister) George Yeo has described these emerging new areas of trade as being part of the so-called “weightless economy”. His point, which I agree with, is that for these new areas, a multilateral approach under the auspices of the WTO might not work. Instead we might need to take a plurilateral approach involving countries where these new and emerging areas of trade are concentrated in. In some ways, this approach is not completely alien to the WTO. The negotiations on government procurement have been conducted under the auspices of the WTO but amongst only a subset of WTO members.

Aaditya Mattoo and Arvind Subramaniam, writing in *Foreign Affairs* in January/February 2009, have also alluded to the need to take a new, plural approach in future negotiations by pointing out that,

It may not be necessary, or even desirable, to continue following the model of the Uruguay Round, in which all countries are invited to discuss all issues and are all bound by any resulting rules. With the failure of the Doha Talks, such efforts to create rules that would apply uniformly to an increasingly diverse membership began to seem like dangerous overreaching. Some issues... would be best resolved by that subset of countries which are most directly involved. In some cases, the benefits of the agreements coming out of these limited talks could be extended to all of the WTO's members.<sup>15</sup>

The important thing is to be generous and to extend the benefits of any agreements reached in these new areas of trade to others who are prepared to join in at a later date. That way, some countries can take the lead and move at a fairly rapid pace to reach an agreement but keep the system open for others to join when they are ready to do so.

## **IX. Conclusion**

I know that it will be difficult for many to consider seriously some of the ideas which have been proposed above. But if we are serious about wanting to make some real progress in the Doha negotiations, all of us will have to apply our minds to identifying new ways to break the current logjam. Some might prefer to “wait it out” until the “right moment” comes along for a deal. My sense, after witnessing first-hand and participating in the Doha Round for almost three years since its inception in November 2001, is that we are deluding ourselves if we think that the “right moment” is going to materialise of its own accord anytime in the near future. We will have to work towards creating it. That calls for new thinking or at least thinking out of the box. It cannot be business as usual. Those who have an interest in making progress — the major players in both the developed and developing world as well as the smaller but important trading nations — will have to take the lead and bring about a paradigm shift in our common thinking. Strong leadership is also required in driving a positive global

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<sup>15</sup> Mattoo & Subramaniam, *op. cit.*

trade liberalisation agenda in general. In other words, even as we examine how to “reboot” the Doha Round from a process and technical perspective, it will ultimately require clear political momentum backed by substantive actions to get the ball rolling. Otherwise, we might as well kiss the Doha Round goodbye.



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CHAPTER 6

**DOMESTIC REGULATIONS  
IN SERVICES: A CHAIRMAN'S  
PERSPECTIVE**

*By Peter Govindasamy\**

*“Members maintain the sovereign right to regulate within the parameters of Art VI of the GATS... Members’ regulatory sovereignty is an essential pillar of the progressive liberalisation of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired.”<sup>1</sup>*

*Members’ “right to regulate trade in services formed part of the object and purpose of the GATS”.<sup>2</sup>*

## **I. Introduction**

I was posted twice to the Permanent Mission of Singapore to the United Nations in Geneva: first, as First Secretary between March 1995 and September 1998, and subsequently as Counsellor from February 2005 to February 2008. During both stints, I was assigned to cover the services

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\* The views expressed in this article are the author’s in his personal capacity and should not in any way be attributed to his employer — the Ministry of Trade and Industry, Singapore.

<sup>1</sup> *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Panel Report, WT/DS285/R, para 6.316.

<sup>2</sup> *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Appellate Body Report, WT/DS285/AB/R, paras 235 & 271.

negotiations. One issue — central to the GATT/WTO regime — that has fascinated me is the endeavour by GATT/WTO Members, Panels and the Appellate Body (since 1995) to balance the GATT/WTO's objective of liberalising trade in goods and services against the avoidance of prejudice to the autonomy of WTO Members or their right to regulate in order to achieve legitimate objectives.<sup>3</sup> This is particularly relevant in services — an area which is regulation-intensive.

In June 2005, I was elected to chair the GATS Article VI:4 negotiations conducted under the auspices of the Working Party on Domestic Regulations (WPDR). I was thereafter re-elected to serve four more terms until April 2009. As Chairman, I worked with WTO Members to develop disciplines to meet the following objectives:

- (i) GATS's objective of facilitating trade in services,
- (ii) without unduly restricting Members' right to regulate to meet legitimate objectives,
- (iii) while ensuring the outcome of the negotiations are in keeping with the development dimension of the GATS and the Doha Development Agenda (DDA).

As Article VI:4 is situated within Article VI, I will begin by assessing how the various provisions of Article VI, namely, Articles VI:1, 2, 3 and 6 seek to achieve the balance between the objectives highlighted above. I will then discuss how the current draft disciplines being negotiated pursuant to Article VI:4 also seek to achieve these objectives.

## II. The GATS's Balancing Act

Due to their invisible character, services are rarely affected by border measures. Tariffs and quotas are very hard to uphold in services. In the absence of border measures, services are subject to a range of domestic regulation.<sup>4</sup>

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<sup>3</sup> There are numerous commentaries written on the WTO's attempt to balance trade liberalisation and Members' regulatory autonomy. For discussions relating to the Agreement on Technical Barriers to Trade, please see Michael Ming Du, "Domestic Regulatory Autonomy under the TBT Agreement: From Non-Discrimination to Harmonization", (2007) 6.2 *Chinese Jo Int'l L* 269. Also see Margareta Djordjevic, "Domestic Regulation and Free Trade in Services — A Balancing Act", (2002) 29 *Legal Issues of Economic Integration* 305.

<sup>4</sup> In literal terms, all regulations at the national level affecting trade in services are "domestic regulations".

Effective regulation or re-regulation can often be a pre-condition for liberalisation in order to produce efficiency gains without compromising on the quality of services and other legitimate policy objectives. These include measures to overcome market failures such as monopolies in network-based services, externalities, asymmetric information in knowledge and intermediation-based services, as well as measures to ensure universal and equitable access and consumer protection. But these legitimate objectives may distort competition and have trade-restricting effects. Regulation could also be used for overt or disguised protectionism.

During the Uruguay Round negotiations, GATS negotiators were conscious of the tensions between liberalising trade in services and ensuring Members' regulatory autonomy. The challenge for these negotiators was not to eliminate legitimate regulation, but rather how such regulation could be made less trade burdensome or restrictive. The GATS preamble reveals the negotiators' balancing exercise. On the one hand, the GATS aims to achieve progressively higher levels of liberalisation of trade in services:

*Desiring* the early achievement of progressively higher levels of liberalisation of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives...

On the other hand, the GATS recognises the right of Members to regulate in order to meet "national policy objectives":

*Recognising* the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right...

Jan Wouters and Dominic Coppens have characterised the notion of Members' right to regulate as a confirmation of the international law principle of a State's sovereignty in the conduct of its national policies within its own territory.<sup>5</sup>

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<sup>5</sup> Jan Wouters & Dominic Coppens, "Domestic Regulation within the Framework of GATS", (2006) K.U. Leuven Faculty of Law Working Paper No. 9.

The GATS also seeks to cater to the interests of developing countries. Indeed, the GATS is generally accepted to be the most development friendly among the WTO Agreements.<sup>6</sup> The GATS Preamble describes its development objectives as follows:

*Desiring* to facilitate the increasing participation of developing countries in trade in services and the expansion of their services exports including, inter alia, through the strengthening of their domestic services capacity and its efficiency and competitiveness...

The development dimension has obtained greater currency, including in the Article VI:4 negotiations, with the launch of the Doha Development Agenda, in Doha, Qatar, in November 2001.

### **III. GATS Article VI (Domestic Regulation)**

During the Uruguay Round, services negotiators recognised that market access and national treatment commitments might not be sufficient to facilitate effective access for services and services suppliers in foreign markets. Domestic regulation such as those mandating multiple licensing requirements may be burdensome and have trade restrictive effects, hence frustrating the benefits of services liberalisation. Disciplines on domestic regulation would thus be necessary to ensure that these regulations are not unduly burdensome or trade restrictive. Aaditya Mattoo and Pierre Sauve have aptly characterised disciplines on domestic regulations to be the “third complementary dimension of a three-pronged approach to effective access to services markets”.<sup>7</sup> GATS negotiating history indicates that the negotiators decided to complete the work on market access and national treatment before dealing with domestic regulation.<sup>8</sup> They managed to agree on a set

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<sup>6</sup> OECD, “Special and Differential Treatment Under the GATS”, TD/TC/WP(2005) 24/FINAL, 26 January 2006, 9; Patrick Messerlin, “Enlarging The Vision for Trade Policy Space: Special and Differentiated Treatment and Infant Industry Issues”, (2006) 29 *World Economy* 1404.

<sup>7</sup> Aaditya Mattoo & Pierre Sauve, “Domestic Regulation and Trade in Services: Key Issues”, in A. Mattoo & P. Sauve (eds.), *Domestic Regulation and Services Trade Liberalisation* (Washington/Oxford: World Bank/OUP, 2003), 3.

<sup>8</sup> See GATT, “Note of the Meeting of 10–25 July 1991”, 28 August 1991, MTN.GNS/44.

of legally binding provisions, largely of a procedural nature, in GATS Articles VI:1, 2, 3 and 6. However, having not been able to complete the work on domestic regulation, they agreed on a set of interim disciplines in Article VI:5 (discussed in Section VIII below) and to continue negotiations as part of the unfinished business/built-in agenda of the Uruguay Round.

Even though the domain of Article VI is one of domestic regulation, Article VI:4 mandates negotiations for the development of multilateral disciplines for only the following five domestic regulatory measures, i.e. licensing requirements, licensing procedures, qualification requirements, qualification procedures and technical standards (hereinafter referred to as the DR measures, unless otherwise specified). These disciplines were intended to ensure that domestic regulations are:

- (a) based on objective and transparent criteria such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service; and
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

#### **IV. An Overview of Obligations Arising From GATS Articles VI:1, 2, 3 & 6<sup>9</sup>**

Article VI:1 calls for the “reasonable, objective and impartial” administration of all “measures of general application”. This serves to prevent arbitrary and biased administration of domestic regulations, hence contributing to the consistency and predictability of administrative decisions and practices. Article VI:1 is however subject to the following qualifications:

- It applies only to “measures of general application”, and not measures addressing specific situations.<sup>10</sup>

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<sup>9</sup> This section draws from Panagiotis Delimatsis, “Due Process and ‘Good’ Regulation Embedded in the GATS — Disciplining Regulatory Behaviour in Services through Article VI of the GATS”, (2007) 10 *Jo Int’l Econ L* 13.

<sup>10</sup> *Id.* According to Delimatsis, “measures of general application are measures which apply to an unidentified number of cases. They are typically of an abstract nature. In most legal systems, general laws and regulations fall within this definition. Administrative decisions and decisions of courts or tribunals are therefore generally not covered by Article VI:1”.

- It applies only to the administration of a measure and not to its substantive content.
- It applies only to sectors where commitments have been made.

With a view to preventing arbitrary decision-making in any sector, Article VI:2(a) requires Members to maintain or institute “practicable judicial, arbitral or administrative tribunals or procedures” for the “prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services”. Unlike Article VI:1, Article VI:2 is a general obligation applying to all measures in all sectors irrespective of whether specific commitments have been made for the sectors. Members must thus establish and maintain review procedures for administrative decisions across all sectors.

Article VI:2(a) however contains the following caveats:

- Article VI:2(a) does not stipulate a general obligation to review administrative decisions. Administrative decisions are to be reviewed only at the request of the affected service supplier.
- While the affected service supplier has the right to request review, this could be based on the service supplier meeting certain conditions. For example, the affected service supplier could be required to submit the request in written form, within a certain timeframe, only upon the identification of the contested administrative decision, and to state the grounds for the challenge and provide evidence as to how the services supplier is affected.
- Apart from requiring that the remedy must be “appropriate”, Article VI:2(a) does not specify the type of remedy which must be granted. For example, remedies could take the form of restitution<sup>11</sup> or compensation.<sup>12</sup>
- Article VI:2 does not seem to stipulate specific requirements regarding the institutional structure of the review mechanism. It can therefore be argued that Members can use the mechanism that best suits their administrative or constitutional framework.
- In addition, Article VI:2(b) exempt Members from the requirement in Article VI:2(a) where the establishment of a review mechanism is

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<sup>11</sup> Restitution would entail the removal of the contested measure whenever appropriate.

<sup>12</sup> Compensation may be applicable particularly in a situation where the service supplier suffers economic loss.

“inconsistent with the constitutional structure or the nature of its legal system”.

Article VI:3 then goes on to recognise that burdensome application procedures can frustrate the ability of services suppliers to provide their services. It also recognises that Members may need adequate time to thoroughly process applications. With a view to balancing these competing objectives, Article VI:3 stipulates that:

- Members must, within a reasonable period of time after the submission of an application (which is considered complete under domestic laws and regulations), inform the applicant of the decision concerning the application.
- At the request of the applicant, regulating authorities shall provide, without undue delay, information concerning the status of the application.

These obligations are also limited to sectors where specific commitments have been made.

In recognition of the pervasiveness of regulation in the professional services sector, and to ensure that the value of market access commitments in professional services is not undermined by the lack of verification procedures, Article VI:6 requires Members to provide adequate procedures to verify the competence of foreign professionals. This is however subject to the following qualifications:

- It only applies to professional services sectors where specific commitments have been made.
- Implicit in Article VI:6 is the understanding that regulatory authorities have the right to verify the competence of professional service suppliers because market access is only granted to service suppliers which are sufficiently qualified.

We can now consider the negotiations held pursuant to the mandate in Article VI:4 and the interim disciplines in Article VI:5. But before we proceed further, the reader would have observed that the terms in Article VI:1, 2, 3 and 6 (“reasonable, objective and impartial”, “administrative procedures”, “undue delay”, “adequate procedures” and “reasonable period of time”) are rather broad and general. They are not defined in the GATS. Unless Members undertake to define these terms (which they have not



attempted, to date, to do) the meaning of these terms would be interpreted by Panels and the Appellate Body in the context of GATS disputes, on a *case-by-case* basis, on the facts of each individual situation. In interpreting these terms, Panels and the Appellate Body could be guided by relevant GATT jurisprudence. For example, in interpreting the terms “reasonable, objective and impartial”, Panels and the Appellate Body could draw from rulings on GATT Article X:3.<sup>13</sup>

### **V. Kicking Off the Article VI:4 Mandate: Disciplines on Domestic Regulation in the Accountancy Sector**

Regulation is especially pervasive in the case of professional services. Accordingly, as a first step in implementing the mandate in Article VI:4, at the 1994 Ministerial Meeting in Marrakesh, Ministers adopted the Decision on Professional Services and established the Working Party on Professional Services (WPPS).<sup>14</sup> Following over three years of negotiations between 1995 and 1998, Members agreed on:

- (a) Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector.<sup>15</sup>
- (b) Disciplines on Domestic Regulations in the Accountancy Sector.<sup>16</sup>

While the Guidelines and the Disciplines are applicable only to regulations governing the accountancy sector, the general nature of many of their provisions has the potential for broader application to other professions and to other sectors. A key aspect of the accountancy disciplines is the inclusion of the “necessity test”. It provides that Members ensure that licensing requirements, licensing procedures, qualification requirements, qualification

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<sup>13</sup> *EC — Selected Customs Matters*, Appellate Body Report, WT/DS315/AB/R. See also Panagiotis Delimatsis, “Due Process”, *op. cit.*

<sup>14</sup> WTO, “Decision on Professional Services”, S/L/3, 4 April 1995.

<sup>15</sup> WTO, “Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector”, S/L/38, 27 May 1997. These guidelines do not have legal status. Their objective is to provide guidance for the negotiation of mutual recognition agreements in the accountancy sector.

<sup>16</sup> While Members adopted these disciplines in December 1998, they however decided to suspend their application until the conclusion of the new round of services negotiations which began in 2000.

See WTO, “Decision on Disciplines Relating to the Accountancy Sector”, S/L/63, 15 December 1998.

procedures and technical standards are not “more trade restrictive than necessary to fulfill a legitimate objective”. The accountancy disciplines also include a non-exhaustive, illustrative list of legitimate objectives which includes quality of the service, consumer protection, professional competence and integrity of the profession.

Though included in the accountancy disciplines, the “necessity test” has become a controversial issue in the broader Article VI:4 negotiations. A more detailed assessment of the “necessity test” is contained in Section VIII below. Other provisions are designed to improve the transparency of the regulatory regime, provide due process in the processing of applications and ensure fair, transparent and impartial treatment of license applicants. The accountancy disciplines apply to both natural and legal persons and include, for example, the need to give consideration to least trade-restrictive alternatives to measures affecting the legal reach of firms (i.e. residency requirement for agents for services), and to allow the use of international firm names.<sup>17</sup>

## **VI. GATS Article VI:4 Negotiations**

Having completed the accountancy disciplines, Members embarked on negotiations to develop disciplines on domestic regulations applicable to all sectors. The WPDR was established in April 1999 as a successor to the earlier WPPS.<sup>18</sup> The WPDR has two specific tasks:

- (a) to develop generally applicable disciplines for the five regulatory measures, and
- (b) to develop disciplines, as appropriate, for individual sectors or groups thereof.

The Guidelines and Procedures for the Services Negotiations adopted in 2001<sup>19</sup> drew the link between the negotiations on domestic regulation and GATS Article XIX relating to specific commitments. It mandated that

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<sup>17</sup> For more details on the Accountancy Disciplines, see Claude Trollet & John Hegarty, “Regulatory Reform and Trade Liberalization in Accountancy Services”, in Mattoo & Sauve (eds.), *op. cit.*

<sup>18</sup> WTO, “Decision on Domestic Regulation”, S/L/70, 28 April 1999.

<sup>19</sup> WTO, “Guidelines and Procedures for the Negotiations on Trade in Services”, S/L/93, 29 March 2001.

Members aim to conclude the negotiations on domestic regulation prior to the conclusion of the negotiations on specific commitments. The Doha Development Agenda, adopted by Ministers in November 2001,<sup>20</sup> confirmed the Guidelines and Procedures, hence incorporating the Article VI:4 negotiations into the single undertaking of the Doha Round.

The WPDR spent a number of years in technical and fact-finding mode,<sup>21</sup> until Members began submitting textual proposals in 2003. By the 2005 Hong Kong Ministerial Conference, over 18 textual proposals from a broad cross-section of members and regional groupings had been tabled.<sup>22</sup> I assumed the Chairmanship of the WPDR in June 2005. The run-up to the Hong Kong Ministerial Conference saw an intensification of the Article VI:4 negotiations. At the request of Members, I circulated an “Illustrative List of Elements for Article VI:4 Disciplines”.<sup>23</sup> The Hong Kong Ministerial Declaration states that Article VI:4 negotiations would be guided by these illustrative elements. The Declaration set out specific timeframes for the various negotiating issues of the DDA. For services, further to stipulating a timeframe for the submission of revised market access offers, the Declaration also called on WTO Members to conclude the negotiations on domestic regulation before the end of the “current round of negotiations” and “develop text for adoption” by the end of the DDA.

With a view to fulfilling the Hong Kong mandate, I circulated a consolidation of members’ negotiating proposals in June 2006.<sup>24</sup> Progress on the domestic regulation negotiations was hindered by the general

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<sup>20</sup> WTO, Ministerial Conference, 4th Session, Doha, 9–14 Nov 2001, Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para 15.

<sup>21</sup> Among others, the WPDR spent a considerable amount of time discussing the type of measures to be addressed by future disciplines under Article VI:4. See, for example, WTO, “Examples of Measures to be Addressed by Disciplines under GATS Article VI:4”, Job(02)/20/Rev.10, 22 Sep 2003.

<sup>22</sup> See Attachment II, WTO, “Report of the Chairman of the Working Party on Domestic Regulation to the Special Session of the Council for Trade in Services”, JOB(05)/280, 15 November 2005.

<sup>23</sup> See Attachment I, WTO, “Report of the Chairman of the Working Party on Domestic Regulation to the Special Session of the Council for Trade in Services”, JOB(05)/280, 15 November 2005.

<sup>24</sup> WTO, “Disciplines on Domestic Regulations Pursuant to GATS Article VI:4 Consolidated Working Paper”, JOB (06)/225, 12 July 2006.

suspension of the overall DDA negotiations in July 2006 on account of the impasse on agriculture. With the suspension of the DDA, negotiations on Article VI:4 went into low gear in the second half of 2006. Notwithstanding this, I continued extensive low-key informal technical consultations. As a result of these consultations, I obtained Members' agreement to circulate the first draft of the negotiating text in April 2007.<sup>25</sup> The elements in the draft text broadly represented my estimation of what the general traffic could take in the WPDR. The text was guided by the imperative of finding the right balance in achieving trade liberalisation without unduly hampering Members' right to regulate. Not surprisingly, no Member was pleased with the text. It did not fully meet the demands of any Member.

Since April 2007, Members have had extensive negotiations on this text. At Members' request, I circulated two further revisions in January 2008<sup>26</sup> and March 2009.<sup>27</sup> Guided by comments and drafting suggestions received during the negotiating sessions, I attempted to close gaps and suggest compromises on a number of provisions where I felt progress could be made. The current (March 2009) text (hereinafter referred to as "the March text") is an attempt to cater to the various and often competing interests and concerns of the WTO membership. The March text is certainly not perfect. But from my vantage point as someone who has overseen the negotiating process over the past five years, the text is the best approximation of what the general traffic can take in the WPDR. It attempts a delicate balance between facilitating trade in services while respecting both the Members' right to regulate and the development dimension. The following provisions from the text demonstrates how a balance between these competing objectives has been attempted.

### ***A. Facilitating Trade in Services***

The March text does not seek to discipline the substance of the regulations. The purpose of the disciplines is to reduce and eliminate the trade

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<sup>25</sup> WTO, "Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI:4", Room Document, 18 April 2007.

<sup>26</sup> WTO, "Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI:4", Revision, Room Document, 22 January 2008.

<sup>27</sup> WTO, "Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI:4", Second Revision, Room Document, 20 March 2009.

restrictiveness of domestic regulations. In this connection, the Preamble adds that the “purpose of the disciplines is to facilitate trade in services by ensuring that measures relating to Licensing Requirements, Licensing Procedures, Qualification Requirements, Qualification Procedures and Technical Standards are based on *objective* and *transparent criteria*, such as *competency* and the *ability to supply* the service, and do not constitute *disguised restrictions on trade in services*”. Paragraph 11 of the text adds that “measures relating to Licensing Requirements, Licensing Procedures, Qualification Requirements, Qualification Procedures and Technical Standards shall be *pre-established*, based on *objective* and *transparent criteria* and *relevant* to the supply of the service to which they apply”. The text would subject domestic regulations to the following tests:

- Regulations should be pre-established;
- They should be based on objective criteria;
- They should be based on transparent criteria;
- They should be based on the competency of the service supplier;
- They should be based on the ability of the service supplier;
- They should be relevant to the supply of the service;
- They should not be disguised restrictions to the trade in services.

In addition, licensing procedures and qualification procedures are further subject to a “*simplicity test*”. Paragraphs 17 and 31 of the text states that licensing procedures and qualification procedures shall be as “*simple as possible* and should *not in themselves constitute a restriction* on the supply of services”. It is clear that the all the above-mentioned disciplines would help to *reduce* trade restrictiveness, even if they do not *eliminate* the restrictiveness of domestic regulations. While these disciplines are useful, they are not without interpretational difficulties. For example, what is meant by the requirement that licensing and qualification procedures be “as simple as possible”? Literally, this can be understood to require Members to strive for a minimal level of complexity with regard to these procedures. For example, if requirements could be verified in one or two steps, then a Member should not require five or six steps instead. Moreover, who is to judge whether a particular regulation is “objective”? What is “objective” to one Member may not be so for another Member. Panels and the Appellate Body may be called on to interpret such terms in the context of future disputes.

It should be mentioned in passing that unlike licensing and qualification requirements and procedures, the draft disciplines on technical

standards are few and less onerous. Despite the efforts of two Members, there was a general view that there was not much by way of standards in services and that this issue was not well understood, least of all by the regulators. As such, as Chairman, I decided that Members accept these few disciplines and revisit this issue in the future when there is a better understanding of standards in services.

### ***B. Respecting Members' Right to Regulate***

The text attempts to balance the substantive obligations highlighted above, through the following elements to ensure that Members' right to regulate are not unduly impaired:

- (i) Like the GATS, the text contains language that specifically calls for respect for Members' right to regulate and to introduce new regulations, in order to meet national policy objectives and ensure the provision of universal service.
- (ii) It further states that the disciplines should not be construed to prescribe or impose particular regulatory approaches or particular regulatory provisions in domestic regulations.
- (iii) Unlike GATS Articles VI:4 and VI:5, the text does not have a "necessity test", in response to concerns by a large majority of the Membership that this test would unduly impinge on regulatory autonomy. However, with a view to balancing the opposition of the majority and the insistence of a few in relation to having a "necessity test", the text presents a potential middle-ground test relating to "disguised restrictions to trade in services". More will be said about this in Section VII below.
- (iv) The text applies only in sectors where specific commitments have been undertaken.
- (v) The proposed disciplines do not apply to measures to the extent that they constitute limitations subject to scheduling under Article XVI or XVII.

### ***C. Development Aspects of Disciplines on Domestic Regulation***

The GATS is generally recognised to be the most development friendly among the WTO Agreements. In this connection, and taking into account the development dimension of the GATS, the March text seeks

to achieve the development aspect of the GATS through the following provisions:

- (i) The text recognises the different economic development levels of Members by highlighting:
  - Asymmetries existing with respect to the degree of development of services regulation in different Member economies;
  - The difficulties which may be faced by individual developing Members in implementing the disciplines on domestic regulation, particularly difficulties relating to level of development, size of the economy, and regulatory and institutional capacity; and
  - The difficulties which may be faced by service suppliers, particularly those of developing Members, in complying with measures of other Members.
- (ii) Developing Members are provided with a transition period to apply the disciplines.
- (iii) Further to the transitional time period envisioned for developing Members in (ii), the Council for Trade in Services (CTS) may extend the time period for them to implement these disciplines, upon request by individual Members. In considering the duration of the transition period, the CTS would also consider the particular Member's level of development, the size of its economy, and its regulatory and institutional capacity. This is an innovation over the current practice of the WTO and GATS, which contained fixed transitional timeframes. The WTO Agreements generally contain five-year and eight-year transition periods for developing and least developed Members respectively.
- (iv) There are also provisions relating to technical assistance and capacity building. These provisions require developed countries and, where possible, other Members to provide technical assistance to developing and least developed Members, upon their request and on mutually agreed terms and conditions. Among others, the purpose of these provisions is to develop and strengthen the developing and least developed Members' institutional and regulatory capacities to regulate the supply of services and to implement disciplines contained in the text.
- (v) LDCs are not required to apply these disciplines (they are nonetheless encouraged to apply these disciplines, to the extent compatible

with their special economic situation and their development, trade and financial needs).

## VII. Necessity Test:<sup>28</sup> “Trade Liberaliser” or “Mother of All Interventions”:<sup>29</sup>

The “necessity test” has been the most controversial issue in the Article VI:4 negotiations. Though the “necessity test” appears in a number of WTO Agreements,<sup>30</sup> many Members, both developed and developing, have opposed the inclusion of this test in future disciplines. They were concerned that the presence of the “necessity test” would create regulatory uncertainty, as regulators would not be certain whether a particular domestic regulation intended to achieve a legitimate objective would be deemed to be more restrictive or burdensome than necessary by a future Panel and/or the Appellate Body. This concern has been reinforced by the ruling in *US-Gambling*<sup>31</sup> which, according to a number of commentators, has had the effect of expanding the reach of the GATS; blurring the line between market access and domestic regulation.<sup>32</sup> In short, the “necessity test” could enable Panels or the Appellate Body to second guess and rule

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<sup>28</sup> This section draws from WTO, “‘Necessity Tests’ in the WTO”, Note by the Secretariat, S/WPDR/W/27, 2 December 2003.

<sup>29</sup> “Necessity Test is Mother of GATS Intervention”, *Observer*, 15 April 2001.

<sup>30</sup> The “necessity test” is not peculiar to the Article VI:4 negotiations. It is also found in other WTO Agreements such as the exceptions in GATT Article XX and GATS Article XIV; the Telecoms Annex; Agreement on Sanitary and Phytosanitary Measures, Articles 2.2 & 2.6; Agreement on Trade-Related Intellectual Property Rights, Articles 3.2, 8.1 & 27.2; and Agreement on Government Procurement, Article 23.2.

<sup>31</sup> *US — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Panel Report, WT/DS285/R; *US — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Appellate Body Report, WT/DS285/AB/R.

<sup>32</sup> There are numerous commentaries written on the *US-Gambling* case. See, for example, Pangiotis Delimatsis, “Don’t Gamble with GATS — The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of *US-Gambling Case*”, (2006) 40 *Jo World Trade* 1059; Donald H. Regan, “A Gambling Paradox: Why an Origin-Neutral ‘Zero-Quota’ is not a Quota Under GATS Article XVI”, (2007) 41 *Jo World Trade* 1297; Nancy J. King & Kishani Kalupahana, “Choosing Between Liberalisation and Regulatory Autonomy under GATS: Implications of *US-Gambling for Trade in Cross-Border E-Services*”, (2007) 40 *Vanderbilt Jo Transnat’l L* 1189.



against measures that Members deem necessary to achieve their legitimate objectives.

Other Members are keen to have this test. In their view, such a test would ensure a more trade liberalising outcome. They have argued that this test is already mandated in Article VI:4 and should therefore be included in future disciplines. In addition, such future disciplines should not be approached from the perspective of regulators and the need merely to safeguard their regulatory autonomy. While they accord importance to regulatory concerns, they have also highlighted that the *raison d'être* of the WTO and the GATS is to liberalise trade. As such, future disciplines should facilitate the ability of service suppliers to effectively access and supply services in foreign markets. In addition, a number of Members have highlighted that the inclusion of a “necessity test” in goods agreements such as the Agreements on Technical Barriers to Trade (TBT Agreement) and Sanitary and Phytosanitary Measures (SPS Agreement) had enabled the provisions in these agreements to be couched in more general terms. If the “necessity test” is not included in the future disciplines on domestic regulation, this has to be made up by having more detailed and prescriptive disciplines.

There is substantial jurisprudence on the “necessity test”, which has evolved quite considerably over the past 20 years, which does not help to assuage the concerns of Members who are opposed to this test. In general, when adjudicating whether or not an otherwise WTO-inconsistent (say, GATT-inconsistent) measure can be saved under, for example, Article XX(b), panels must determine whether or not the measure is “necessary” to fulfil the objectives listed under the relevant provision. In GATT disputes during the late 1980s and early 1990s (e.g. *US-Section 337*<sup>33</sup> and *Thailand-Cigarettes*<sup>34</sup>), panels established a requirement that a measure has to be the “least trade restrictive” measure in order to decide whether a measure is “necessary” under GATT Articles XX(b) and (d). For example, in *Thailand-Cigarettes*, the Panel stated that “the import restrictions imposed by Thailand could be considered necessary in terms of Article XX(b) only if there were no alternative measure consistent with GATT, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.

The jurisprudence relating to the necessity test has however evolved over the years from a “least trade restrictive” test to a “less trade restrictive”

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<sup>33</sup> *US — Section 337 of the Tariff Act of 1930*, BISD 36S/345-402, para 5.26.

<sup>34</sup> *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200.

test. For instance, in *Korea-Beef*,<sup>35</sup> the Appellate Body first stated that for a measure to be necessary, the measure does not need to be “indispensable” or “inevitable”. The Appellate Body created a three-factor balancing test to decide whether or not a measure is necessary: (i) the contribution made by the measure to the legitimate objective; (ii) the importance of the common interests or values protected; and (iii) the impact of the measures on trade. The Appellate Body indicated that the process of weighing and balancing were part of a process of determining whether an alternative WTO-consistent or less inconsistent measure was reasonably available. In this connection, the WTO’s jurisprudence also points to the importance of determining the importance of legitimate objectives to be protected. In *EC-Asbestos*,<sup>36</sup> the Appellate Body stated that the preservation of human life and health was both vital and important to the highest degree, hence making it easier to meet the requirements of Article XX(b).

The *Korea-Beef* weighing and balancing test appears to have been further loosened in *Brazil-Tyres*<sup>37</sup> with the articulation of a “material contribution” test. The Appellate Body stated that a trade ban for health or environmental reasons cannot be “by design as trade-restrictive”, nor is the word “necessary” limited to that which is ‘indispensable’. A measure will be sufficiently linked to an objective if it is “apt to make a material contribution to the achievement of its objective”.<sup>38</sup> While the jurisprudence seems to be evolving more in the direction of environmental, health and regulatory considerations, many Members have highlighted that as there is no doctrine of precedent or strict *stare decisis* in the WTO, it should not be taken for granted that jurisprudence will evolve in this direction. Moreover, as highlighted above, the interpretation of Article XVI (market access) in *US-Gambling* has made many Members adopt a more cautious approach in the negotiations. It has made the negotiations more difficult.

To placate and balance the demands of those who have insisted on the deletion of the necessity test and others who want to have this test, I came up

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<sup>35</sup> *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Appellate Body Report, WT/DS/161,169/AB/R, para 160.

<sup>36</sup> *EC — Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report WT/DS/135/AB/R, para 172.

<sup>37</sup> *Brazil — Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report, WT/DS/332/AB/R.

<sup>38</sup> *Brazil — Measures Affecting Imports of Retreaded Tyres*, Appellate Body report, WT/DS/332/AB/R, para 161.

with a middle-ground solution. The text contains a looser test relating to “disguised restrictions to trade in services”.<sup>39</sup> Though this term has been presented as a middle-ground solution, WTO jurisprudence has not, to date, provided full clarity to this term. It raises a number of interpretational issues.

### **VIII. Interim Disciplines on Domestic Regulation in Article VI:5**

Article VI:5 states that until the entry into force of the disciplines developed pursuant to the Article VI:4 negotiations and in sectors in which a Member has undertaken specific commitments, a Member shall not apply domestic regulations that nullify or impair the specific commitments in a manner which:

- (a) does not comply with the criteria in Article VI:4; and
- (b) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

This begs the question: When the Article VI:4 negotiations are concluded, what would happen to Article VI:5? Given the interim nature of this provision, one would expect it to “disappear”. If so, are there any elements in Article VI:5 that Members need to take into account in the Article VI:4 negotiations? Should these elements ultimately find their way into the Article VI:4 disciplines?

As Members have focused on developing disciplines pursuant to the Article VI:4 negotiations, there has not been much discussion on Article VI:5. Nevertheless, there are perhaps three elements in Article VI:5 that Members may need to consider as they continue work on Article VI:4 negotiations. The first element is found in Article VI:5(a)(ii). When read in conjunction with Article V:5(a), Article VI:5(a)(ii) refers to “domestic regulations applied in a manner which could not reasonably have been expected of a Member at the time that the commitments were made”. What this could mean is that Article VI:5(a)(ii) applies only to domestic regulations which are introduced after the time that the specific commitments in those sectors

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<sup>39</sup> WTO, WPDR-Chairman Consultations, “Disguised Restrictions on Trade in Services”, 5 November 2007. See also Timothy M. Reif & Julie Eckert, “Courage You Can’t Understand: How to Achieve the Right Balance Between Shaping and Policing Commerce in Disputes Before the World Trade Organisation”, (2004) 42 *Columbia Jo Transnat’l L* 657.

were made (i.e. new domestic regulations). In other words, a Member is expected to ensure that new domestic regulations that nullify or impair specific commitments shall not be applied in a manner that could not have been reasonably expected of that Member.

As for domestic regulations existing at the time that the specific commitments were made, it is likely that these measures could be considered to be applied in a manner reasonably expected of the Member since they already exist and are in effect. Therefore, Article VI:5(a)(ii) appears to have the effect of “grandfathering”<sup>40</sup> domestic regulations applied in a manner which could have been “reasonably expected” or which existed at the time that the commitments were undertaken.

The second element to be considered is the notion of “nullification or impairment” which is reflected in Article VI:5(a). When examining the notion of “nullification or impairment”, Article 3:8 of the DSU has a bearing on this issue. Article 3:8 states that where a provision of a WTO Agreement is violated, “nullification or impairment” is presumed. Article 3:8 of the DSU thus places the burden of rebutting the existence of “nullification or impairment” on the respondent.

However, under Article VI:5, the burden of proof appears to be on the complainant. The manner in which Article VI:5 is drafted suggests that “nullification or impairment” should first be established or be present before violation can be confirmed. If so, this means that the onus may fall on the complaining party to show the existence of “nullification or impairment”.

## **IX. Conclusion**

The discussion above has demonstrated the balancing act attempted in relation to Articles 1, 2, 3 and 6 discusses the text which has been circulated pursuant to the ongoing negotiations under Article VI:4. While no one is satisfied with everything that is in the text, Members have agreed to use it as a basis for the negotiations. At one level, the general sense is that the text is broadly in the ballpark. My efforts until the time I relinquished the Chairmanship of the WPDR in March 2009 was devoted to fine-tuning the text. The second revision of the text that I circulated in March 2009 was the outcome of this fine-tuning exercise.

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<sup>40</sup> It is qualified that the term “grandfathering” is used in this communication to facilitate an easy understanding of the issue. It is not intended to have any legal connotation.

Whether or not Members will accept the current text in the foreseeable future is dependent on two factors:

- (i) As the Article VI:4 negotiations are now part of the DDA's single undertaking, its outcome is dependent on the outcome of the overall DDA negotiations.
- (ii) While Members have engaged with the text, the onus is on all of them to decide whether the text achieves the objectives of trade liberalisation, right to regulate, and development in a balanced manner.

Besides the contents of future disciplines, Members also have to agree on the legal form that future disciplines should take. As Chairman, I proposed that future disciplines could take the form of an Annex to the GATS. This means that the relevant GATS terms, definitions and provisions would apply automatically to these disciplines. Further to this, also proposed the following for Members' consideration:

- (i) Establishment of a Committee on Domestic Regulation to oversee:
  - (a) the implementation of these disciplines; (b) the operation of Article VI; and (c) any further work (e.g. sectoral disciplines) that Members may decide to undertake under Article VI:4.
- (ii) The Council for Trade in Services shall, upon request from any Member, review the operation of these disciplines and make recommendations as appropriate.

Going forward, as I impressed upon Members, the March text is not only relevant for new commitments that are expected from the DDA negotiations. They are also needed to facilitate effective access with respect to Members' existing commitments. With the conclusion of the DDA proving elusive (at least until 2011), Members should explore applying the March text on an interim basis until the conclusion of the DDA. The experience gained in applying these disciplines could facilitate efforts to further fine-tune the disciplines, as necessary.

To conclude, my WTO stint, particularly the five years that I served as Chairman of the WPDR has been a fascinating learning experience of how the GATT/WTO system has achieved balance between its many competing objectives.

## CHAPTER 7

# FUTURE TRENDS IN INTELLECTUAL PROPERTY AND IMPACT ON TRADE AND DEVELOPMENT

*By Geoffrey Yu*

### **I. Introduction**

One of the questions at the core of the current debates on where technology and innovation would go and how they would shape society and life is the question of the influence of intellectual property (IP) protection on socio-economic development and trade.

For the time being, there is little convergence of views yet. The media have reported extensively on a number of cases which have served as flash-points in the debate on the positive and negative aspects of IP, namely, file-sharing and piracy on the Internet and access to affordable medicines for the seriously sick. As a consequence, many members of the public, especially the younger ones among them, have become participants in the debate, as they feel directly concerned. Engaging the public in this way is welcome, as it promotes a healthy and transparent exchange of views among a larger number of stakeholders, an exchange hitherto confined to a limited circle of government policy-makers, business interests and legal specialists.

In the process, the relationship between IP and development, a new and more obscure issue, is slowly emerging from the shadow and is today increasingly coming to the attention of governments, civil society groups, economists and academics.

Two features mark the current, more open, debates. First, the treatment hitherto of IP rights (IPR) as private rights, as recognised in the

preamble of the TRIPS Agreement, covering private goods and services, is today complemented by the treatment of IPR as covering goods and services as public goods, with the latter's emphasis on the welfare, as opposed to the revenue, output. Second, the basis of the discussions is no longer just conceptual and theoretical, but empirical. IP principles previously accepted as incontrovertible concepts and theory are now starting to be seen as standing or falling on whether they are demonstrable, that is, proven statistically or in practice.

This chapter will begin by focusing on the five factors which elucidate the relationship between IP on the one hand, and trade and development on the other. In this context, development means economic and social progress brought about by a rise in living standards in a country, including meeting various human needs better.

### **A. *The TRIPS Agreement***

The first factor is the conclusion of the World Trade Organisation's (WTO) Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in 1994. One of the Agreement's most significant consequences was to embed the hitherto esoteric subject of IP into the consciousness of trade negotiators everywhere. In doing so, it established a direct link between IP on the one hand, and trade and development on the other.

Indeed, the Agreement regards the development dimension as an integral and indispensable part of the new arrangement, in references scattered throughout the treaty.<sup>1</sup>

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<sup>1</sup> The preambular part of TRIPS recognises “[the] underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives”. It goes on to highlight the special needs of the least developed countries for “maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base”.

In the substantive part of TRIPS, Article 7 provides the following elaboration: “The protection and enforcement of intellectual property rights contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”.

What the articles cited in footnote 1 say, in effect, is that the Agreement rests on the premise that the IPR system contributes to the public good and development objectives, especially of developing countries. At the same time, while IP contributes to technological progress and the acquisition of knowledge, it can also be open to abuse, hence the need to recognise the right of states in ensuring the proper balance of private ownership and public interest. This is especially the case where social and economic welfare, especially health, nutrition and technology transfer, are concerned.

Nevertheless, when the Agreement was concluded, not many people saw how IP rights necessarily led to development, since the references linking the two were a series of assertions without examples. Academics and development economists, including those from the World Bank, who examined the link through studies and surveys could not establish in any conclusive manner the claim that IP protection led unwaveringly to socio-economic progress. Recent studies remain inconclusive, with many sceptics, notably Nobel Prize laureate Professor Joseph Stiglitz of Columbia University leading the call today for review and revision of the TRIPS Agreement.

The link between IPR and trade, which was at the origin of negotiations in the 1980s, is even less explicitly worded in the TRIPS Agreement. One could even say that the negotiators regarded the connection as self-evident

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Article 8 goes further by stating that “Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrict trade or adversely affect the international transfer of technology”.

In this regard, two other provisions in TRIPS are pertinent. Article 66.2 states: “Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base”. Furthermore, Article 67 states: “developed country shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members”.



since they inserted in the name of the Agreement itself the phrase “trade-related aspects”. It could even be argued that the Agreement is not so much about promoting legitimate trade in goods and services protected by IPR as suppressing the illegal trade in goods and services which infringe IPR.<sup>2</sup>

It was therefore not surprising that almost as soon as TRIPS was concluded, there were questions about the relevance of IPR to trade, and a view became quite current, continuing to this day, that the treaty was a trade-off for other gains, such as market access for agricultural or manufactured goods and services. The counterview to this is that, although not explicitly stated, the TRIPS Agreement (and other related international treaties), in ensuring internationally identical or similar standards and practices in obtaining and protecting IPR in countries and thereby creating predictability, certainty and security of rights, foster cross-border trade in goods and services protected as intellectual property.

Some serious students of the TRIPS Agreement regard it as desperately in need of updating, although it continues to be regarded by trade officials as *the* basic global IP treaty. Since its creation, the only significant refinement to it has been that relating to IP and public health (see later in this chapter), but it has been bypassed by later IP treaties concluded in the World Intellectual Property Organisation (WIPO). It was also at WIPO that international discussions on the protection of genetic resources, traditional knowledge and folklore were initiated. However, the question of such updating will not be dealt with here, as it is not the main focus of the chapter.

## **B. WTO-WIPO Cooperation**

The second factor is the cooperative arrangement which was concluded between WTO and WIPO. On the eve of the entry into force of the TRIPS

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<sup>2</sup> The preambular part of the Agreement states: “Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade”.

Articles 3 and 4 refer to two of the tenets of the international trading system: national treatment and most-favoured nation treatment. The rest of the treaty text goes into great technical detail matters relating to requirements and procedures for obtaining intellectual property rights as well as protecting and enforcing those rights.

Agreement on 1 January 1996, the WTO signed a cooperation agreement with WIPO in December 1995. The most significant among the terms of cooperation was WIPO's undertaking to provide to WTO members "...legal-technical assistance relating to the TRIPS Agreement as it makes available to Member States of WIPO which are developing countries...". Although the WTO undertook in turn to do the same, in reality it had little resources or expertise to do so. In July 1998, the two organisations launched a joint initiative to assist developing country Members of the WTO in meeting the 1 January 2000 deadline for implementing the TRIPS Agreement. The widening cooperation was extended further with a new joint initiative in June 2001 under which the two sides agreed to work together to assist least developed country Members of the WTO meet the January 2006 deadline for implementing the TRIPS Agreement.

Although the language was diplomatically couched as between two equal intergovernmental organisations, the bilateral agreement and the subsequent initiatives were *de facto* recognition of the longer history, deeper experience and much larger capacity of WIPO's programme of support for developing countries. In reality, therefore, although the TRIPS Agreement enshrines development concerns, responsibility for giving effect to those concerns has been carried primarily by WIPO.<sup>3</sup>

The cooperation also is implicit recognition by the WTO of a fundamental difference in the substantive work at WIPO. The WTO's TRIPS deals essentially with legal rights and rules and their enforcement, with the TRIPS Council overseeing application and compliance with them. WIPO too deals with rights and rules, but unlike the WTO, it deals also with intellectual property, as opposed to intellectual property rights. In other words, WIPO deals with the entire sequence and socio-economic context in which actual tangible goods and services, that embody the legal rights, are made and used. WIPO's development cooperation programme helps developing (and transition-economy) countries devise policies and strategies, with their accompanying mechanisms, which will encourage innovations and creations and attract inflows of technology and know-how. The objectives

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<sup>3</sup> It is useful here to recall that WIPO as an intergovernmental institution dates back to the 1880s when the world's first international treaty dealing with the protection of industrial property was signed in Paris in 1883 and the second one dealing with the protection of literary and artistic works was signed in 1886. The primary legal principles enshrined in these two treaties, known respectively as the Paris and Berne Conventions, were incorporated into the TRIPS Agreement.

are to support innovative individuals and institutions, help them obtain legal rights and protection of those innovations, to their commercialisation as well as employment and revenue generation. In short, WIPO's aim is precisely to help the countries realise the development advantages, that are asserted in the TRIPS Agreement, of having an effective IPR regime.

It is not difficult to understand why the WTO turned to WIPO for cooperation. The latter's development cooperation programme began in the late 1970s, expanding steadily throughout the 1980s. By the 1990s, when the World Bank and OECD began to also look into IP issues, WIPO was the acknowledged world leader in helping developing countries negotiate the difficult waters of improving the administration of the national IP system, complying with international obligations, creating IP from innovation, extracting commercial gain from that IP and enhancing its value through good management. WIPO is today trying to help developing countries create employment and wealth through appropriate IP strategies as part of national growth plans, while also helping to transform original ideas into business assets.

Some ten years ago, the WTO itself began to provide technical assistance, but it was mostly confined to courses and seminars explaining the provisions of the TRIPS Agreement and the rights and obligations of its Members, as well as the working of the dispute settlement mechanism. By then, WIPO's technical assistance had moved into providing developing countries with tools and skills in negotiating license and franchise agreements, technology-mapping using patent literature. As the 21st century began, new areas of expertise from WIPO covered toolkits for audits of the national IP system, support to governments in mainstreaming IP into national economic and development plans, promotion of public-private sector cooperation, university-industry project development, valuation of IP and documentation of national systems of traditional knowledge and folklore. Specialisation and customisation were the order of the day at WIPO, to cater to the varied needs of individual countries and circumstances, so much so that the countries in transition too looked to the organisation for help. The new palette of specialised skill sets complemented the ongoing needs of some countries for the more traditional forms of support, namely the drafting of legislation, computerisation of IP office procedures and the training of personnel dealing with administrative and enforcement work.

Two dramatic developments at the end of the 20th century ushered in a new age. They injected new urgency and perspectives into the international

IP trends which had hitherto evolved at a placid pace since the late 19th century. In particular, those two factors transformed the dialogue on development from an essentially technical one into a political exchange fraught with emotion, drama and their accompanying rhetoric. Ideology too was injected into the discourse. The first was the grave exposure of large tracts of the population in Africa to the HIV virus and the second was the advent of digital technology and the Internet explosion.

### ***C. Patents and Public Health***

The third factor is the widely publicised controversy over the role of patents in access to affordable medicines or drugs. Nowhere was this issue more crystallised than in the case of drugs to treat the HIV virus. It would be instructive to look briefly at the case of South Africa to understand what the stakes and positions were. By the late 1990s, about 4.2 million people, some 20% of South Africa's adult population, were estimated to be HIV carriers or suffering from AIDs, and about 400,000 were said to have died. At the same time, it was widely agreed that the prices of the patented drugs, which returned patients to the semblance of a normal life, were prohibitively expensive for sufferers in that country and other developing countries. In 1998, therefore, observers were perplexed or astonished, while the growing civil society action movement was outraged, when some 40 pharmaceutical companies, among them the world's largest, challenged the South African government on the enactment in 1997 of its Medicines and Related Substances Control Amendment Act.

The government had been motivated by its desire to allow, under limited conditions, parallel importation of branded drugs and importation of generic versions of those drugs, as prices would be considerably lower. There was also the possibility for the government in the amendment to grant compulsory licences for their manufacture by, notably, companies in Brazil and India. For their part, the companies argued in their challenge that the legislation would create legal uncertainty, accord arbitrary powers to the government, discriminate unfairly against patent owners and that it was unconstitutional. Because Africa, the crucible of poverty, had by far the world's highest numbers of HIV carriers and sufferers, the legal tussle was keenly watched. For more than three years, the issue moved through the courts, culminating in hearings before the South African High Court in March 2001. A month later, the companies dropped their suit, but by then, the image of the multinational pharmaceutical companies, acquired

through long years of goodwill painfully gained, had been seriously eroded.

Collateral damage was inflicted on the TRIPS Agreement, for the action of the companies seemed to make a mockery of the relevant provisions in the Agreement. Was the fact that 20% of the adult population being afflicted by the HIV virus not regarded as a case for “measures necessary to protect public health and nutrition, and to promote the public interest” covered under Article 8 of the TRIPS Agreement? Was this national situation not also a case of “national emergency or other circumstances of extreme urgency” falling within Article 31 where compulsory licences could be granted? Criticism of the lack of “balance” in the Agreement mounted.

The most significant, long-term consequence of this South African case was the impetus given to the rise of socio-political activism targeting the established international IP order. There are three aspects to this consequence.

First, it energised many civil society groups focused on development, health, children, women and poverty eradication which in turn forged collaboration between them and many developing country governments on future IP issues. In pushing their case, civil society groups, however, have oversimplified the issues at stake, such as holding pharmaceutical companies responsible for the deaths of AIDS patients and ignoring the enormous risks and costs involved in drug research and development work. They have often also downplayed or ignored such crucial considerations as the responsibility of national governments for providing healthcare to the people, the absence of adequate basic public health infrastructure (such as hospitals, medical workers), transportation, delivery and dispensation of medicines and the follow-up, the import duties levied by government on foreign drugs as well as local socio-cultural patterns of behaviour.

Second, many developing countries were galvanised to push for clarification, re-examination and even revision of the TRIPS Agreement. One of the eight United Nations Development Goals set in 2000 dealt with combating HIV/AIDS and other diseases (two other goals also deal with health issues of child mortality and maternal health). WTO members adopted in November 2001 the Doha Declaration on the TRIPS Agreement and Public Health in which the trade ministers agreed that the “Agreement does not and should not prevent members from taking measures to protect public health...that (the Agreement) can and should be interpreted and implemented in a manner supportive of WTO members’ right to protect public

health and, in particular, to promote access to medicines for all”.<sup>4</sup> That Declaration was followed up in 2003 and 2005 by decisions by WTO members laying down certain administrative procedures for a system of production of medicines under a compulsory licence for export to countries in need of those medicines.

Third, the activism and politicisation of the international discourse on IP and development led to the multiplication of intergovernmental fora dealing with the subject, far beyond the confines of WIPO and the WTO. Today, not only is the World Health Organisation (WHO) closely involved, but also, among others, the Convention on Biological Diversity, Food and Agriculture Organisation (FAO), United Nations Educational, Scientific and Cultural Organisation (UNESCO), World Bank, International Telecommunications Union (ITU), United Nations Conference on Trade and Development (UNCTAD), World Customs Organisation (WCO), Universal Postal Union (UPU), Organisation for Economic Co-operation and Trade (OECD) and United Nations Framework Convention on Climate Change (UNFCCC). From this development stems a problem which has not yet been seriously addressed, namely, that of coordination of the work which takes place in each body, to avoid conflict and, more importantly, to ensure consistency and coherence in future international norm-setting.

#### **D. *Internet and Digital Technology***

The fourth factor is the transformative character of digital technology and the Internet. For the first time in history, vast amounts of information and knowledge have become available which not only could be accessed easily, but also copied and shared on an unprecedented scale across borders, at negligible marginal or no cost. Or so most people thought, until holders of IP rights over the content (such as music, films, books, visual images, software) held in digital format and circulating on the Internet took strong measures to curb unauthorised access, use, copying and sharing of the content via the Internet and other digital devices.

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<sup>4</sup> This declaration went on to clarify that “each member has the right to grant compulsory licenses” and the grounds for them; that “each member has the right to determine what constitutes a national emergency of other circumstances of extreme urgency”. It also reiterated that the question of parallel importation is entirely a matter of national policy.

In enforcing their legitimate IP rights in the digital environment, the IP rights holders, often referred to as content providers, ran into three formidable obstacles. The first obstacle was the digital culture spawned by the anarchic nature of the Internet, which nurtured the belief that everything found on the Internet was free. The second obstacle was the consequence of the first, namely, that many people felt that Internet content was free, that it was owned by no one and thus belonged to everyone, that everyone had a right to use the content, change it, share it, reproduce it and even to earn revenue from it. The third obstacle was the power which digital technology placed in the hands of the consumer. Consumer electronic companies gave consumers the means by which they could easily access digital and Internet content, to use, share and transform in blithe disregard of the owners and rights holders.

When the latter applied the force of the law which was on their side, they discovered the elusive nature of their targets in the digital world. Various enforcement means were tried, the two most controversial being the suing of identified infringers and the use of digital locking devices on CDs, DVDs and online access to content on the Internet. The ensuing fracas, widely covered by the media, raised hackles and emotions on both sides of the disputes, much like the disputes over the issue of patents and medicines, except that this time, it was copyright ranged on one side and music, films, games, software and publications ranged on the other. Once again, the popular press was often sympathetic to the users, the consumers, seeing them as Davids fighting corporate Goliaths with outmoded business models.

Again, as was the case with the question of patents and public health, civil society activism was aroused over issues such as the right of the public to information, knowledge and culture. To them, limiting or denying access to information and its sharing on the Internet was tantamount to preventing people from improving themselves and their lives. Those groups sometimes conveniently overlooked the fact that what interested many consumers on the Internet was not knowledge, but ephemeral entertainment and distraction.

### ***E. Development Agenda***

The fifth factor is the Development Agenda at WIPO. In adopting this Agenda in September 2007, in the form of 45 recommendations (to be

implemented over time), the 183 member countries of WIPO took a historic step. By doing so, the international IP community formally recognised the wider ramifications of the links between IP and development, taking those links beyond what is covered under the TRIPS Agreement.

It is worth recalling that the origins of the Development Agenda pre-date even the TRIPS Agreement, going back to the 1970s when IP was part of the then intense discussions within the United Nations on a New International Economic Order which was later aborted. In the late 1990s, when the TRIPS Agreement was being implemented, many developing countries felt that the Agreement would not realise developmental benefits for them. This was brought into dramatic relief for them by the imbroglio over medicines to treat HIV infections and the rise of a new Internet culture with its attendant belief that access to information and knowledge was a human right that was in danger of being denied.

The WIPO Development Agenda has five substantive parts.<sup>5</sup> What constitutes a significant new departure in the debate on IP and development is that the Development Agenda has woven together a number of hitherto disparate concerns of developing countries. All the five parts listed above are meant to henceforth inform all international programmes and negotiations on IP, and to constitute their overarching objectives. Notable among the concerns mentioned are the following: taking account of national priorities, capacities and levels of development of developing countries; according special and differential treatment to them; mainstreaming development concerns into future negotiations on international norms and standards; ensuring balance between IP and public interest; using the flexibilities in the TRIPS Agreement; focusing on the protection of folklore, traditional knowledge and genetic resources; containing anti-competitive IP practices; promoting pro-competitive IP practices; enhancing the public domain; and examining new IP models such as open collaborative projects.

How this will flesh out in practice is still the subject of debate among the member countries of WIPO. However, the developing countries behind

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<sup>5</sup> 1. Technical assistance and capacity-building  
2. Norm-setting, flexibilities, public policy and public domain  
3. Technology transfer. Information and communication technologies (ICT) and access to knowledge  
4. Assessment, evaluation and impact studies  
5. Institutional matters including mandate and governance.



this Agenda have been trying to incorporate its substance into the work of other intergovernmental bodies, notably the WTO, WHO and the CBD. It remains to be seen what impact the Agenda will have on IP negotiations in the next two years at the WTO, WIPO and WHO, among others.

In the meantime, governments keen to realise tangible benefits from their IP regime cannot wait. For them, IP and development at the local level means putting in place support structures that will create a whole IP ecosystem with its constituent parts. Doing so involves raising knowledge of IP in the marketplace, helping small and medium enterprises, R&D centres and targeted enterprises and creative individuals to develop and monetise their IP. It also calls for general and specialised IP skills to be inculcated, especially among businessmen, engineers, scientists and artistes, as well as creating a pool of IP skill sets in patent agents, lawyers, licensing executives and music managers. Last but not least, the IP legal framework must be supplemented by appropriate fiscal policies such as tax incentives.

## **II. The Future**

It is almost a cliché today to say that traditional IP concepts and practices are undergoing new and unexpected scrutiny, strains and controversy, due in particular to new pressure points created by digital technology and the Internet, a new culture in the virtual world, the failure of old business models, spiralling health costs, amongst others, and the entry of new actors onto the stage.

Ironically, even as the Development Agenda is hailed at WIPO and elsewhere as a breakthrough for developing countries as well as recognition by developed countries of IP's development dimension, it is in danger of becoming primarily a template for technical assistance. There are two explanations for this. The first is that almost 30 of the 45 recommendations contained in the Agenda deal in whole or in part with supporting developing countries in capacity building or technology, information and knowledge acquisition. The second, more serious, is that the recommendations are silent on or skim over a number of major issues, some of which are being energetically debated mostly in fora outside of WIPO and the WTO.

Those overlooked issues are extensive and important. Some are controversial, while some are urgent, all with long-term global implications. They include, above all, public health and access to affordable medicines;

funding of medical R&D and delivery of the results to treat and prevent diseases most afflicting developing countries; new innovation models for pharmaceutical research and the related reward system for successful medicines; changing consumer behaviour and the related trumping of IP protection in the digital environment by technology change; the evolution of new business models to deal specifically with such enforcement problems; continual extensions of the scope and duration of IP protection; the rising costs of IP protection; overlapping of IP rights and the consequential legal uncertainties; abuse of IP rights; as well as the reshaping of IP concerns to deal with the imperatives of climate change, energy and food security. As stated earlier in this chapter, they are being debated at other intergovernmental organisations, which have thereby emerged as major players on IP matters, especially WHO.

Away from the politicised environment, IP issues are also critically discussed in business, creative and technology circles, as well as among more and more academic and civil society groups. What is encouraging is that participants in the debate are no longer just IP specialists, but include today as full partners people who have different concerns, even divergent views, and therefore bring new perspectives to the IP discourse. The dialogue becomes more complex, even complicated, but there are emerging signs that rhetoric and ideology are ceding to a new pragmatism, a recognition that the views and expectations of all sides need to be accommodated.

At the beginning of this chapter, reference was made to the ground shift in the debate on the benefits of IP for society, from a position of reiterating conceptual and theoretical claims to a position of using studies with empirical data and measurable indices. Traditional arguments are now subjected to scrutiny. For example, policy-makers in government are no longer unquestioningly accepting that stronger IP protection leads automatically to more innovation and greater welfare gains for society or that stronger IP protection is the answer to endemic infringement. This ground shift will gain momentum and is welcome for three reasons. First, it is an acknowledgement that the private and public dimensions, namely, the private gain motive, and welfare contribution as well as cost concern, both deserve equal weight and attention. Second, it is a recognition that developed and developing countries are not adversaries but partners in the effort to refine the international IP regime and render it more responsive to addressing a wider range of preoccupations. Third, the head start and experience which developed countries have enjoyed in

using IPR can be used to help developing countries through the learning curve.

For the momentum to yield concrete results, several requirements need to be met. First, the notion of development should be inclusive, to cover all countries irrespective of developmental status. All countries today require stability and growth, that is, development in its broadest sense of improving the life of people and their socio-economic security. The current economic crisis gripping the world affirms this and should be accepted as the common concern of all. That certain countries are much better off and are in a good position to help others is not at all incompatible with universal acceptance of the fact that development is what everyone wants and works towards.

This step leads to the second requirement, namely, depoliticisation of the current intergovernmental discourse characterised by the “them” versus “us” divide which, in turn, is aggravated by a trust deficit between developed and developing countries. It would be unrealistic to expect elimination of all political content in the discourse, but a significant diminution will greatly facilitate joint efforts to break the current impasse in international discussions in the WTO and WIPO. If this happens, the current deadlock in reaching international consensus on a policy instrument for protecting folklore and traditional knowledge — and possibly genetic resources as well — both so dear to developing countries, would well be over.

The third requirement is for future discussions to be transparent and open, with prior information in the form of surveys, studies and analysis made available in good time to assist participants and negotiators. In the past government representatives often arrived at the table unevenly and unequally prepared. Sometimes, certain facts were left out by one side or the other, despite being relevant. Greater sharing of information and experience, as well as recognition that many problems, e.g. piracy and counterfeiting, are common to both sides of the negotiation will help fill the trust deficit. The process will certainly be aided by the reduction, if not elimination, of ideological positions and rhetoric. Intergovernmental organisations should be empowered more by their member countries to provide developing country negotiators with training and information. Not to allow the secretariats of organisations to do so would lead to heavier reliance by developing countries on non-governmental players for help, a trend already discernable today.

Fourth, the proliferation of intergovernmental fora where IP is discussed requires international coordination through identification of lead

agencies. The evolution of international norms, standards and practices across the range of human affairs deserves proper management and regulation. It is one of the achievements of recent years that governments now accept the relevance of IP in so many spheres, but the existing duplication, overlap and competition has given rise to confusion and inconsistencies. No single UN agency today has an overview of events and progress. Countries should put their collective minds to bringing order to an untidy, occasionally chaotic, situation. WIPO could be a good choice to be entrusted with the task of information coordination while respecting the mandates of the other organisations. This is because IP is at the very heart of WIPO's mandate, unlike the other organisations. The problem of global IP governance must be addressed.

The last requirement is acceptance that it is no longer sufficient to assert that IP is beneficial to developing countries unless this assertion is accompanied by concrete support to help them acquire the capacity to identify, create, use and manage their own IP. Major IP owners in developed countries cannot indefinitely seek to prolong and expand their rights without undermining the delicate balance of rights and obligations inherent in the IP system. As a corollary, no party can in future credibly claim that IPR lies at the root of many economic and social ills. In practice, this means working bilaterally and multilaterally to foster IP-related projects and programmes with measurable outcomes which will generate realisable market value. Help must go beyond training government officials and helping developing countries to draft IP legislation, run functional offices and have enforcement mechanisms. Such help must address the problem that many developing countries, while subscribing to the international IP regime, are unable to derive concrete benefits from IP, whether it is to have a home-based system of innovation which earns income and creates employment, to see an inflow of technology and know-how or to exploit such natural advantages as genetic resources, traditional knowledge and geographical products. To be effective, such help from developed countries and international agencies has to be sustained over multiple years so that businesses are grown.

### **III. Conclusion**

No one today can deny that IP as a creative and business tool enjoys unprecedented success. Yet, it is also a time of much questioning of its fundamental premises, engendered in part by the obvious strains and excesses,

including through abuse of IPR, and the need to adapt century-old precepts and practices to an uncertain business environment. The next ten years therefore will be a crucial period as the international IP community tackles the challenge of adding value to the debate on IP and trade and development at a time when the entire globe is facing an economic meltdown, and the need for effective global economic governance has never been stronger.

Governments must lead the change. To succeed, the debate must move unequivocally to a multidisciplinary approach where legal concerns, having occupied the centre stage for so long, henceforth take full account of relevant economic, technological, social and cultural considerations. At the same time, the profit motive underpinning the business of IP in the marketplace and in international trade has to share its place with the public policy objective. In such circumstances, governments in both developed and developing countries, with all the other actors, can realistically arrive at balanced outcomes acceptable to all.

## **(B) Reflections**

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## CHAPTER 8

# MY EXPERIENCES WITH THE WTO DISPUTE SETTLEMENT SYSTEM

*By Tommy Koh*

### **I. Introduction**

Under the General Agreement on Tariffs and Trade (GATT), the dispute settlement process was based upon the concept of conciliation. Therefore, a party whose trade practices had been challenged could block the establishment of a dispute panel. It could also block the adoption of an adverse panel report.

#### **A. *From Voluntary to Mandatory***

One of the enduring achievements of the Uruguay Round is the adoption of a mandatory system of dispute settlement. In 1995, in Marrakesh, the WTO adopted the Dispute Settlement Understanding on Rules and Procedures Governing the Settlement of Disputes, known by the acronym DSU. The DSU is administered by the Dispute Settlement Body (DSB) consisting of all WTO members.

#### **B. *Dispute Settlement Body***

The DSB is the sole WTO body with authority to establish panels to adopt their reports and those of the Appellate Body, to maintain surveillance of the implementation of the rulings and recommendations it adopts, and to



authorise the suspension of concessions or other obligations under WTO agreements if its rulings or recommendations are not acted on by members in a timely fashion.

### **C. 1996 WTO Ministerial Meeting**

I had never served at the GATT or the WTO. My involvement with the WTO happened accidentally. In 1996, the WTO held its first Ministerial Meeting in Singapore. I was a member of the Singapore delegation led by our then Minister for Trade and Industry, Mr. Yeo Cheow Tong. My job was to help the Minister in chairing the various negotiations and meetings.<sup>1</sup> As a result, I got to know the then WTO Director-General, Dr. Renato Ruggiero, and other members of the WTO Secretariat as well as the members of some of the delegations. I could not have foreseen, in 1996, that in the following four years, I would be called upon to serve on three dispute panels, twice as chairman.

### **D. How the System Works**

If a member of the WTO has a trade dispute with another member, the former could make a formal request to the latter for consultations concerning the subject of the dispute. If the consultations do not succeed in resolving the dispute, the complaining member can request the DSB for the establishment of a panel to examine the dispute. A panel normally consists of three persons, none of whom should be a national of the complaining or responding members or of a third party which has intervened in the proceedings before the panel.<sup>2</sup> The panellists serve in their individual capacity. One of the three panellists would be chosen as chairman. The panellists are usually chosen by the WTO Secretariat, with the consent of the parties. If either party disagrees with the proposed composition of the panel, it could, within 20 days of its establishment, ask the WTO Director-General to name the panel. Sometimes, the parties take the initiative to propose to the Secretariat the composition of a panel.

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<sup>1</sup> I have said something about this meeting elsewhere — Tommy Koh, *The Quest for World Order* (Singapore: IPS/Times: 1998), 120–126.

<sup>2</sup> This rule precluding national panellists does not however apply to persons serving on the Appellate Body.

Once a panel has been composed, the panel would be informed of the identity of the person from the WTO Secretariat who would serve as the panel's secretary. This person is usually from the division of the WTO Secretariat most relevant to the subject of the dispute, e.g. agriculture or rules. The panel would also be served by a lawyer from the Legal Division. The team therefore usually consists of the three panellists and the two Secretariat officials. The gang of five would work very closely on the dispute for the ensuing six to nine months.

The first order of business is for the panel to discuss its terms of reference, settle the working procedures, timelines, dates for the two substantive meetings with the parties, date of the meeting with third parties, etc. The panel would usually request one of its members to hold an organisational meeting with the parties in Geneva to settle these procedural matters.

The panel would then study the written presentations submitted by the parties. The presentations, together with their annexes and exhibits, could be quite voluminous. The panel would then meet in Geneva and hold the first substantive meeting with the parties. The panel would hold a special session with the third parties. If there are preliminary applications, the panel would arrange to hear them first and then decide whether to dispose of them immediately or defer its decisions on them.

The parties would submit their second written presentations to the panel. After studying them, the panel would hold the second substantive meeting with the parties. I will have something more to say about how the second panel, which I chaired, changed the format of the second meeting in order to extract more value from it.

Following the second substantive meeting, the panel, with the help of the Secretariat, would begin drafting its interim report. The report is in two parts. The first part is factual and descriptive and is subject to the amendments of the parties. The second part of the report is substantive. The panel would issue its interim report to the parties and request their comments. The panel would take their comments into account before issuing its final report.

After receiving the final report of the panel, a party could request the panel to hold a meeting to review its report. In the two cases which I chaired, no such meeting was requested. However, in both cases, the unsuccessful party appealed to the Appellate Body. We waited anxiously for several months before we heard the good news that the Appellate Body had upheld our decisions. The whole process, from the beginning to the end,

could take about a year. The time taken by the dispute panel is about six months.

## **II. The First Dispute Panel**

### **A. US — *The Cuban Liberty and Democratic Solidarity Act or Helms-Burton Act***

On 17 February 1997, I received a telephone call from the WTO's Director-General, Dr. Renato Ruggiero. He informed me that the European Commission (EC) had brought a complaint against the United States, on the extraterritorial effect of the Helms-Burton Act, which imposed sanctions against Cuba. The EC requested the WTO to establish a dispute panel to which the US was opposed. The DSB had agreed to establish such a panel on 20 November 1996. The two sides had been unable to agree on the composition of the panel. The EC had requested the Director-General to name the panel. Dr. Ruggiero informed me that Mr. Arthur Dunkel of Switzerland (former Director-General of GATT) had agreed to chair the panel and Mr. Edward (Ted) Woodfield of New Zealand had agreed to be a panellist. Dr. Ruggiero would like me to be the third panellist. He wanted my reply by 20 February as he intended to announce the composition of the panel on that day. Because of the importance of the panel and its possible impact on Singapore's relations with the US, I told Dr. Ruggiero that I had to obtain the permission of my government. I was given approval to accept the appointment by Dr. Ruggiero's deadline.

### **B. *Helms-Burton Act***

Cuba had shot down two planes piloted by Cuban-Americans. This caused great anger in the US Congress. In retaliation, the US Congress enacted the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act, also known as the Helms-Burton Act. The Act aimed at deterring non-US persons and companies from doing business with Cuba. The Act provided, *inter alia*, for any US citizen with more than US\$50,000 worth of expropriated property in Cuba to sue, in US courts, any foreign company or person which bought, leased or profited from these properties. The law also directs the US Administration to deny visas

to and exclude from the US such persons and corporate officers and controlling shareholders of those companies, along with their spouses and minor children.

### ***C. EC Requested US for Consultations***

The Helms-Burton Act attracted protests from many US allies and friends. The EC alleged that the Cuban Democracy Act and the Helms-Burton Act contained six objectionable measures. The EC therefore requested the US for consultations pursuant to the DSU, GATT and the General Agreement on Trade in Services (GATS).<sup>3</sup>

Consultations were held on 4 June, 2 July and 23 September. The consultations were, however, not successful in resolving the dispute between the two parties.

### ***D. EC Requested Establishment of Panel***

On 3 October 1996, the EC requested the DSB to establish a panel. The EC requested the panel to find that eight of the US measures were inconsistent with its obligations under the GATT, WTO and GATS.

The DSB agreed to establish such a panel on 20 November 1996. As the two parties could not agree on the composition of the panel, the EC requested the Director-General to name the panel.

### ***E. EC and US Reactions to Panel***

On 20 February 1997, Dr. Ruggiero met with the representatives of the EC and the US to inform them of the composition of the panel. The EC representative said that it was a very good panel. The US representative kept silent.

On the same day, the US announced in Washington, DC, that it would boycott the panel on the ground that it lacked jurisdiction.

Also, on the same day, the EC's Commissioner for Trade, Sir Leon Brittan, issued a statement in Brussels stating that the EC would continue to negotiate with the US in spite of the establishment of the panel.

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<sup>3</sup> Request for Consultations, *US — The Cuban Liberty and Democratic Solidarity Act (Helms-Burton Act)*, WT/DS38/1, 13 May 1996.

### **F. Panel's Teleconference**

The panel had a teleconference on 27 February 1997. We agreed on the following:

- (a) that the establishment of the panel was exerting pressure on the two parties to reach a settlement;
- (b) that the panel would send its proposed timetable to the parties;
- (c) that we would give the parties three months to settle the dispute;
- (d) that we did not know whether the US would invoke the defence of national security (GATT Article XXI) and requested the Secretariat to undertake research on the topic; and
- (e) to hold the first meeting with the parties on 12 May 1997 and the second meeting on 16 June 1997.

### **G. Communication to EC, US and Third Parties**

On 27 February 1997, Chairman Dunkel wrote to the EC and US, conveying our proposed time-table and working procedures.

On 3 March 1997, the EC replied, accepting the Panel's proposals. The US did not respond.

On 12 March 1997, the panel wrote to the third parties (Japan, Thailand, Malaysia, Canada and Mexico), informing them of the proposed timetable and affording them with an opportunity to be heard on 13 May 1997 at 10.00 a.m.

### **H. EC Requests Delay and Suspension**

On 14 April 1997, the EC requested the panel for a one-week extension for the filing of its first written submission to 21 April 1997. The panel agreed.

On 21 April 1997, the EC requested the panel to suspend its proceedings pursuant to Article 12.12 of the DSU in order to allow the parties to bring their negotiations to a successful conclusion. The EC, however, reserved its right to resume the panel's suspended proceedings within the next 12 months. The panel acceded to the EC's request on 21 April 1997.

### **I. US-EU Understanding on Helms-Burton**

On 18 April 1997, a Washington-based publication, *Inside US Trade*, published the text of the US-EU Understanding on the Helms-Burton Act

(Vol. 15, No. 16). This text was never officially communicated by the two parties to the panel or to the WTO.

### **J. *Panel Lapsed on 21 April 1998***

The panel's proceedings were suspended on 21 April 1997. It could remain in suspension for 12 months. Thus, at midnight, on 21 April 1998, the authority of the panel lapsed and it ceased to exist.

### **K. *Thanks from Ruggiero and Dunkel***

On 5 May 1998, Dr. Ruggiero wrote to thank me for serving on "this very controversial and sensitive panel". On 19 June 1998, Mr. Arthur Dunkel wrote to say that the "Dispute Settlement Body was taken seriously by both parties, and I believe that it has helped to enforce the multilateral trading system".

### **L. *Concluding Thoughts***

As this was my first experience of serving on a dispute panel, I treated it as a learning experience. What did I learn? I learnt the rules and procedures of the WTO dispute settlement system, especially the DSU and DSB. I learnt how a panel works with the Secretariat, the parties, the third parties, etc. I learnt from Mr. Dunkel the role and responsibility of the chairman of the panel. I came to know and admire the two members of the Secretariat who were assigned to assist the panel: Ms. Gabrielle Marceau and Mr. Joost Pauwelyn. I took comfort in the fact that although our panel was suspended, its very existence had imposed tremendous pressure on the two parties to negotiate in good faith and to arrive at an amicable compromise.

## **III. The Second Dispute Panel**

### **A. *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products***

On 28 July 1998, I received a fax from Mr. Paul Shanahan, Counsellor of the WTO's Division on Agriculture and Commodities. The fax recalled that on 25 March 1998, the DSB had established a panel to examine the complaints brought by New Zealand and the US against Canada. The WTO

Secretariat, in consultation with the three parties, was in the process of establishing the panel and wanted to know whether I was willing to be a member. Permission was given for me to accept the appointment.

### ***B. Background***

The US and New Zealand alleged that Canada was providing subsidies, in particular, export subsidies, on dairy products through its national and provincial pricing arrangements for milk and other dairy products. Specifically, the two complaining countries alleged that Canada had established and maintained a system of special milk classes through which it maintained high domestic prices, promoted import substitution and provided export subsidies for dairy products going into world markets. They alleged that the Canadian measures were inconsistent with the GATT (1994), the Agreement on Agriculture, the Agreement on Subsidies and Countervailing Measures and the Agreement on Import Licensing Procedures.

### ***C. Consultations***

The US and New Zealand requested Canada for consultations pursuant to Article 4 of the DSU. Consultations were held between the US and Canada on 19 November 1997 and between New Zealand and Canada on 28 January 1998. The consultations were not successful in resolving the dispute.

### ***D. Requests for Panel***

Following the failure of consultations, the US requested the DSB for a panel on 2 February 1998. New Zealand did likewise on 12 March 1998. The DSB acceded to the two requests on 25 March 1998 and merged the two panels into one.

### ***E. Composition of Panel***

On 12 August 1998, I received another fax from Mr. Paul Shanahan confirming that I had been selected by the three parties to serve on the panel and to be its chairman. I was also informed that my two colleagues on the panel were Professor Ernst-Ulrich Petersmann of Germany and Mr. Guillermo Aguilar Alvarez of Mexico. Professor Petersmann was

formerly with the WTO Secretariat and, after his retirement, was teaching in Geneva. Mr. Aguilar Alvarez was a lawyer in private practice and a member of the Mexican delegation which negotiated the North American Free Trade Agreement (NAFTA).

#### ***F. Secretariat***

Mr. Shanahan served the panel as its secretary. We were also assisted by a lawyer from the Legal Division, Mr. Joost Pauwelyn. Both of them did a splendid job. The other members of the Secretariat who helped us with the case were: Mr. Jeffrey Gertler, Mr. Erik Wijkstrom and Mr. William Davey.

#### ***G. Organisational Meeting***

The panel accepted the Secretariat's proposed timetable for the work of the panel and its working procedures. Professor Petersmann chaired an organisational meeting with the parties on 18 August 1998. The parties accepted the panel's proposed timetable and working procedures.

#### ***H. First Substantive Meeting***

The first substantive meeting was held on 19 and 20 October 1998. On the first day, the panel heard oral presentations by the US, New Zealand and Canada. On the second morning, the panel heard the presentations of the two third parties, namely, Australia and Japan. In the afternoon of the second day, the panel allowed the three parties to pose questions to each other. The panel also posed questions to the three parties.

#### ***I. Second Substantive Meeting***

The second substantive meeting with the parties was held on 17 and 18 November 1998. On the first day, we heard the rebuttal submissions by the three parties. On the second afternoon, we heard the concluding statements of the parties.

#### ***J. Interim Report***

The interim report was divided into two parts: the first part was descriptive and the second substantive. The panellists and the Secretariat met in



Geneva in October and November to brainstorm on the issues presented by the case and the panel's findings on each of the issues. The process was interactive. Following the discussions, the panel would request the Secretariat to put up drafts which would then be commented upon by the panellists. The drafts would be amended until all the panellists were satisfied with them.

On 5 February 1999, the interim report of the panel was conveyed to the parties.

### **K. *Final Report***

Comments on the interim report by the parties were carefully considered by the panel and the Secretariat. The Secretariat sent the panel a memorandum on the comments received, discussed their merit and proposed how the panel should respond to them in its final report. Following the exchange of many emails, the panel and the Secretariat agreed on the content of the final report.

In its final report,<sup>4</sup> the panel found that Canada was in violation of its obligations under the Agreement on Agriculture, specifically Article 9.1(a) and 9.1(c) and, in the alternative, Article 10.1.

Canada did not ask the panel for a review meeting but appealed to the Appellate Body.

### **L. *Upheld by Appellate Body***

On 13 October 1999, seven months after the panel's final report, the Appellate Body upheld the panel's finding that Canada was providing subsidies, in violation of Article 9.1(c) of the Agreement on Agriculture.<sup>5</sup>

### **M. *Significance of this Case***

The legal significance of this case was that it was the first case which involved the substantive provisions of the Agreement on Agriculture relating to

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<sup>4</sup> Report of the Panel, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, 17 May 1999.

<sup>5</sup> Report of the Appellate Body, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, 13 October 1999.

export subsidies. The Appellate Body upheld the panel's finding that the provision of milk to processors/exporters, although not financed directly with government funds, was, nevertheless, "financed by virtue of governmental action", within the meaning of Article 9.1(c) of the said Agreement.

#### **IV. The Third Dispute Panel**

##### **A. *US — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia***

On 24 February 2000, I received a fax from Mr. Jan Woznowski, Director of the Rules Division of the WTO. He informed me that Australia, New Zealand and the US had nominated me to chair a dispute panel to examine a dispute between Australia and New Zealand, as complainants, and the US, as respondent. The issue was whether the US had violated its obligations under the WTO's Safeguards Agreement. I was given permission to accept the appointment.

##### **B. *Background***

For over 50 years, the sheep industry in the US had been on the decline. The downsizing of the industry was accelerated by the phasing out, in 1996, of US subsidies to sheep farmers. The US alleged that in 1997 and 1998, there was an unexpected surge of imports of lamb meat from Australia and New Zealand. The US alleged that because of the progress of technology, it became possible for Australia and New Zealand to export fresh and chilled lamb meat instead of frozen meat to the US. As a result, there was direct competition between the imports and domestically produced lamb meat. The US contended that its domestic industry was faced with the threat of serious injury from the increased imports. The US imposed safeguard measures to protect its domestic industry for a period of three years, by a combination of tariff and quota, and by providing the industry with a grant of US\$100 million in order to bring about adjustment and to regain competitiveness. Australia and New Zealand complained that the US had acted in violation of the Safeguards Agreement and GATT (1994).

### **C. Consultations**

On 16 July 1999, New Zealand requested the US for consultations pursuant to Article 4 of the DSU and Article 14 of the Agreement on Safeguards. Consultations were held on 26 August 1999 but they failed to resolve the dispute.

On 23 July 1999, Australia requested the US for consultations. Consultations were held on 26 August 1999 but they also failed to resolve the dispute.

### **D. Panel**

On 14 October 1999, New Zealand requested the DSB to establish a panel to examine the dispute. On the same date, Australia made a similar request.

At its meeting on 19 November 1999, the DSB agreed to establish a single panel to deal with the two disputes.

On 21 March 2000, the three parties agreed to compose the panel with me, as chairman, and with Professor Meinhard Hilf of Germany and Mr. Shishir Priyadarshi of India as the other two panellists. Professor Meinhard Hilf was a professor of law at Hamburg University. Mr. Shishir Priyadarshi was an Indian diplomat and Counsellor in the Permanent Mission of India to the WTO.

### **E. Secretariat**

Ms. Clarisse Morgan of the Rules Division served as the able secretary to the panel. Mr. Werner Zdouc, a lawyer from the Legal Division, was also assigned to assist the panel. The five of us worked very hard and harmoniously.

### **F. Organisational Meeting**

Mr. Shishir Priyadarshi chaired the organisational meeting with the parties on 28 March 2000. The meeting adopted the timetable and the working procedures.

### **G. First Substantive Meeting**

The panel held the first substantive meeting with the parties on 25 and 26 May 2000.

On the morning of 25 May, the panel first heard two preliminary applications from the US and one from Australia. The first preliminary application by the US was for a ruling on the alleged insufficiency of the panel requests of Australia and New Zealand. The second preliminary application was for a ruling on exclusion of the US Safeguards Statute from the panel's terms of reference. The panel rejected both applications.

Australia requested the panel to make a preliminary ruling on the disclosure by the US of confidential information excluded from the US International Trade Commission's (USITC) report and information covering the process after the USITC had reported to the President. The panel declined to make such a ruling.

After disposing of the three preliminary applications, the panel heard the oral presentations of the three parties.

On the morning of 26 May, the panel allowed the parties to respond to each other's presentations made on the first day and to pose questions to each other. The panel posed eight questions to the US and six questions to Australia and New Zealand.

The panel also held a session to hear the three third parties: Canada, the EC and Iceland. Although Japan had intervened as a third party, it did not submit a written or oral statement to the panel.

## **H. *Second Substantive Hearing***

The second substantive hearing was held on 26 and 27 July 2000. On the first day, the US, Australia and New Zealand made very long statements. The panel felt dissatisfied as no new value had been added. It therefore decided to change the format for the second day.

On the second day, and with no prior notice, the panel informed the parties that it was grappling with four clusters of issues and would like to hear the parties' views on them. The four issues were:

- (a) Was the surge in imports foreseeable?
- (b) What was the definition of the term "industry"?
- (c) What was the proof of serious injury?
- (d) Was the remedy imposed by the US President consistent with the WTO Agreement on Safeguards?

The change of format produced the intended result. We got the three parties away from reading scripted statements. We got them to think on their feet, to engage each other and to focus on the issues.

### **I. *Interim Report***

The descriptive part of the interim report was prepared by Ms. Clarisse Morgan. The panel reviewed and approved it. It was conveyed to the parties for their comments and amendments.

The substantive part of the interim report was more carefully considered by the panel. A conference call was held on 10 October 2000 to go over a draft of the interim report.

The interim report was issued to the parties on 2 November 2000.

### **J. *Final Report***

The panel took the comments of the parties into account in preparing its final report. In its final report, the panel held, *inter alia*:

- (a) that the US had acted inconsistently with Article XIX:1(a) of the GATT (1994) by failing to demonstrate as a matter of fact the existence of “unforeseen developments”;
- (b) that the US had acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because the USITC failed to obtain data in respect of producers representing a major proportion of the total domestic production by the domestic industry as defined in the investigation; and
- (c) that the US had acted inconsistently with Article 4.2(b) of the Agreement on Safeguards because the USITC’s determination in the lamb meat investigation in respect of causation did not demonstrate the required causal link between increased imports and threats of serious injury. Because of the above violations of Article 4, the US had also acted inconsistently with Article 2.1 of the Agreement on Safeguards.

The final report of the panel was issued on 6 December 2000, and circulated on 21 December 2000.<sup>6</sup>

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<sup>6</sup> Report of the Panel, *US — Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, 21 December 2000.

### **K. Appellate Body**

The US appealed to the Appellate Body. On 1 May 2001, the Appellate Body upheld the panel's findings on most points in its report (AB-2001-1).<sup>7</sup> This was a huge relief coming five months after our report.

### **V. Concluding Reflections**

Based upon my three experiences, I have formed several reflections.

First, I believe that the WTO dispute settlement system is an admirable one. It is mandatory and not voluntary. No member of the WTO, no matter how powerful, can block the establishment of a panel or the adoption of a panel's report. The system is speedy, low-cost and fair. In practice, the Appellate Body ensures that a consistent jurisprudence is being followed by the different panels.

Second, I have formed a very favourable view of the quality, dedication and productivity of the WTO's small Secretariat. The personnel assigned to assist the three panels of which I was a member were uniformly excellent.

Third, the WTO is very fortunate to be able to find so many well qualified "volunteers" to serve as panellists. Each assignment is extremely intense and takes about six to nine months. The panellists are not paid for their contributions. They do it because they believe in the WTO, in the rule of law and in the peaceful settlement of disputes between States.

Fourth, in the case of the two panels which I had the good fortune to chair, I was very pleased that although the panellists had never worked together before, they worked well as a team. I was also very happy to see the symbiotic relationship which developed between the panellists and the Secretariat officials assigned to work with us.

I wish I had more time so that I could assist the WTO by serving on other panels. On three subsequent occasions, I had to reluctantly turn down the WTO's requests and recommended three able colleagues, Ambassador Vanu Gopala Menon, Ambassador K. Kesavapany and Mr. S. Tiwari.

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<sup>7</sup> Report of the Appellate Body, *US — Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, 1 May 2001.

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## CHAPTER 9

# THE WTO MINISTERIAL CONFERENCE IN SINGAPORE

*By K. Kesavapany*

### **I. Deriving Security from Globalisation**

Singapore has benefited crucially from open trade. Its place in the global order based on open trade, an order whose origins lie in the Bretton Woods system, has reflected the erosion of the Keynesian peace in the 1970s; the arrival of monetarism in the 1980s; shifts towards protectionism in the developed world; and the ascendancy of neo-liberalism since the end of the Cold War, particularly in the form of the Washington Consensus which is now coming under attack from left-liberal activists and the poor in the Third World.

However, the fundamental ideas and institutions that underpinned efforts to create a lasting peace after World War II continue to be a source of Singapore's security. In his book, *Singapore's Foreign Policy: The Search for Regional Order*, Amitav Acharya underscores the point that "the global economy is the foundation of [Singapore's] national security".<sup>1</sup>

The post-War search for production bases by multinational companies offered states the opportunity to attract both investment from these multinationals and, as Acharya puts it, "the security umbrella of their parent states". Singapore's economic policies have been geared both to securing "protection from friendly external powers as well as to induce moderation on the part of neighbours with whom it has sensitive security relations".<sup>2</sup>

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<sup>1</sup> Amitav Acharya, *Singapore's Foreign Policy: The Search for Regional Order* (Singapore: World Scientific, 2008), 33.

<sup>2</sup> *Id.*, 35.



Prospects for the Republic's integration into the global economy, which grow brighter with the increasing spread and depth of globalisation, underline Singapore's indebtedness to a global economic order based on free trade.

## **II. Singapore Offers to Host the First WTO Ministerial Conference**

This was why Singapore decided to offer itself as the venue of the World Trade Organisation's (WTO) first Ministerial Conference in 1996. I was elected Chairman of the first WTO General Council in January 1994. In that capacity, I proposed, after receiving the endorsement of our Government, the holding of the first Ministerial Meeting in Singapore. The proposal was received warmly by the entire membership. This was a reflection of both Singapore's standing in the world of trade and our Geneva Mission's stature as a leading player in the GATT/WTO. The latter was due to the contributions made by my predecessors, including Ambassador Chew Tai Soo, Ambassador See Chak Mun and their respective teams of officers. My WTO colleagues congratulated me personally on Singapore's offer to host the first Ministerial Meeting.

## **III. The United States Objects**

When it appeared that everything was set for the holding of the Ministerial Meeting in December 1996, an extraneous event cast a long shadow on it. This was the Michael Fay incident, in which an American teenager, following due process of law, was given the mandatory punishment of caning for vandalism. Despite pleas by the United States Government against the sentence of caning, Singapore stuck to its guns. This action by the Singapore authorities inflamed the Clinton Administration and the then US Trade Representative Mickey Kantor in particular. For reasons not clearly known, Mr. Kantor took the Singapore action personally and declared that the WTO Ministerial Meeting in Singapore would be held "over his dead body". The other WTO members were aghast at this stand taken by Mr. Kantor. It was not in keeping with both the letter and the spirit of the WTO, which was against extraneous issues being brought in to cloud its work. Except for the European delegation, the other WTO members were wholly in favour of the move to hold the first meeting in Singapore. The European Commission's stance was explained by the fact that Sir Leon

Brittan, who was then the European Union's Commissioner for Trade, allowed his personal friendship with Mr. Kantor to weigh in. Sir Leon made the compromise suggestion that the first Ministerial Conference be held at the WTO Headquarters in Geneva and the second be held in Singapore. I declined the suggestion. Fortunately, the Permanent Representatives to the WTO of both the United States and the European Union were sympathetic to Singapore's position. While they could not go against instructions from their capitals openly, they disclosed to me their private unease. In fact, the head of the US delegation in Geneva, Ambassador Booth Gardner, told me that he had personally gone to Mr. Kantor's office on three occasions to get him to reverse his decision. Mr. Kantor would have none of it and threw him out of the office.

On account of this impasse, members of my team at Geneva Mission — a team consisting of Tan Yee Woan, Ng Bee Kim, Siva Somasundram, Peter Govindasamy, Rossman Ithnain and me — had to work the ground to secure the commitment of the rest of the delegations in Geneva. It was an arduous task lobbying the entire membership but it had to be done as under the WTO's decision-making process, the matter had to be decided by consensus. Apart from meeting individual delegations, we also met the African, Latin American and Nordic groups. Having secured the affirmation of all these countries, I went to see Ambassador Booth Gardner and informed him that I would be tabling a proposal on the matter at the last meeting of the General Council for that year. By that time, Booth and I had become good friends. He told me to go ahead and table the proposal and he would look the other way. This is in fact what occurred and the motion was passed. The proposal was accepted, with only the United States not indicating its preference one way or the other.

#### **IV. Work Begins**

With the issue of the venue put to rest, work began earnestly on the preparation of the meeting. A preparatory committee was set up under the chairmanship of WTO Director-General, Renato Ruggiero. An agenda evolved gradually over many meetings. However, a divide soon appeared between the developing and the developed countries, basically on account of a difference in views over how the WTO should move forward in its work. The developed countries — namely, the European Communities — wanted to add to the agenda the additional items of investment, competition policy, labour standards and trade facilitation. The European

Communities felt that the WTO should respond to the needs of the times, particularly that of the global economic community. The developing countries, on the other hand, were of the view that they had not got much out of the Uruguay Round. They insisted therefore that whatever had been agreed upon in that Round should be implemented first before the WTO moved on to an enlarged agenda. They were also concerned that the developing country delegations did not have the capacity and resources to understand the ramifications of the issues that the European Communities wanted to be placed on the WTO agenda. There was particular resistance to the issue of labour standards being hoisted on to the agenda. This division of views persisted right until the arrival of the delegations in Singapore.

Meanwhile, work on the logistics for the meeting had begun in Singapore with the setting up of an Inter-Ministerial Committee. The proposed location for the Ministerial Meeting was Suntec City. However, it was only starting to be built. On one of my trips to Singapore for consultations, I met the management of Suntec City, who asked for an assurance that the meeting would be held in Singapore. In turn, I asked for an assurance that Suntec City would be completed by the time of the meeting. As it turned out, both assurances were met.

The other major issue that the Inter-Ministerial Committee had to tackle was the place to be accorded to non-governmental organisations (NGOs) at the meeting. Since it was the first meeting of its kind, and having observed the street demonstrations that had occurred at other international gatherings, Singapore civil servants were uneasy with having to cope with large numbers of NGOs. Among the many suggestions was one to put the NGOs in Johor Bahru so as to create logistical problems for them. I opposed this move on the ground that, in my experience, NGOs responded positively if they were treated well and given a fair hearing. Ambassador Tommy Koh, who was also not happy with the idea of keeping the NGOs away, supported my view. In the end, this particular problem was solved by the NGOs being housed in a hotel in Victoria Street, a kilometre away from the meeting's venue. Apart from briefings by WTO officials, the NGOs were given access to delegations. Tommy, well-liked and respected by the NGO community, personally briefed them. The outcome was a very friendly encounter with the NGOs as far as Singapore, the host country was concerned. This positive interaction was to serve as the template for future international meetings held in Singapore, including the World Bank/IMF meetings in September 2006. NGOs came to recognise that they would be

given a fair shake and could get their work done if they observed the laws of Singapore.

## **V. Lack of Progress Over the Substantive Issues**

Meanwhile, the Singapore working group was getting alarmed over the lack of progress on the substantive issues in Geneva. Our Mission was encouraged to work 110% and deliver an agreed upon draft declaration. The then Permanent Secretary, Ministry of Trade and Industry, Mr. Khaw Boon Wan, and the then CEO, Trade Development Board, Mr. Barry Desker, made periodic visits to Geneva to take soundings and push the process. In spite of all these efforts, the goal of delivering an agreed upon draft agreement proved to be elusive. The lines drawn by the developing countries, led by India, Egypt, Pakistan and Kenya, and the developed countries were so deep that there was no text to be tabled when the delegations arrived in Singapore.

Over the three or four days of the Ministerial Meeting, delegations sought very hard to bridge the differences. However, the two sides were hell-bent on maintaining their positions. While basic agreement was reached on some of the issues such as textiles, there was absolutely no give on the four issues (investment, competition, procurement and trade facilitation) which, although proposed by the EU, came to be known as the “Singapore issues”.

## **VI. Breakthrough**

The clock was ticking and the deadline for the conclusion of the meeting was drawing close. Fearing that no agreement would be reached, the Singapore team proceeded to draw up a scenario to manage the failure of the meeting. However, Malaysia, in the person of Trade Minister Rafidah Aziz, came to the rescue in a most unexpected way. At the penultimate meeting of the Conference Committee, chaired by then Minister for Trade and Industry, Mr. Yeo Cheow Tong, Rafidah remarked that there was no harm in discussing the “Singapore issues” provided there was no firm commitment that these issues would be placed on the WTO trade agenda for negotiations. Rafidah’s statement took the entire participating delegations by surprise since Malaysia was perceived to be in the camp of the developing countries that opposed the enlargement of the trade agenda in the WTO. However, the opening provided by Rafidah was seized upon quickly

and a Ministerial Declaration was agreed upon. Looking back, it is sobering to think that if not for this unexpected development, the first WTO Ministerial Meeting would well have ended in failure. The Egyptian, Pakistani and Indian delegations were particularly distressed by Malaysia's breaking of ranks.

## **VII. The Singapore Ministerial Declaration**

The Singapore Ministerial Declaration, adopted on 13 December 1996, noted that the Ministers had met to further strengthen the WTO as a forum for negotiations, the continuing liberalisation of trade within a rule-based system, and the multilateral review and assessment of trade policies. In particular, there was a need to assess the implementation of commitments under the WTO Agreements and decisions; review ongoing negotiations; examine developments in world trade; and address the challenges of an evolving world economy. Envisaging a world where trade would flow freely, the Declaration renewed WTO members' commitment to a fair, equitable and more open rule-based system; the progressive liberalisation and elimination of tariff and non-tariff barriers to trade in goods; the progressive liberalisation of trade in services; the rejection of all forms of protectionism; the elimination of discriminatory treatment in international trade relations; the integration of developing and least developed countries and economies in transition into the multilateral system; and the maximum possible level of transparency.<sup>3</sup>

The agenda was nothing but ambitious, but that was natural. In his closing speech, Conference Chairman Minister Yeo Cheow Tong said that the conference had broken new ground:

The Conference has provided a strong political message underlining opportunities in the new global economy while not ignoring the challenges that our economies face... The message this Conference has sent is one of confidence in the multilateral trading system as it approaches its fiftieth anniversary in 1998 and in its ability to promote growth and guarantee stability.

On that point, it is noteworthy that, with regard to existing WTO provisions on matters related to investment and competition policy, the ministers

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<sup>3</sup> See [http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/wtodec\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm).

meeting in Singapore agreed to establish a working group to examine the relationship between trade and investment; and a working group to study issues raised by members relating to the interaction between trade and competition policy (i.e. in order to identify any areas that may merit further consideration in the WTO framework).

### **VIII. The Doha Development Round Today**

However, the so-called “Singapore issues” tabled at the Ministerial Meeting continue to plague the work of the WTO in Geneva. Successive ministerial meetings have failed to bridge the gap. The perennial issue of agriculture also continues to be a stumbling block. On account of these insurmountable issues, the Doha Development Round, which began in 2001, continues to be a “work in progress”. There is also an attitudinal change among the WTO members, with developing countries asserting themselves and making their voices heard, while developed countries, insisting that fresh ground should be broken in the trade agenda, are clinging on to protectionist positions on issues like agriculture, textiles and bananas.

### **IX. Conclusion**

Whatever the future holds for the WTO, the decision by the membership to hold the first Ministerial Conference in Singapore was an early recognition of the shift in economic and geopolitical gravity to Asia. This has been borne out largely by China’s and India’s increasing influence in the WTO and the global economy in general.

For Singapore, the Ministerial Conference served as an opportunity to reiterate its commitment to freer trade and open markets. This commitment was made permanent by our offer of the logo used for the conference to the WTO Secretariat. It has since become the WTO’s official logo.

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**PART TWO**

**ESSAYS AND REFLECTIONS ON  
FREE TRADE AGREEMENTS**



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## **(A) Essays**

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## CHAPTER 10

# AN INTUITIVE GUIDE TO THE SERVICES CHAPTER OF THE UNITED STATES-SINGAPORE FREE TRADE AGREEMENT

*By Ong Ye Kung*

### **I. The Mystique of the USSFTA**

When the Institute of Policy Studies approached me to write a chapter on the United States-Singapore Free Trade Agreement (USSFTA), the institute had in mind a narration of the negotiation process — like a war story. But I decided instead to write a technical article, on how the USSFTA has affected government policies on trade in services. The disciplines affecting trade in services straddle a few chapters — namely Government Procurement (which includes procurement of services), Competition, Cross-Border Trade in Services and their voluminous Annexes.

I decided on this theme because of various misperceptions and myths that I have encountered over the years, since the conclusion of the USSFTA. I will relate two instances.

First, some years back, in a high-level discussion, a government agency presented its plan to engage a fund manager. The officer briefed the meeting that it had wanted to engage only one fund manager, but it could not do so because it was constrained by the USSFTA. I was puzzled and asked why. The officer said the advice given to him was that the USSFTA disallowed monopolies, and engaging a fund manager would be tantamount to setting up a monopoly.

I explained to the officer that fund management is a highly liberalised sector in Singapore. There were many players from many countries and there was no monopoly. A government agency wishing to engage the services of a fund manager would observe the disciplines of government

procurement, not trade in services. Under the Government Procurement Chapter, we should have transparent and objective criteria to evaluate the tenderers, but it would be entirely up to us to decide how many service providers we wanted to engage. I did not say this, but in fact there is a clause in the USSFTA that specifically allows the set up of monopolies.

Second, in a casual discussion with civil service colleagues, I heard them arguing vehemently that government agencies could no longer divest companies 100% owned by the agency to Temasek Holdings because that was not allowed under the USSFTA. I could not understand how my colleagues had arrived at this conclusion. Temasek Holdings is also 100% owned by the Government of Singapore. Transferring the company's ownership to Temasek Holdings would not change the fact that the company remains 100% government-owned. The "divestment" was in fact an internal exercise for the Government to adjust the way it held its fully owned assets. It would not affect the commercial interests of our FTA partners to justify any dispute settlement actions.

The right advice would have been: the Government can choose to fully own whichever company it wishes. But whether a company is fully owned directly by a government agency or through Temasek Holdings, they have to observe the disciplines of the Competition Chapter of the USSFTA, which are to operate based on commercial considerations, and not become extended arms of the Government and operate based on governmental policy directions.

What we have committed not to do under the USSFTA is to divest a government-owned company to a selected privately owned company, without a proper and objective selection process. A case in point is the divestment of the then Post Office Savings Bank (POSB), which was 100% government-owned, to the Development Bank of Singapore (DBS), which was a listed company and partially owned by the private sector. If the USSFTA had been in force then, there could be an argument from our FTA partners that their companies were denied competing for the acquisition of POSB, and that DBS's competitive position had been strengthened at their companies' detriment.

These two instances reflect a lack of basic understanding of the USSFTA and how it relates to the real workings of the economy and the commercial world. Many government officers and lawyers hold the perception that our hands are severely tied by the USSFTA. This chapter will attempt to demystify the USSFTA, and explain the basic disciplines on

trade in services, and how the fundamental levers and tenets to develop and grow our economy are protected and clarified under the USSFTA.

## **II. The USSFTA: Basic Commitments**

As a start, it is useful to remind ourselves that an FTA is a set of rules for the Governments of the Parties to the agreement to observe. It does not apply to actions of private sector players. If a Party breaks those rules, the other Party can initiate a dispute settlement process, whereby facts will be established, evidence presented, hearings conducted and compensation awarded, if appropriate.

This is where the USSFTA contains its most powerful provision, which few people have understood. And that is the provision for investor-state dispute. Under the USSFTA, dispute settlement is not confined to disputes between Governments. A private investor in one Party can file a dispute against the Government of the other Party, and claim compensation for losses arising from government actions that breach the disciplines of the FTA. We should be worrying about breaching the provisions of the USSFTA, not just because we want to abide by the rules, but because of the consequences of investor-state dispute and the compensation that may be involved.

What are the circumstances that may lead to dispute settlement? For the layman, it is useful to remember that in the area of trade in services and investments, dispute settlement can arise if parties fail to observe two basic disciplines:

- (a) Market access: This means keeping your markets open, and not shutting out foreign investments and competitors. For example, there are many countries that disallow foreign investments in telecommunications, power utilities or banking.
- (b) National treatment: This means after market access is allowed, the party treats foreign and local competitors equally. It will not discriminate against the foreign competitor on the basis of its nationality. For example, it will be against the national treatment discipline if a Government imposes strict regulatory standards on a foreign investor, but lax standards on a local player. National treatment means a fair referee.

### III. The Negative List

In an FTA, market access and national treatment disciplines can be expressed in two ways. First, the positive list system. Parties list exhaustively all the sectors and activities which they are prepared to observe — market access, national treatment, or both disciplines. For sectors not listed, the Party can implement any economic policy it wishes to without the risk of a dispute.

Second is the negative list system. This means that at the outset, parties agree to observe market access and national treatment disciplines for all sectors and activities, then list exhaustively “carve-outs” or “reservations”, where they can be excused from observing the disciplines without the risk of dispute settlement.

The USSFTA was the first FTA Singapore negotiated that was based on the negative list system. (However, the USSFTA was not the first FTA concluded on the basis of the negative list system. That honour belongs to the Singapore-Australia FTA.) This partly explains why there is a lot more apprehension towards the USSFTA. In Singapore we do U-turns when there are U-turn signs (a positive list principle), instead of doing U-turns wherever we can unless there is a no U-turn sign (a negative list principle). Having said that, while the negative list approach is bolder, it is the older and more traditional system. It was the architecture adopted for the North American FTA (NAFTA), which predates the conclusion of the positive list system of the Uruguay Round.

The reservations for the Services Chapter are laid out in two Annexes — A and B. Annex A restrictions are reservations on specific measures and policies. An Annex A reservation will enable a Party to continue a specific practice, such as stipulating that a foreign company must have a local office even though it is selling its services across the border. And once a measure is listed in Annex A it cannot become more restrictive — it can only become more liberal over time. Annex B reservations are bigger sectoral reservations, giving a Party a free hand to implement all policies and measures within a particular sector or area of activity. Annex A is akin to precision bombing, while Annex B is closer to a nuclear bomb.

The key to a good negative list is whether negotiators know comprehensively all the policies and measures that may breach the disciplines of the FTA governing trade in services. To prepare for this, the services negotiating team went around every ministry and every major statutory board, to explain the disciplines of the FTA and request inputs for the reservations.

Our advice to ministry officials was to be as exhaustive as possible. Ministry officials participated actively, and many gave their personal inputs. The team then ploughed through the hundreds of reservations, weeding out some and combining others, to form a respectable and streamlined set of reservations. One which we removed was a reservation on space travel, which the team felt was unlikely that Singapore would need. Nevertheless we appreciated the enthusiasm of the officer who provided it.

Our reservations fall broadly into three categories:

- (a) Grandfathering of existing measures: These are policies and measures that are already in place, are inconsistent with market access and national treatment, but which we want to continue with. These were listed in Annex A;
- (b) Sensitive sectors: Every country has their sensitive sectors — maritime and textiles in the US, agriculture in Japan, arts and culture in Canada. Singapore too has its sensitive sectors, though significantly fewer than most other countries. In these sectors, industry policies may also take into account security, social or law and order considerations, and not only commercial and economic considerations. We reserve them to provide for future flexibility. These were mostly in Annex B; and
- (c) Preserving government levers: FTAs are not meant to curtail governments' ability to undertake widely accepted governance functions, such as taxation, acquisition of land and property for public purposes, defence and security, and so on. The necessity of reserving these functions is an issue of debate, but most FTAs do so for clarity and peace of mind to the Parties. In the case of the USSFTA, the negotiating team went beyond these normal governance functions, to also reserve policy levers which we feel Singapore will continue to need. These can be found throughout the Agreement.

The rest of the article will go through each of these categories of reservations.

#### **IV. Grandfathering of Existing Measures**

The stocktaking of existing measures was a relatively straightforward exercise. Once ministry officials understood the disciplines of the USSFTA, the reservations came in promptly. A large number was to reserve our local presence requirements, such as the need to appoint a local manager when



foreigners register a business in Singapore; the need to incorporate a company to manage property development projects, provide information services or register a co-operative or a trade union; the need to fulfil residence requirements to practise as contact lens practitioners or testers of plants and animals; local registration requirements in order to practise in professions such as medicine, pharmacy, architecture, land surveying, patent law, engineering and auditing; and local presence requirements to apply for import and export permits or distribute medical and health-related products. These measures are needed for prudential and regulatory reasons which our FTA partners quite readily accepted.

In addition, we reserved Singapore Post as the sole provider of postage services; Sentosa Development Corporation as the sole and overall developer of Sentosa Island; PowerGas as the sole distributor of manufactured natural and piped gas; PowerGrid as the sole operator of the power transmission and distribution network; PSA Corporation and Jurong Port as the two providers of cargo handling services; Singapore Airport Terminal Services and Changi International Airport Services as the two providers of ground handling services at airports. Ground handling services were later liberalised and more providers introduced. As the US did not have any commercial interest in these areas at the point of negotiations, these reservations were not controversial.

There were some measures that favoured Singaporeans and hence would have violated the national treatment discipline. For example, only Singaporeans could be employed as security guards; only citizens and permanent residents could be registered as seamen; and only Singaporeans could own landed or low-rise residential property and benefit from Government Asset Enhancement Schemes. These reservations were not controversial.

We also reserved practices such as where the Government held a controlling share in Singapore Technologies Engineering; the policy to limit the number of healthcare professionals such as doctors and pharmacists to moderate healthcare costs; restrictions on financial institutions in Singapore providing credit facilities to foreign financial entities; and ownership restrictions in relation to certain companies. Where these areas did not represent the commercial interests of US companies, such reservations were quickly settled.

The one reservation which took several discussions was the Control of Manufacture Act. This was enacted in the early stages of Singapore's industrial development. As my colleagues from the Economic

Development Board explained, the Government at that time decided against having certain industries and their support services in Singapore. This was done to protect local industries or to limit the production of undesirable products, such as cigarettes, in Singapore. The US was concerned with the reservation as the Act enabled the Singapore Government to extend the list of controlled industries in future. In the end, we made a commitment not to extend the list of controlled industries, but reserved manufacturing activities already listed in the Act, namely for beer and stout, cigars, drawn steel products, chewing gum, cigarettes and matches.

To me, this was purely a legal exercise, to reflect our existing legislation in the FTA. I do not think any of these are growth industries given our industry and cost structures.

## **V. Sensitive Sectors**

Beyond grandfathering existing measures and policies inconsistent with FTA disciplines, the team consulted and brainstormed over the sectors which would remain sensitive to Singapore in years to come, and hence needed broader sectoral reservations. We read speeches, reports, interviews with political leaders, to gain insights into the key concerns of our leaders and economic policy levers which the Singapore Government would need to chart our economic future in an increasingly globalised and competitive environment. As a senior Permanent Secretary said to us, “Preparing a negative list requires a view of Singapore’s future”.

Most countries used sectoral reservations to protect their sensitive sectors. However, for Singapore, most of these were not done for protectionist reasons. Instead, we took into account two key considerations, which are discussed below.

### **A. *Social, Security and Other Non-Economic Considerations***

The first consideration is whether economics is the dominant one for the sector. In various sectors, such as armed guard services, public transport or supply of potable water, security and social considerations can override economic considerations. It does not mean that economic and other considerations are necessarily incompatible. Often, the Government leverages on the market and commercial disciplines to achieve social or other non-economic objectives.

For example, in public transport, an overriding consideration is that all Singaporeans, even if they live along sparsely populated corridors, must be served by public transport. Universal service is therefore a key consideration in providing a public transport service. At the point of writing, the Government has decided to introduce more competition into the market by allowing more bus companies, including foreign ones, to compete for the operation of bus routes bundled with profitable and non-profitable services. However, such liberalisation measures are often experimental in nature. If the market does not respond, or responds in a way that undermines other non-economic considerations, we will have to refine or adjust the policies. It is therefore more prudent to reserve these sectors, to give ourselves flexibility for adjustments and encourage experimentation.

Another good example is gambling. At the point of negotiations, there was no ministry in charge of gambling, and so a reservation on the industry did not surface in the consultation exercise. Nonetheless, the team felt that gambling would have ill effects on society which would remain a future concern, and hence decided to reserve the entire sector. As it turned out, in 2005, the Government decided to introduce the Integrated Resorts, and set up the Casino Regulatory Authority under the Ministry of Home Affairs to oversee the sector. Various safeguards were put in place to minimise problem gambling, and the Government restricted the number of Integrated Resorts to two. The sectoral reservation on gambling had given Singapore peace of mind as it developed these measures.

## **B. *We Have a Different View***

A second consideration in placing a sectoral reservation was whether our view of the industry or activity was significantly different from the US or other countries. One good example is the media industry. Many countries hold the view there should be unfettered competition in the media industry, which they regard as a sign of healthy democracy. However, looking around the world, this approach often produces a mudslinging media scene, populated with fabricated and sensational reports with little credibility. Citizens around the world may well prefer and enjoy this, because media is part of entertainment.

The Singapore Government takes a different view. Media is no doubt for entertainment, and there is practically free Internet access, and all kinds of international programmes and decent publications are found in Singapore. Nonetheless, when it comes to the local media, we believe that

it first and foremost plays a constructive nation-building role and helps forge consensus amongst our people to take Singapore forward. It does not mean that the media must agree with the Government all the time, but it will probe, question, present alternatives, so that the final consensus is a stronger and better one and represents the view of the broad mainstream. To do so, we will need credible local media players which have a strong stake in Singapore, which will present issues objectively and critically before Singaporeans, and not generate controversy for the sake of selling newspapers or programmes.

Another example is legal services. The US has a thriving legal industry where battling it out in the courts is a normal course of settling disagreements. In Singapore, legal services are valued, but not to the extent of making us more litigious as a society. In addition, we have an overriding need to develop our core group of top lawyers who understand Singapore and our circumstances to assume critical positions on the judiciary bench. Hence, even as Singapore liberalises its legal sector, litigation in court is still reserved for Singapore lawyers.

The purpose of the media or lawyers in societies is not the subject of this article, but it is fair to say that Singapore's view differs from the politically correct and conventional view around large parts of the world. This makes a reservation of the media and broadcasting industry necessary, to ensure that our different views are respected and recognised. Other countries will have different views for other sectors, which we will respect.

### ***C. A Different World***

In the end, we reserved a handful of sectors under Annex B of the negative list. These include seaport, airport, gambling, public transport, broadcasting and media, social services, armed guards, legal services, national education, supply of potable water, hazardous waste management, freight forwarding and warehousing.

Since we are on the subject of having a view of the future when negotiating FTAs, it is useful to test the robustness of what we agreed to seven years after the accession of the USSFTA.

The world is now a very different place compared to seven years ago. Years of excesses, aggravation of global consumption and savings imbalances had culminated in the biggest global downturn since the Great Depression. The American economic growth model of free markets and unfettered competition has lost favour around the world, as governments

advocate a more socialistic and interventionist economic model. As unemployment numbers shot up, so did protectionist sentiments. As financial institutions were weakened, governments stepped in to buffer them with much needed capital, partially nationalising them in the process. At the point of writing, the US Government owns around 80% of AIG and 40% of CitiGroup.

This turn of events reminds me of the long meetings we had during the negotiations of the Competition Chapter of the USSFTA. My American counterparts wanted Singapore to agree to language committing Singapore to ensure that our government-owned companies would operate solely based on commercial considerations, as opposed to other considerations that could be political or nationalistic. I agreed to the language, but countered that this would have to be an obligation on both Parties, to which my American friends replied that this was a non-issue for them, because the American economy was run based on free, private enterprises, and eschewed the model of state-owned enterprises.

My American counterparts did not foresee the future that unfolded. But who could? With large chunks of equity owned by the Government, funded through taxpayers' money, companies like AIG, CitiGroup and General Motors are now under the close scrutiny of the Treasury Department and Congress. At the same time, the Administration is careful not to let share ownership translate into management influence that could undermine the commercial independence of these companies. US Trade Representative lawyers may well be flipping through their FTAs to make sure they are not breaching the Competition Chapter disciplines.

In the case of Singapore, our negotiators felt that government-owned companies would continue to be an inescapable feature of the Singapore economy. It is not a policy choice, but a reality for Singapore. In our early years of nationhood the Government built up many capabilities, several of which became commercially viable activities. So these operations were incorporated, and the Government progressively divested them at a pace which the market could absorb, and which ensured that there was a significant shareholder that would watch over the proper running of the company. And as the Government continues to convert government operations into commercial activities and enlarge the domain of the private sector, we will continue to see new government-owned enterprises emerging.

But while government ownership of companies is a reality in Singapore, the Singapore Government has always held the view that these

cannot become extended arms of the Government. For these companies to be well-run and competitive regionally and globally, they must be run on a commercial basis, no different from other privately owned companies. Protection will only distort and weaken them.

In other words, the Singapore negotiating team did not take an ideological view that the Government cannot own enterprises. Instead, we took a robust and practical position that government ownership of companies is a reality in Singapore, but these companies must be run on a commercial basis in order to be competitive and viable. We instituted this longstanding approach as a discipline in the USSFTA.

## **VI. Government Levers**

Beyond sensitive sectors, we need to cater to governmental measures and activities that are not sector-specific. For example, government functions such as defence are clearly out of the scope of all FTAs, while economic functions such as taxation are clearly preserved under the general provisions of our FTAs. Property and land acquisition is also a well-recognised function and right of governments under all FTAs under the Investment Chapter. What FTAs seek to achieve is to ensure that there is proper compensation to private property owners in the event of an acquisition.

With a clear understanding of the negative list template, the team was quite assured that most government policy levers needed to manage our economy for the future were not affected by the USSFTA. The challenge for the team was to foresee, identify and reserve other government functions that were not already provided for under the negative list template, but which meet the peculiar needs of Singapore. We identified three, which are described below.

### **A. *Investment Incentives***

First, to preserve our flexibility to offer economic and tax incentives to attract investments and create jobs for Singaporeans. This will continue to be a critical function of the Government, as our slew of economic agencies, ranging from the Economic Development Board, the Media Development Authority, the Infocomm Development Authority and the Singapore Tourism Board, go out to the world to attract foreign investments into various sectors. It is rather ironical that we had to worry about preserving a measure that arguably favours foreign investments over local investments.

To clarify, there are already World Trade Organisation rules on investment incentives, which require incentives to be generally available to foreign investors and which we have assessed our policies to be consistent with. Under the USSFTA, our ability to implement investment incentives is better protected, as it is stated in the main text of the Services Chapter that the Chapter does not apply to “subsidies and grants...including government-supported loans, guarantees and insurance”.

The “subsidy” clause highlighted a contradiction, as on the one hand there is a national treatment discipline under which a Party undertakes not to discriminate against foreign suppliers of services, while on the other hand the subsidy clause stated that it is alright to discriminate using subsidies and grants. I am not aware of any dispute settlement jurisprudence that clarifies this contradiction, but the economy of words of the subsidy clause has provided comfort to all Parties of FTAs to continue to carry out necessary government measures to compete for investments, which must surely strengthen global trade and investments.

## **B. *Land Use***

The Urban Redevelopment Authority’s role to plan and optimise the use of land is a function quite unique to Singapore as a city-state. We need to cater to the land use needs for housing, industries, offices, sports, natural reserves, seaports, airports, hospitals, incinerators, water catchment and treatment, power stations, schools, tourist attractions, parks, training grounds for defence, all within 700 square kilometres of land. Hong Kong, which is a small and cosmopolitan economy, still has a vast amount of land in the New Territories and need not cater to land uses that Singapore as a sovereign country will need to. Looking around the world, Singapore probably faces the greatest challenge in terms of optimising land use.

The negotiating team foresaw that land use planning would inevitably lead to market access restrictions, especially in services that involve significant infrastructure that takes up land. Singapore will not have sufficient coastline to support multiple transshipment seaports, even assuming that the market is large enough, nor are we able to cater to an unlimited number of power generation plants, even though the market has been liberalised.

The discussion over the land use reservation was not controversial, as everyone could see the unique circumstances Singapore is in, and that we are clearly different from the US. It was indicated in the reservation

that land use planning is not aimed at, but may result in, market access restrictions.

### ***C. Devolution of Government Functions***

The last lever we reserved was on government devolution. On the night before the Singapore Minister for Trade and Industry and US Trade Representative were to meet and close the deal, the US side called for a meeting to discuss the government devolution reservation, which I thought was sealed and settled. When my team and I went into the meeting room, I noticed that the US side had assembled a big group of negotiators. They told us they had major concerns about the reservation. My team was disappointed, and naturally we could not complete our discussion that night. Not many people knew that after the USSFTA was declared as concluded the next day, both sides continued to hold several midnight telephone conferences to sort out the government devolution reservation. It was the last issue to be settled in the entire FTA, and was also probably the most complicated of all our reservations.

I thought the government devolution reservation was a significant contribution from Singapore to the know-how of FTAs, which other countries that went into the negative list architecture earlier than us should really have considered.

What really is the government devolution reservation about? At the point of negotiating the USSFTA, policy innovation and technological advancement had resulted in many governments around the world devolving functions to the private sector, which would supply the services on a commercial basis. The thinking was that competition and the profit motive would provide more choice and better value services to the public.

A good example is telecommunications. With technological advancement, telecommunications ceased to be a “natural monopoly”. Singapore, like many other developed countries, corporatised part of the then Telecommunications Authority of Singapore, which was providing telephony services as a government monopoly, into Singapore Telecommunications (SingTel) Pte Ltd. Part of SingTel was then divested through a listing on the stock exchange, and shares were distributed to Singaporeans at a discounted price as part of the Asset Enhancement Programme. Thereafter, competition was introduced into the market, but in a progressive, controlled pace which the market could bear, rather than through a big bang approach. For some time, SingTel continued to hold a monopoly on fixed-line telephony.



If the USSFTA had been in place during the SingTel exercise, we would have violated a number of disciplines. Distributing SingTel shares at a discount to Singaporeans and not to foreigners could be argued as a violation of national treatment. Holding a monopoly on fixed-line telephony, and introducing competition progressively could be argued as violating market access.

Consider power as another example. The Government broke up its own monopoly in the supply and distribution of power. Power generation was liberalised, with different generation companies producing electricity using different technologies, and supplying to the national power grid. The power grid remained a tightly regulated natural monopoly. Retail of power was liberalised later, to give consumers a choice of the shop front which they purchase power from. In some countries, power can in fact be purchased from places like supermarkets, not just power companies. For energy security reasons, we put in place various safeguards, such as ownership limitations, on companies in the power sector. Again, if we run through the disciplines of the FTA, it could be argued that we violated various disciplines when devolving the power industry from the Government to the private sector.

Fortunately all these devolutions were done before the USSFTA. Devolution of government functions to the market creates more opportunities for the private sector, and is undoubtedly a pro-trade and pro-investment approach. It would have been a great irony if further devolution of government functions were put off because of our FTAs.

Looking ahead, we cannot be certain that we have seen the end of government devolution. At the point of writing this article, the operation of our airport and seaport are corporatised and run on a commercial basis, but not divested. The new National Gallery will be run on a commercial basis by the private sector. Our National Stadium which had been run by a government agency would eventually give way to the Sports Hub, which is a private-public partnership, and commercially operated. We are still constantly creating more space for the private sector to operate services commercially. And who knows? One day, policy and technical innovation may allow our library services to be run commercially; taxation collection services to be partially privatised; building of Mass Rapid Transit lines to be based on a public-private partnership; public accounting services to be devolved to private accounting firms; the list goes on.

We explained to our US counterparts that what was considered public services and commercial services was not an absolute but a dynamic divide. I am sure my USTR counterparts understood this, probably more so than

us, given that the size of government is a key ideological difference between the Republicans and the Democrats. We explained that the government devolution reservation was needed so that government could be given some flexibility during such devolution exercises to experiment and push the envelope towards a more market-based approach in supplying hitherto public services. I told my US counterparts that they would need this reservation too, but my offer was not taken up. Instead, they were concerned that the reservation provided some circuitous avenue for Singapore to derogate from its commitments in the USSFTA.

After several rounds of midnight conferences and haggling over forms of words, we arrived at a fairly tight reservation. Essentially, the starting point of the reservation recognises that there are services that are supplied only by government agencies and not on a commercial basis. When the Singapore Government decides to corporatise such agencies and provide the services on a commercial basis, it can as a matter of policy maintain a monopoly, limit the number of suppliers, impose restrictions on the composition of senior management and board of directors, and require local presence. In the next stage of devolution, when the Singapore Government decides to divest the shares of the same corporatised agency, it can limit total foreign ownership to no greater than 49%, limit single-share ownership to not more than 5%, reserve preferential shareholder rights for the Singapore Government, and impose restrictions on the composition of senior management and board of directors.

The government devolution reservation also contains a useful clarification, which is that when the Singapore Government sells the shares of a company, which it fully owns, to another holding company (such as Temasek Holdings) which it also fully owns, no sale of shares has really occurred from the FTA's point of view. And since no sale of shares has occurred, the national treatment discipline is not applicable. This is why it was wrong for officials to think that it was a violation of the USSFTA to sell a company fully owned by a government agency to Temasek Holdings. From the USSFTA's point of view, no sale had occurred, and national treatment was not applicable.

## **VII. Conclusion**

I wrote this chapter so that future trade negotiators and professionals will have some understanding of the basic architecture of the USSFTA, its negotiating history and the thinking behind certain provisions.

Our lawyers and trade negotiators will continue to argue over what exactly are our rights and obligations under the USSFTA, and which provision will trump which, and conjure up intricate linkages that create unintended effects. This is natural and to be expected because a clear-cut FTA is easy to draft but will not represent a feasible deal. Many provisions are a result of an iterative process of compromises, developed after negotiators from both sides have huddled late into the night to find language that provides sufficient yet unsatisfying comfort to both sides. And yet both parties know that having that unsatisfying feeling on both sides usually represents a deal.

We should also understand that an FTA does not curtail the sovereignty of a country. Governments can continue to implement policies that it wishes to and which expresses the will of its people. What an FTA does is to confer a right to the FTA partner or its companies to seek compensation under certain circumstances, such as when market access or national treatment disciplines are breached. A dispute settlement process will establish the validity of the case, and if necessary, determine the exact form or quantum of compensation, which has to be commensurate with the losses suffered.

So, unlike certain international agreements where a violation may lead to a country being branded as an international pariah, the nature of an FTA is somewhat different. It is a system of compensation, to ensure that when government exercises its sovereignty in implementing economic policies, it is biased towards pro-trade and pro-investment policies. But any self-respecting country will always try to abide by any international agreement it entered into. This system of compensation, plus the balance of language, serves to motivate both Parties to try to solve any dispute amicably, rather than launch into a legal battle. We should view FTAs as a means of avoiding disputes, rather than encouraging disputes.

## CHAPTER 11

# SOME LESSONS FROM PAST FTA DISPUTES

*By C.L. Lim*

### **I. Introduction**

When asked to say something about FTA disputes worldwide which could have some instructive value in assessing the possible implications of Singapore's FTAs, I readily agreed. At the time, I did not consider two questions. First, what qualifies as an "FTA dispute"? Second, which of the disputes that so qualify might we learn something from, and where will we find such cases? I have chosen to define the answer to the first question broadly and have included not only disputes which in some way are related to FTAs that have appeared before various tribunals and the World Trade Organisation (WTO), but also disputes which have not appeared under a formal dispute mechanism. In addition, I have included disputes arising under the terms of certain bilateral investment treaties (BITs) because such terms are now common in FTAs.<sup>1</sup>

As for the second question, we will have to look widely to Europe, Latin America and North America in search of instructive cases because East Asia has been a latecomer to FTAs. Our survey will begin in the late 1950s, where dispute had broken out in Geneva regarding the formation of the six-member European Economic Community (EEC) and its various Association Agreements with the African colonies and ex-colonies of its

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<sup>1</sup> I have excluded disputes which, at one extreme, are specific to the unique terms of particular FTAs, such as those arising under the system for settling anti-dumping and anti-subsidy disputes under the North American Free Trade Agreement; and at the other extreme, such WTO disputes which inform the meaning of common trade clauses but otherwise have nothing to do with FTAs as such.

members. I then offer the more recent example of a treaty between the European Communities (EC) and Turkey whose result adversely affected the Indian textile industry, before moving on to Korea's unsuccessful attempt to question the very legality of the North American Free Trade Agreement (NAFTA) in the midst of WTO litigation. From there we will look to Latin America, where Argentina had sought to exempt fellow members of the *Mercado Comum do Sul* or "Southern Common Market" (MERCOSUR) from the action which it took against footwear imports from other nations, before discussing two further cases in which first Brazil, then the United States (US) disagreed, respectively, with Argentina and Mexico about whether a dispute could be brought to the WTO after proceedings had been brought under MERCOSUR and NAFTA. We then look at some NAFTA cases where the Mexican municipal authorities had refused to grant a license to an American investor to operate its landfill business there, and where Canada had prohibited an American waste company from processing waste product over the US-Canada border in Ohio. We will also discuss the case of a Canadian methanol producer which had complained of discrimination by the State of California against its business, before turning to a number of recent cases arising from the Argentine financial crisis of the 1990s. Finally, we will look at two suits brought by a Dutch company and its investor (a well-known American businessman) against the Czech Republic, and which concerned the abrogation of a lucrative television broadcasting license; before concluding our discussion with Honda's dispute with US customs in the 1990s regarding Honda motor-vehicles assembled in Canada with substantially US-made engines for sale in the US.

These are some of my main lessons from past FTA disputes.

## **II. Disputes About the Legality of an FTA**

### ***A. The Formation of the EEC and the EEC's Association Agreements***

The first and largest FTA dispute following the operation of the GATT 1947 is now often forgotten. That historic dispute had to do with the validity of the EEC itself, and its Association Agreements (what the EEC claimed were "FTAs") with various European colonies and ex-colonies. The formation of the EEC and these Association Agreements brought into question their conformity with GATT Article XXIV, a provision which even today defines the legal conditions which customs unions, FTAs and interim agreements

must satisfy. In 1957, the EEC argued, for example, that Article XXIV's well-known requirement that "substantially all the trade" between the members of a customs union or FTA should be liberalised had been fulfilled in relation to the agreements with various African colonies and ex-colonies. However, the EEC counted not only the inadequate amount of liberalised trade between the EEC and a colony, but also the amount of trade liberalised purely between the EEC's members which was more substantial. Evidently, the EEC's members had no intention to fully liberalise trade with these colonies, but only with each other. According to the EEC, however, this combined trade figure amounted to more than 90% of trade while the "substantially all the trade" requirement only required the liberalisation of 80% of trade.<sup>2</sup>

GATT members disagreed with this method of calculation.<sup>3</sup> However, denying the EEC's validity and that of its Association Agreements could have required the wholesale renegotiation of the GATT, and GATT members therefore chose the more pragmatic approach of simply accepting the formation of the EEC as a *fait accompli*. In doing so, they pushed legal (as opposed to political and strategic) considerations aside.<sup>4</sup> The consequences of that "delegalisation" of the GATT linger on today. The "substantially all the trade" requirement, as well as other GATT/WTO requirements have since been so loosely applied that, currently, the WTO cannot be said to

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<sup>2</sup> L/778, GATT BISD (6th Supp.), para 30 (1958).

<sup>3</sup> The 80% figure was controversial, and has been since; *id.*, generally. In more recent times, Australia has proposed a figure of 95% of tariff lines, Hong Kong has proposed an additional test which would measure the amount of intra-FTA trade conducted under the FTA's preferential rules of origin, while others have disagreed about the precise application of a qualitative (as opposed to a purely quantitative) test under which no sector may be excluded. For the contemporary views of WTO members, see WT/REG/W/22/Add.1, paras 9–10 (Australia); WT/REG/W/27 (Hong Kong, China); as well as WT/REG/M/15, para 32 (Argentina); WT/REG/M/15, para 35 (Switzerland); WT/REG/M/15, para 38 (Hong Kong, China); WT/REG/M/17. The US believes that setting a quantitative figure would become a licence for excluding particular sectors, see para 21 and WT/REG/M/15, para 66.

<sup>4</sup> See Robert Hudec, *The GATT Legal System & World Trade Diplomacy* (London: Butterworths, 2nd. ed., 1990), 211–212; Robert Hudec, *Developing Countries in the GATT Legal System* (London: Gower, 1987), 50. The late Professor Hudec served as Assistant General Counsel of the Office of the US Special Representative for Trade Negotiations during the Kennedy Round negotiations (1964–1967).

regulate the formation of FTAs in any effective or meaningful way.<sup>5</sup> Part of that difficulty has to do with the fact that WTO members disagree over the manner in which the WTO should regulate FTAs.<sup>6</sup>

What have we learnt? Basically, if the GATT/WTO is presented with a large, regional FTA, the size of the proposed FTA or its political significance could present other WTO members with a *fait accompli*.

### **B. *The Turkey-Textiles and US-Line Pipe Disputes***

Such disputes over the WTO legal requirements have also spilled over into formal WTO dispute settlement. In the famous *Turkey-Textiles* case, Turkey argued that if it had not imposed quotas on Indian textiles, the EC would have carved out textiles from its agreement with Turkey. Had this occurred, the “substantially all the trade” requirement in Article XXIV would not have been fulfilled and the EC-Turkey agreement would therefore have violated the GATT. Since Article XXIV of the GATT says that FTAs should not be prevented from taking place so long as the “substantially all the trade” and other requirements are fulfilled, the quotas on Indian textiles were justified by the terms of Article XXIV. Turkey’s argument compelled the Appellate Body to take a broad and flexible reading of the “substantially all the trade” requirement, which ruled that the requirement is “flexible” and not as stringent as Turkey’s argument would suggest.<sup>7</sup>

Another case which pushed the question of an FTA’s conformity with the GATT’s requirements even further from the diplomatic into the legal sphere was Korea’s argument in the *US-Line Pipe* case. Korea claimed that NAFTA was illegitimate, but the panel found the allegation to be unproven as Korea had not provided “extensive evidence” for its claim.<sup>8</sup>

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<sup>5</sup> Notwithstanding the latest reforms to increase the timeliness and effectiveness of the FTA notification requirement. See further, WTO, General Council, Transparency Mechanism for Regional Trade Agreements — Decision of 14 December 2006, WTO Doc. WT/L/671, 18 December 2006.

<sup>6</sup> For members’ views, see (e.g.) WTO Docs. WT/REG/W/37; TN/RL/W/8/Rev.1.

<sup>7</sup> *Turkey — Restrictions on Imports of Textile and Clothing Products*, Report of the Appellate Body, WT/DS34/AB/R, 22 October 1999, para 62.

<sup>8</sup> *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Panel Report, WT/DS202/R, 29 October 2001, paras 7.145–7.146. The Appellate Body disregarded this part of the Panel’s reasoning as “moot” and “having no legal effect”, i.e. that it was not a relevant consideration in disposing of the case. See the Appellate Body report, WT/DS202/AB/R, 15 February 2002, paras 198–199.

One lesson seems to be that a WTO member should not invoke its FTA as a legal defence (as Turkey had tried to do in the *Turkey-Textiles* case, and the US had tried to do in the *Line Pipe* case) where this might risk ending up with a pronouncement that its FTA is unlawful.

Of course, individual WTO members still could object to the Appellate Body's rulings in the two cases above, on the basis that questions of FTA validity are for the WTO members to decide and cannot be made subject to panel or Appellate rulings.<sup>9</sup> They can do this during the adoption of the Appellate Body report by the WTO's Dispute Settlement Body (DSB). The DSB is the political body which formally adopts the rulings of WTO panels and the Appellate Body. But while there exists this diplomatic layer above the judicial work of WTO panels and the Appellate Body, the DSB is virtually powerless to prevent the adoption of the rulings as such. WTO members can only question the reasoning behind particular rulings at the relevant DSB meeting.<sup>10</sup>

Whether a WTO member chooses to object in this way is of course a policy question for the member country to decide. It may also have to consider the legal position of its FTA partners.<sup>11</sup> Similarly, Singapore will have to monitor the disputes brought before the WTO in order to keep track of such arguments in cases in which it may wish to intervene or otherwise adopt a public position.

### III. Trade Remedy Clauses and Disputes

One of the most controversial questions today regarding the design of FTAs concerns the inclusion of "trade remedy" clauses in FTAs, i.e. the right to impose anti-dumping measures, countervailing duties and safeguard measures. Anti-dumping measures are duties imposed on imports sold below "normal" market value. In the classic example, they are imposed

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<sup>9</sup> The panel in the *Turkey-Textiles* case seems to have conceded as much, but the Appellate Body was more ambiguous in treating the same point; see WT/DS34/AB/R, 22 October 1999, para 60.

<sup>10</sup> For an example of such DSB interventions, see C.L. Lim, "The Amicus Brief Issue at the WTO", (2005), 4 *Chinese JIL* 85.

<sup>11</sup> For example, the United States maintained in the *Argentine-Footwear* case, discussed below, that for an FTA to be used as a defence to a safeguard violation, it has to be notified under GATT Article XXIV and not the Enabling Clause. See *Argentina — Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, WT/DS121/AB/R, 14 December 1999, para 65.



by a foreign country on goods sold in its market for less than the price of the goods in their home market, i.e. in cases of “price discrimination”. More controversially, they can involve so-called “non-market economy” goods sold in a market economy, or where the goods in question are not widely sold in the home market itself. In such cases, the authorities of the importing market economy country will calculate the “normal value” for the goods either on the basis of the sale price in a substitute, third-country market or a constructed value (based on a construction of costs of production plus a certain amount of profit). Thus anti-dumping action against Chinese imports can result in the use of Japanese prices as a comparison.

Countervailing duties, on the other hand, are duties imposed on goods and manufactures which enjoy subsidised production. Both anti-dumping and countervailing duties are usually justified in public on the basis of “fairness”, for example, that cheap goods are unfair because dumping has been facilitated by monopoly capture in the producer’s home market, or because the producer enjoys state support of production at home. Clearly there is more to how and why anti-dumping and countervailing duties are imposed and the manner in which their imposition is regulated at the WTO; but these details need not concern us.

Finally, safeguard measures are taken when there is an unforeseen surge in imports which harms or threatens harm to importing country producers.

The question for our purposes is this: Can provisions on anti-dumping duties, countervailing duties and safeguard measures be included in FTAs? One view at the WTO is that trade remedy measures are prohibited between FTA partners and that if a WTO member wishes to enter into an FTA, it must give up the right to use trade remedy measures against its FTA partners. There is a fair basis for that argument in the text of Article XXIV of GATT 1994.<sup>12</sup> However, some other WTO members say that trade remedy measures are especially required when trade has been liberalised between two or more countries, and that FTAs which create free trade should therefore allow trade remedies to be used when a country is faced with “unfair” imports or unexpected, harmful import surges.

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<sup>12</sup> See Mitsuo Matsushita, “Legal Aspects of Free Trade Agreements”, in Mitsuo Matsushita & Dukgeun Ahn (eds.), *WTO and East Asia: New Perspectives* (London: Cameron May, 2004), 497, 508–509. Professor Matsushita (Japan) served as a WTO Appellate Body member from 1995 to 2000.

The cases we have had so far have been about safeguards specifically. Perhaps the most well-known is the *Argentine-Footwear* case which involved a challenge by the European Communities (EC) against Argentina. The EC had argued that Argentina could not investigate imports of footwear from all sources, including imports from Argentina's FTA partners, in seeking to prove that such imports had injured or threatened to injure Argentine industries, but then go on to exclude Argentina's FTA partners' exports from eventual safeguard action. In this case, Argentina had excluded its MERCOSUR partners from action it took against shoe imports despite having included them in its initial investigation of injurious imports. The Appellate Body considered that Article 2.2 of the Safeguards Agreement ("Safeguard measures shall be applied to a product being imported irrespective of its source") requires such measures to be applied to imports from all sources so long as those sources were included in the initial investigation.<sup>13</sup> This is known as the "parallelism" doctrine and it has been upheld in several cases, including the famous *US-Steel Safeguards* controversy, sparked by the Bush Administration's effort to protect its steel industry and in which Singapore's Ms. Margaret Liang acted as one of the WTO panellists.<sup>14</sup>

However, this ruling does not tell us whether trade remedy rules are permitted in FTAs, and to make matters worse, the WTO rulings we have had so far have sent conflicting signals.<sup>15</sup> In practice, WTO members have

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<sup>13</sup> *Argentina — Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, *op. cit.*, para 114.

<sup>14</sup> *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, Panel Report, WT/DS248/R, 11 July 2003.

<sup>15</sup> The panel in the *Argentina-Footwear* case observed that most FTAs contemplate safeguard action, and that Article XXIV need not be read so strictly as to prohibit such action between FTA partners. Accordingly, a WTO Member which imposes safeguards selectively (i.e. by exempting its FTA partners) cannot argue that WTO law requires it not to apply safeguards against its FTA partners. See *Argentina — Safeguard Measures on Imports of Footwear*, Panel Report, WT/DS121/R, 25 June 1999, paras 8.96–8.98. On appeal, the Appellate Body ruled that the point did not require a decision since the case did not involve the application of a safeguard measure by MERCOSUR on behalf of Argentina. See *Argentina — Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, *op. cit.*, para 114. However, the panel in the subsequent *US-Line Pipe* case seemed to have gone in the opposite direction. The *Line Pipe* panel considered that an FTA party can exempt its fellow FTA

entered into FTAs which have exempted FTA partners from safeguard action, but there are also examples of FTAs which provide for such action even between FTA partners.

Putting such legal controversies aside, a more practical issue has to do with the trade policy justification for having trade remedy rules in FTAs. Anti-dumping and anti-subsidy rules are usually justified on the basis that they protect domestic producers and manufacturers against unfairly priced or subsidised imports from abroad, while safeguards are justified on the basis that domestic producers need a cushion against sudden, increased imports. In other words, having these rules help to make it “easier” to negotiate trade treaties. Viewed in this way, they are devices which might not be so easily excluded from an FTA during negotiations.

Disagreements between WTO members about whether WTO law permits trade remedy rules in FTAs only make it more difficult to consider that their inclusion in FTAs is strictly impermissible.<sup>16</sup>

While the law is therefore no clearer than it was in the early years of the present decade, we do know a little more about what other countries are doing as more and more FTAs have come into existence. In the early years of Singapore’s FTA programme, its negotiators were necessarily

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members from safeguard action because GATT Article XXIV permits the elimination of duties and other restrictive regulations of commerce against fellow NAFTA members (i.e. Canada and Mexico) under GATT Art. XXIV:5. In that case, the safeguard measure was a tariff quota, thereby falling under Art. XXIV:5’s permission to eliminate duties and other restrictive regulations of commerce. See *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Panel Report, WT/DS202/R, 29 October 2001, paras 7.140–7.141. Again, the Appellate Body avoided ruling on the point. See *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Appellate Body Report, WT/DS202/AB/R, 15 February 2002, para 198. The point had initially been raised, but avoided, in the *US-Wheat Gluten* case, see *US — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Appellate Body Report, WT/DS166/AB/R, DSR 2001:III, para 99.

<sup>16</sup> One example of such disagreement involves Canada’s claim that FTA parties can exempt each other from anti-dumping measures. Japan disagrees, and so we can assume that Japan considers the inclusion of trade remedy rules in FTAs to be permissible. Another example is Australia, which has argued that safeguard action must be eliminated under FTAs. Hong Kong and Japan disagree. See WT/REG/M/15, para 40 (Australia); WT/REG/M/14, para 7 (Japan); WT/REG/W/29, paras 8–11 (Japan); WT/REG/M/15, para 22 (Hong Kong, China).

working at the very forefront of existing knowledge and WTO members' understanding about such questions.

#### **IV. Using an FTA as a Legal Defence**

A related but broader issue has to do with the extent to which WTO members can raise their FTAs or customs unions as a general legal defence to a WTO violation. The issue came to prominence in the *Turkey-Textiles* case mentioned earlier. Turkey had tried to use its customs union with the European Communities as an excuse for imposing what would otherwise have been unlawful import prohibitions on Indian textiles,<sup>17</sup> claiming that had it not imposed these prohibitions, the European Communities would not have entered into the customs union with Turkey for fear of a surge in Indian textile imports entering Europe through a Turkish back door.<sup>18</sup> From Turkey's viewpoint, saying that Turkey could not impose these prohibitions would therefore be tantamount to saying that it could not enter into a customs unions with the European Communities, while Turkey claimed the legal right to do so under GATT Article XXIV. In that case, the Appellate Body considered that GATT Article XXIV could have been used as a defence, provided that, amongst other things, the unlawful measure (i.e. the textiles prohibition) was truly necessary.<sup>19</sup> In the *Turkey-Textiles* case, the prohibition of Indian textiles was unnecessary to the formation of the EC-Turkish customs union since the EC and Turkey could easily have employed a rule of origin to distinguish Indian from Turkish textiles instead.

#### **V. Disputes about FTA Dispute Provisisons**

A different problem has to do with the tendency of FTA negotiators to specify where an FTA dispute should be heard where a dispute can be heard in

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<sup>17</sup> This issue was also raised in the *Argentine-Footwear* case. But the Appellate Body considered that since Argentina had not specifically raised the argument, there was no need to rule on the issue. *Argentina — Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, WT/DS121/AB/R, 14 December 1999, para 110.

<sup>18</sup> Because of certain historical exemptions which the European Communities enjoyed from WTO disciplines, Indian textiles were already restricted from entering the European Communities through the EC side.

<sup>19</sup> *Turkey — Restrictions on Imports of Textile and Clothing Products*, Report of the Appellate Body, WT/DS34/AB/R, 22 October 1999, para 58.

more than one place. Typically, a clause is inserted such as the one contained in the European Free Trade Area-Singapore FTA. That clause states that an FTA party can bring the dispute either to the WTO or the FTA's own dispute system. Once a choice is made either to bring the dispute to the WTO or under the FTA's own dispute system, the same dispute cannot be brought again to the other forum.<sup>20</sup> There is a similar "fork in the road" clause in MERCOSUR's Olivos Protocol,<sup>21</sup> as well as in the US-Singapore FTA.<sup>22</sup> However, having such a clause does not always solve the problem. Two WTO rulings have already shown how such clauses can fail to take effect.

The first is the *Argentina-Poultry* case where Brazil brought two cases at once, one under MERCOSUR and another under the WTO dispute settlement system. Argentina complained that Brazil was precluded from bringing the second, WTO, case. Unfortunately for Argentina, Brazil had only signed but not yet ratified the Olivos Protocol which contains a fork in the road clause. As such, another treaty — the Brasilia Protocol, which did not contain such a clause — applied to the dispute instead. Argentina argued that since Brazil had also signed the Olivos Protocol, it was at least prevented — as a matter of good faith — from resorting to the WTO after having already brought the dispute with Argentina before MERCOSUR dispute settlement. The panel disagreed.<sup>23</sup>

In the second case — the *Mexico-Soft Drinks* case — the Appellate Body ruled that WTO panels and the Appellate Body ordinarily cannot refuse to hear any case brought by a WTO member against another WTO member. Mexico had argued that the Appellate Body and the panels have an "inherent" jurisdiction to choose to refuse to hear certain cases whenever it would be appropriate to do so. The Appellate Body disagreed in a ruling which suggests that if WTO members approach the WTO for justice, they will get

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<sup>20</sup> EFTA-Singapore FTA, 26 June 2002, Article 56.

<sup>21</sup> The Protocol of Olivos for the Settlement of Disputes in MERCOSUR, 18 February 2002, Article 1. Lawyers call such fork in the road clauses "*electa una via*" clauses.

<sup>22</sup> Sivakant Tiwari, "The Role of Legal Counsel and Dispute Settlement", in Tommy Koh & Chang Li Lin (eds.), *The United States-Singapore Free Trade Agreement* (Singapore: IPS & World Scientific, 2004), 151, 155.

<sup>23</sup> *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, Report of the Panel, WT/DS241/R, 22 April 2003, paras 7.30, 7.37–7.39.

it notwithstanding the fact that the same dispute might already have been triggered under an FTA dispute system.<sup>24</sup>

Did the FTA negotiators anticipate all this when they drafted their FTA dispute settlement clauses? For a good number of FTAs negotiated before these Appellate Body cases, the answer is probably not. In which case, there is now the real risk of extended litigation in FTA disputes where the winning party would otherwise be justified in thinking that such cases should have been confined purely to FTA dispute settlement. However, the picture is not entirely bad. The losing party will also have a second bite at the cherry. The real question then is whether this is something which the FTA negotiators would have welcomed had they considered it. Disputes involving matters not included under one of the WTO's covered agreements, e.g. most investment disputes, are largely saved from this problem since WTO panels and the Appellate Body can only deal with disputes under one of the WTO's "covered agreements" (e.g. goods and services trade disputes, etc.)

## **VI. Investment Disputes**

Many FTAs, including Singapore's, contain investment chapters. Indeed, one of the arguments for saying that FTAs bring more gains than the WTO is the inclusion of investment liberalisation and protection in today's comprehensive FTAs. An innovation which found its way into NAFTA was the inclusion of the modern device of an investor-state dispute settlement mechanism for investment disputes. In the past, investors needed their home countries to adopt their complaints as a claim of the home state itself against the host state. The investor-state dispute mechanism was invented to circumvent the need to seek diplomatic protection from an investor's home state. It means that an investor can bring a lawsuit directly against the host state alleging the deprivation of an investment right guaranteed under a BIT or FTA investment chapter. Such international investment arbitration is now common.

In 2000, during which Singapore's FTA programme was beginning to move into high gear, a very controversial award was handed down by the tribunal which heard a dispute concerning NAFTA's investment chapter (Chapter 11). A hazardous waste landfill operator and investor — the

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<sup>24</sup> *Mexico — Tax Measures on Soft Drinks and Other Beverages*, Appellate Body Report, WT/DS308/AB/R, 6 March 2006, paras 40–57.

Metalclad Corporation — had obtained all necessary federal and state permits to operate its business. It was assured that no other permit was required at the municipal level. However, two things happened. First, the municipal authorities in Mexico claimed that Metalclad still needed municipal permission, did not grant Metalclad a permit to operate its proposed landfill, and obtained a court injunction to halt the construction of the landfill. Second, the new Governor of the State issued a new ecological decree preventing the landfill operation. The case was controversial because it concerned the amount of policy space which domestic authorities would have in regulating environmental (and other) concerns within their usual policy domain. This of course is something which domestic authorities typically consider to be something best left to their own judgment on the basis of their appreciation of relevant social, economic, environmental and other policy needs. Should Metalclad succeed, the ability to formulate environmental laws and other social policies would be severely curtailed, which is precisely what happened.

The tribunal found, in light of the uncertainty created over the required permits, that there was no clear rule for Metalclad to follow. Mexico had violated a requirement under NAFTA's investment chapter that required its laws to be transparent. Second, the tribunal considered the "totality of the circumstances", i.e. Mexico's failure to ensure a transparent and predictable regulatory framework, to further amount to unfair treatment of Metalclad since it had to endure a lack of orderly process and the untimely disposition of its case. This constituted a violation of the standard of fair and equitable treatment under NAFTA. Finally, by "permitting or tolerating", or "participating or acquiescing" in all of this, Mexico had deprived Metalclad of the "use or reasonably to be expected economic benefit" of its investment. This amounted to expropriation of Metalclad's investment.<sup>25</sup>

The tribunal was guided by another case — *Biloune v. Ghana Investments Centre*. The ruling in *Biloune* had also turned on the fact that the investor had relied upon the representations of a "government affiliated entity".<sup>26</sup> Such cases suggest that representations by host government or governmental entity officials to investors could lead an investment tribunal to

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<sup>25</sup> *Metalclad Corp v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (31 Aug 2000).

<sup>26</sup> (1993) 95 ILR 183.

conclude that an expropriation has occurred where the host state acts in ways contrary to such representations. It also suggests that typical forms of governmental conduct (e.g. environmental policy and regulation) could amount not only to a violation of the transparency and fair and equitable treatment provisions in an FTA, but also to expropriation. Host state governments will have to put in place systems or guidelines concerning official conduct which would require a wide range of dealings with potential investors and intended governmental policies to be screened beforehand for their legal risk exposure.

The *Metalclad* ruling was received with alarm. Following that award, as well as a number of other awards by NAFTA tribunals, the NAFTA parties decided to act. By way of a NAFTA Free Trade Commission (FTC) “Note of Interpretation”, the US, Canada and Mexico issued a statement which was intended to clarify two things. First, that the NAFTA clause which guarantees a minimum standard of treatment, including “fair and equitable treatment”, is nothing more than the existing international law standard, does not go beyond that standard and therefore does not offer a higher standard of protection than what international law offers.<sup>27</sup> Second, that breach of another provision of the FTA investment chapter does not entail a breach of the minimum standard of treatment. This was in reaction to another award in *S.D. Myers*.<sup>28</sup>

The *S.D. Myers* case had concerned an environmental regulation prohibiting S.D. Myers from transporting Canadian PCB waste across the US-Canada border to its processing plant in Ohio. This, evidently, was a more efficient and competitive method when compared to the need to process the waste in Canada. S.D. Myers argued that the true intent of the new regulation was to divert business to Chem-Security, a Canadian competitor which processed the waste in Canada; and that Canada had therefore acted to favour a Canadian business at the expense of an American business. The tribunal ruled by a majority that since Canada had violated the standard of national treatment owed to a foreign investor, this was also a violation of the minimum standard of treatment owed to the foreign investor.<sup>29</sup> What the NAFTA countries now hope to achieve is to

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<sup>27</sup> The NAFTA parties were reacting to the tribunal award in *Pope & Talbot, Inc. v. Canada*, Award (10 April 2001).

<sup>28</sup> *S.D. Myers, Inc. v. Government of Canada*, Partial Award (13 November 2000).

<sup>29</sup> *Id.*, para 266.



roll back FTA investment protection to the days when investors were protected only against “egregious” forms of violations of investor rights.<sup>30</sup> But if we can resort to euphemism, the horse has bolted.

Having said that, there has yet to be another clear case, other than *Metalclad*, where a purely environmental regulation has been so successfully challenged. An early case, *Ethyl*, was settled, and another case, *Methanex*,<sup>31</sup> which is discussed further below and involved a challenge by a Canadian company against a Californian environmental regulation, ultimately failed. In light of this, negotiators would like to treat *Metalclad* as an aberration. In addition, if we look at the US-Singapore FTA, the two clarifications brought by the NAFTA parties have also been written into the treaty text of the US-Singapore FTA.<sup>32</sup> With this, it is hoped that danger has been averted, and that legitimate governmental regulation for public purposes will not be too severely questioned by future arbitral tribunals. In my view, the danger is not entirely past. It cannot be by the very abstract nature in which the question is posed. The field of investment law is dynamic, it evolves, and the recent efforts of countries entering into treaties which seek to protect and yet limit the scope of such protection to egregious cases will in the course of time be considered on the facts of each case, by an arbitral tribunal whose views cannot be wholly predicted. This situation is only compounded by the controversy within the discipline over the extent to which international law *should* uphold property rights.

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<sup>30</sup> For the view that this was an overreaction to *Myers*, see Ian A. Laird, “Betrayal, Shock and Outrage — Recent Developments in NAFTA Article 1105”, in Todd Weiler (ed.), *NAFTA Investment Law and Arbitration* (NY: Transnational Publishers, 2004), 49, 59–63. Another commentator who, rightly, emphasises the view that *Myers* and another award in *GAMI* “recognized that adverse consequences for foreign investors caused by wrong regulatory choices could not be considered as a violation of the minimum standard of treatment” and that implicit “in this finding is the premise that perfection is not the standard regarding the quality of abstract regulation”: Alberto Alvarez-Jiménez, “Foreign Investment Protection and Regulatory Failures as States’ Contribution to the State of Necessity under Customary International Law”, (2010) 27 *Jo Int’l Arb* 141, 142, 147. See also *GAMI Investment Inc. v. Government of the United Mexican States*, Final Award (15 November 2004), paras 93–94; *Myers*, *op. cit.*, para 260.

<sup>31</sup> *Methanex Corp. v. United States of America*, ICSID Case No. ARB (AF)/98/3, Award (3 August 2005).

<sup>32</sup> See USSFTA, Article 15.5.

A number of subsequent awards in similar arbitrations have since confirmed the view that the minimum standard of treatment of foreign investors is not confined only to protection against egregious governmental acts, or cases where bad faith on the part of the host government has clearly been shown.<sup>33</sup> Remarking on two awards following the Note of Interpretation issued by the NAFTA parties (whose terms, as I have mentioned, were essentially incorporated into the US-Singapore FTA), one commentator has observed that:<sup>34</sup>

Although none of these tribunals have...[questioned]...the legitimacy of the FTC Note of Interpretation, one can detect an implicit challenge...to the NAFTA parties' attempt to narrow the ambit of NAFTA...

Only time will tell what more the future will bring. For Singapore, the emerging lessons were incorporated early on. As we have seen, the US-Singapore FTA sought to incorporate the NAFTA parties' subsequent Note of Interpretation within the treaty text itself, while others such as the Singapore-Australia FTA make no mention of a minimum standard of treatment in its investment chapter. One view which I should, however, mention is that such disputes are really only about money. That is true, except that — first — in addition to facing, say, a financial, liquidity, credit or other economic crisis, a country may find itself saddled also with expensive litigation. That has been the Argentine lesson, which I shall discuss further below. Second, there was a notable case, involving the abrogation of a television broadcasting license in the Czech Republic where the award, which included lost future profits and interest, was so large that it almost certainly affected the Czech national treasury and led legal commentators to fear that it could dissuade states from allowing investor-state arbitrations in the future.<sup>35</sup>

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<sup>33</sup> *Mondev International, Ltd. v. The United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), paras 116, 123; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (2006); para 372; *CMS Gas Transmission v. Argentine Republic*, ICSID Case No. ARB/01/08, Award (12 May 2005), para 280; *Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB/00/2, Award (2003).

<sup>34</sup> Laird, "Betrayal, Shock and Outrage", *op. cit.*, 66.

<sup>35</sup> See Thomas Wälde, "Introductory Note to Svea Court of Appeals: Czech Republic v. CME Czech Republic B.V.", (2003) 42 *ILM* 915; and the more expansive version,

## VII. Disputes Over FTA Language

The disputes we have seen over FTA investment chapters have also revealed two further problems which go well beyond the investment context.

In the first example, a Canadian multinational, Methanex, which produces methanol, brought an investment suit against the United States. The State of California had banned methanol, a close substitute of ethanol, while putting in place schemes which encouraged ethanol production. According to Methanex, this violated NAFTA's fair and equitable treatment standard, its guarantee against unlawful expropriation, and the national treatment standard. Methanex's national treatment argument is based on the construction of the phrase "like circumstances" in NAFTA. According to Methanex, that phrase is the same as the phrase "like products" in the GATT — in other words, whether methanol and ethanol were "in like circumstances" should be decided according to the meaning of "like products" in the GATT. On the face of it, this seems reasonable enough but the tribunal was unpersuaded that the NAFTA and GATT phrases were the same.<sup>36</sup>

What the *Methanex* arbitration suggests is that treaty negotiators are well advised to use virtually identical language to the language of WTO instruments, and not just similar language in some cases if they intend such language to mean what they do in the WTO context. Where they fail to do so, they cannot always depend on the same meaning being upheld.

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from which this point is taken, in Thomas Wälde, "CME/Lauder v. Czech Republic: Case Comment & Introductory Note", June 2003, available at <[www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)>. In the latter version, the late Professor Wälde wrote: "I have my own doubts over very large awards...As I see the advantage of investment arbitration very much in being an instrument of discipline on government regulation, I also view awards selected from...the upper range of what can plausibly be argued in this very subjective area as having the potential to undermine the political acceptance of investment arbitration and thus feeding the backlash." For examples of other modern awards which granted lost profits, see *Himpurna California Energy Ltd. (Bermuda) v. P.T. Perusahaan Listrik Negara*, 14(12) *Mealey's Int'l Arb Rep* A-1, A-43 (1999); and *Karaha Bodas LLC v. Perusahaan Perambanban Minyak dan Gas Bumi Negara and PT PLN (Persero)*, 16(3) *Mealey's Int'l Arb Rep* C-1, C-13 (2001).

<sup>36</sup> *Methanex Corp. v. United States of America*, ICSID Case No. ARB (AF)/98/3, Award (3 August 2005), para 29. The tribunal added however that even if the meanings were the same that would not have affected its ruling (para 28).

## VIII. The Spectre of Multiple Law Suits

A second problem has to do with the risk of multiple FTA investment suits. The recent situation faced by Argentina is instructive. Although the problem Argentina faced arose from its bilateral investment treaties (BITs), not least its treaty with the United States, one of the most notable features of the present-day FTA is the inclusion of an investment chapter which closely resembles a modern BIT. Indeed, while the double-digit annual growth in BITs worldwide has slowed, the growth rate for FTAs has grown and these include FTAs containing investment chapters.

Following the Argentine financial crisis in the early 1990s, Argentina took steps to stabilise its economy. These included such things as measures taken in relation to utility rates, the conversion of dollar-denominated financial instruments into pesos (“pesoisation”), and restrictions on asset transfers outside Argentina. At the time of writing, at least six out of the forty or so international investment lawsuits currently pending against Argentina have been decided.<sup>37</sup> Argentina’s defence in all these lawsuits was that it had no choice but to impose the measures it did. It invoked (1) a treaty argument based on a common BIT clause and (2) another argument based on general or customary international law. The typical BIT clause I have just referred to states that in exceptional situations, say of crisis, measures which would otherwise be considered violative of a treaty cannot be precluded. Invocation of such “non-precluded” measures (NPM) clauses is tantamount to a country saying that, because of a crisis, “All bets are off.”<sup>38</sup> There is, as I have also mentioned, a broadly similar doctrine of necessity under general, customary (i.e. non-treaty-based) international law.

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<sup>37</sup> *CMS Gas Transmission v. Argentine Republic*, ICSID Case No. ARB/01/08, Award (12 May 2005); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006); *Enron Corp. Ponderosa Asset L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007). The latest rulings were *British Gas v. Argentine Republic*, 24 December 2007; and *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9 (5 September 2008). The *British Gas* Award was subject to a confidentiality order and not made public until an Argentine challenge revealed its existence in ancillary legal proceedings in Washington DC. See *Investment Treaty News*, 1 April 2008.

<sup>38</sup> See (e.g.) Treaty Concerning the Reciprocal Encouragement and Protection of Investment, United States-Argentina, 14 November 1991, S. Treaty Doc. No. 103-2 (1993), art. XI.

The exact details of the treaty and general international rules need not concern us here.<sup>39</sup> The main point to observe is that while Argentina considered that it had no choice but to take certain measures to address the extreme financial crisis which it faced, it also faced the prospect of having to pay some very high amounts of compensation for the freedom to take such measures once it became bound to the terms of its treaties with the US and other nations.

We have already seen that the modern-day BIT and FTA investment chapter contains a clause which allows an investor, i.e. a company or individual, to bring a lawsuit against the host country where that investor considers that its investment has been harmed by some regulatory or other similar host country measure. This is a modern innovation. In the past only countries could bring each other to an international court or tribunal. Companies and individuals could not sue foreign countries before international tribunals. The modern-day BIT or FTA investment chapter such as to be found today in Singapore's FTAs with the United States, Australia and India allow foreign companies and individuals to sue Singapore before an international arbitral tribunal. Typically such tribunals comprise an odd number of persons (e.g. three) whose award is final and binding on the parties. Because such suits are brought directly against the host state, there is no room, in principle, for diplomatic negotiation between the two countries — the host state and the investor's home state — and no room therefore for diplomatic intercession. Another aspect is that because these suits can be brought directly before an international tribunal, it gets around the common situation where national law could block a court, say in the investor's home state, from rendering a judgment against a foreign country for foreign governmental acts.<sup>40</sup> Today, governmental measures

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<sup>39</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its 53rd Session, G.A.O.R., 56th Sess., Supp. No. 10 (A/56/10), chp. IV/E/1 (November 2001), art. 25. See also, Alberto Alvarez-Jiménez, "New Approaches to the State of Necessity in Customary International Law: Insights from WTO Law and Foreign Investment Law", (2008) 19 *American Rev Int'l Arb* 463.

<sup>40</sup> At common law, such questions typically fall for certification by the executive branch of the state of the court that the foreign state is recognised by the state of the court. Generally, if the answer is "yes", a suit is precluded unless it falls within a widespread legislative exception for commercial disputes. See (e.g.) C.L. Lim, "Non-Recognition of Putative Foreign States (Taiwan) under Singapore's State Immunity Act", (2003–2004) 11 *Asian Yrbk Int'l L* 3.

taken by Singapore do not enjoy such immunity against suits brought by foreign investors whose investments are protected by such FTA provisions. These “measures” as defined under Singapore’s FTA investment chapters can be very broad. They include all kinds of laws and policies, even the very operation of Singapore’s justice system.<sup>41</sup>

Perhaps the greatest difficulty will have to do with the case where a single governmental measure — say, in times of financial turmoil or liquidity, credit or other economic crisis — could result in a multitude of lawsuits against the host state. Unlike a national court system, the tribunals set up to hear each individual dispute would not be bound by decisions in other cases.<sup>42</sup> Such uncertainty complicates the extent to which the best legal advice can avoid much of the inherent legal risks, and the extent to which government lawyers can predict the outcome in individual lawsuits. These factors increase the legal exposure which the host state faces, indeed with each agreement signed.

Again, the Argentine example is instructive. It was clear, by the time the first few awards were handed down, that the rulings and the legal reasoning applied by these tribunals were contradictory.<sup>43</sup> Over and above the usual swings and roundabouts of litigation, this suggests that once dispute breaks out, the continued management of such disputes — such as the question of whether it would be best to negotiate a settlement or to consolidate particular cases — will involve decisions and judgement calls made on the basis of highly imperfect information.<sup>44</sup>

A more routine case was presented by the Czech television licence dispute mentioned earlier. CME B.V., a Dutch media company, brought a claim against the Czech Republic on account of the licence revocation under one treaty (the Netherlands-Czech Republic BIT), while a further

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<sup>41</sup> See the facts of *Loewen Group Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB (AF) 98/3, Award (26 June 2003). That challenge against the Mississippi justice system was unsuccessful on the basis that the plaintiff had not exhausted domestic US remedies.

<sup>42</sup> See Tai-heng Cheng, “Precedent and Control in Investment Treaty Arbitration”, (2007) 30 *Fordham Int’l LJ* 1014.

<sup>43</sup> See William Burke-White, “The Argentine Financial Crisis: State Liability under BITS and the ICSID System”, (2008) 3 *AJWH* 199.

<sup>44</sup> The arbitration practitioner’s reply to this is that certainty is not the point of arbitration. Arbitration of this kind is designed to force the parties into a resolution or compromise of their differences, but not to impose a resolution, let alone a predictable outcome that is governed by a rigid body of legal principles.

suit was brought by an American investor in CME, Ronald Lauder, under another treaty (the US-Czech-Republic BIT). The Czech Republic, for reasons undisclosed, refused to consolidate the two claims.<sup>45</sup> Despite finding a breach of the US-Czech treaty, the claim brought by Mr. Lauder failed before London arbitration because of a lack of evidence that the Czech measures had resulted in a transfer of, or deprived or interfered with, Mr. Lauder's property rights.<sup>46</sup> Since the London arbitration had concluded first, there was an attempt to compel the Stockholm tribunal which heard CME's claim against the Czech Republic to take account of the London outcome, but that attempt failed before the Swedish courts on account of the fact that two different parties and treaties were involved (CME/Lauder, and the Netherlands/US treaties with the Czech Republic).<sup>47</sup> My point is that the Czech Republic felt compelled to defend two disputes at once, and while it succeeded in one, it failed in the other. The Stockholm arbitration award amounted to US\$ 350 million.<sup>48</sup>

As with the existence of two treaties in the Czech investment dispute above, a similar difficulty could also arise outside the investment context from the sheer number of FTAs to which a State may be party. At first sight, the problem appears to be no different from a WTO suit brought by more than one other WTO member against that State. However, the difference is that such WTO suits can be (and often are) consolidated in the same proceedings.<sup>49</sup> In the case of multiple FTA suits, more than one tribunal could

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<sup>45</sup> As the late Professor Wälde had put it: "Assuming a 50:50 chance of losing in one case, the probability moves to 75% in case of having to defend two cases." See Wälde, "CME/Lauder v. Czech Republic", *op. cit.*, 3.

<sup>46</sup> *CME v. The Czech Republic*, London Final Award of 3 September 2001, paras 222, 201, 202; cited in *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Final Award, 14 March 2003, para 25.

<sup>47</sup> The Svea Court of Appeals in whose jurisdiction the Stockholm arbitration occurred also refused to set aside the Stockholm Award, having found no misconduct or mistake of law. See Svea Court of Appeal, case no. T 8735-01; 18(6) *Mealey's Int'l Arb Rep* A-1 (2003).

<sup>48</sup> See further: Norbert Horn, "Arbitration and the Protection of Foreign Investment: Concepts and Means", in Norbert Horn (ed.), *Arbitrating Foreign Investment Disputes: Procedure and Substantive Legal Aspects* (Hague: Kluwer, 2004), 3.

<sup>49</sup> Indeed, the latest proposed amendments to the Working Procedures for Appellate Review contain a proposal (Rule 16(1) *bis*) to consolidate Appellate Body proceedings where there is a substantial overlap in the content of appeals; WT/AB/WP/W/10, 12 January 2010. This follows existing Appellate Body practice.

be engaged in a dispute arising from controversy over the same governmental measure.

Having said this, there is at least some comfort to be had from the way Singapore's FTAs have been written. The language of Singapore's FTAs on what happens in a crisis situation is different from the language of Argentina's bilateral investment treaty clauses. In Singapore's case, these clauses are typically written in such a way that they give Singapore better protection for what it may choose to do in times of crisis. They at least make it clearer that Singapore gets to decide largely for itself whether the governmental measure in question is necessary for the protection of Singapore's essential security interests. In the case of Argentina's treaties, the tribunal was given the task of deciding that very question.<sup>50</sup>

## **IX. Conclusion**

I have not included discussion of FTA disputes arising from special FTA procedures such as the "binational panel review mechanism" under the Canada-US FTA which was later incorporated into NAFTA. This allows private parties to seek the review of Canadian and US dumping and countervailing duty determinations before a panel comprising two experts each from the US and Canada, and a fifth Chairman of either nationality.<sup>51</sup>

Likewise, I have not included disputes caused by the failure to design workable FTA rules because the FTA partners, notwithstanding their "partnership", never had the same aspirations to begin with. For example, countries A and B may wish to prevent imports from country C, and have designed rules which would require the manufacturers of country C to shift their manufacturing operations to countries A and B in order to "jump" a tariff barrier established by countries A and B for that very purpose.

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<sup>50</sup> For example, the Singapore-Australia FTA has the following clause in art. 20(b) of the Investment Chapter: "Nothing in this Chapter shall be construed...(b) to prevent a Party from taking any action *which it considers* necessary for the protection of its essential security interests..." (emphasis added). In contrast, the US-Argentina Bilateral Investment Treaty says: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests".

<sup>51</sup> Andreas F. Lowenfeld, *The Role of Government in International Trade* (London: Cameron May, 2000), 128, 129.



However, country A would really like the manufacturers of country C to come to country A instead of country B. This is roughly what happened in the famous *Honda Case* where Honda engines manufactured in the US were intended to be sent across the border to Canada for further assembly. Canadian customs accepted that the Honda engines were “North American” in origin, and granted preferential treatment under the Canada-US FTA. However, when the fully assembled Honda cars were sought to be exported from Canada to the US, US customs claimed that the Canadian assembled cars did not qualify for preferential tariff treatment under the Canada-US FTA because the engines, which had been manufactured in the US, were insufficiently American in content to start with. Strictly speaking, the *Honda Case* was not an FTA dispute, but a dispute between Honda of Canada and US Customs. Yet from the Canadian viewpoint, it arose because the US and Canada were in the same bed but had different dreams.<sup>52</sup>

Second, I have not mentioned a whole range of ordinary WTO disputes which will have an effect on how treaty language that is common to both WTO agreements and FTAs is likely to be interpreted.

Third, I have ignored thus far cases (like the *Honda Case*) where a country’s industry or business person chooses to appear before the domestic courts or administrative authorities of another country. Trade disputes brought before domestic courts or domestic administrative agencies are an important way of putting an end to an international trade dispute. One recent example involves the US International Trade Commission’s finding that Chinese coated free sheet paper (*kaolin* paper) imports did not cause injury to the US domestic industry.<sup>53</sup> That terminated the anti-subsidies petition brought against Chinese imports in the US. But there are also cases, unlike the *Coated Free Sheet Paper* case where the two countries involved are FTA, and not just WTO, partners. Such proceedings can sometimes be brought in tandem with WTO litigation. For example, in a case involving the US Continued Dumping and Subsidy Offset Act (CDSOA),<sup>54</sup> under which the US disbursed monies collected from anti-dumping and counter-vailing duties imposed on foreign imports to its successful domestic

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<sup>52</sup> See *id.*, 237; or Frédéric P. Cantin & Andreas Lowenfeld, “Rules of Origin, the Canada-US FTA, and the Honda Case”, (1993), 87 *Am J Int’l L* 375.

<sup>53</sup> Coated Free Sheet Paper from China, Indonesia, and Korea, Investigations Nos. 701-TA-444-446 and 731-TA-1107-1109 (Final).

<sup>54</sup> 19 U.S.C. § 1675c.

petitioners; Canada and Mexico, together with seven other WTO members, successfully challenged the legality of the CDSOA before the WTO.<sup>55</sup> One main issue was whether US petitioners were getting a form of “double protection” — not only were their competitors subjected to anti-dumping and countervailing duties, the successful US petitioners would directly benefit from the sums collected. But because certain Canadian producers of softwood lumber, magnesium and hard red spring wheat wanted remedies which were not available under WTO law, they therefore brought separate proceedings before the US federal courts, challenging the CDSOA under NAFTA (more specifically, under the US NAFTA Implementation Act).<sup>56</sup> They succeeded, and secured a US domestic ruling that the CDSOA does not apply to the United States’ NAFTA partners (i.e. Canada and Mexico).<sup>57</sup>

Fourth, no reflections are offered on negotiations in which I served as Singapore’s counsel, or on specific Singapore treaty clauses. My excuse is that there are differences between what the lawyers and other officials do. In comparison with the undoubted value of having greater public understanding of Singapore’s foreign trade policies, told from the viewpoint of its most senior diplomatic and other policy practitioners, the lawyers’ ruminations and recollections are less interesting to non-lawyers. In any case, I was only one in a team of able, generous and inspiring colleagues in the Attorney-General’s Chambers. If anyone is to tell a story about how we thought and what we thought, there are persons who are better able, more deserving and more qualified to do that. If this chapter succeeds in conveying a flavour of what lawyers who specialise in economic diplomacy tend to think about, it would have achieved its aim. What is clear is that, in those days, Singapore was not only pushing ahead of the wider region in trade and investment liberalisation, it needed to be at the forefront of the legal technology necessary to achieve that aim. The bounds of existing legal knowledge and experience loomed close and confronted us with a series of practical legal questions and choices which had to be addressed despite such uncertainty which might have existed at the time about what forms of FTA design WTO rules would ultimately favour, as well as enormous uncertainty then (and, in my view, still) taking place in the field of international investment law.

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<sup>55</sup> US — *Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/DS234/AB/R, Report of the Appellate Body, 27 January 2003.

<sup>56</sup> 19 U.S.C. §§ 3301–3473.

<sup>57</sup> *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319 (2008).

Finally, a chapter dealing with treaty disputes giving examples of some of the graver implications such as in the Argentine case above inevitably highlights some of the risks countries face in entering into those treaties. This is not in any way intended to convey any reservation or doubt concerning Singapore's treaty policies. Some of the most admirable things we do in life incur real legal risks. Such is the condition of life, and we do not allow ourselves to be prevented from doing them. We try to understand the risks involved and to continually seek to increase that understanding. The extent to which Singapore's FTA programme captured an international trend ahead of the rest of Asia is already its own testament, and like with all new things — a new life-saving drug or even, unpopular as it may be to offer this example today, the latest innovation in the financial world — time helps to lessen the risks with advances in our understanding, and brings with it some measure of public knowledge and awareness of the nature of these things.

Aside from such "ordinary" legal risks, there is also the broader question of systemic risk. As a small, open trading nation, Singapore elected to advance trade liberalisation in a competitive way. If the WTO cannot do it, Singapore will employ other means, i.e. through FTAs. When Singapore started signing FTAs, much of Asia was not doing the same. There was no serious question that tiny Singapore could inflict much systemic risk or harm on the multilateral trading system. Today, Singapore's approach has caught on in Asia, and people now talk about the possibility of some very large FTAs. One proposal is to have a 21-member Asia-Pacific FTA — the Free Trade Area of the Asia-Pacific. If it ever transpires, it may not simply spur the WTO on to maintain its relevance, but could reduce the importance or relevance of the WTO. Some of the Asian FTAs negotiated or talked about today could also lead to an Asian trade bloc. At this time, we already see movement towards an East Asian FTA. It raises an important question: How will Singapore position itself in the future? On the whole, small countries are well-advised to act in such a way as to advance *global* rules and institutions, including the WTO and its rules. There is also truth in the general view that small countries need multilateral institutions more than big countries. Going back to the disputes over the EEC in 1957, had they been mishandled, they could have brought the GATT down. In future, a very large FTA could raise similar questions. It is a policy issue, in addition to being a legal issue, and something which Singapore's best policy minds may have to attend to in due course.

## CHAPTER 12

# ASEAN's JOURNEY TOWARDS FREE TRADE

*By David Chin Soon Siong*

### **I. ASEAN's Development in Freeing Trade in Goods**

The Common Effective Preferential Tariff (CEPT) Scheme is the main mechanism through which tariffs are reduced in the Association of Southeast Asian Nations (ASEAN). The Agreement on the CEPT for ASEAN Free Trade Area (AFTA-CEPT) was signed in 1992 and came into effect in 1993. ASEAN adopted a process that accommodated the differing stages of development amongst the original six ASEAN countries and subsequently evolved an even more accommodating formula for the four newer ASEAN countries.

#### **A. ASEAN's Process of Negotiated Accommodation**

In the 1992 AFTA-CEPT Agreement, the original ASEAN countries committed to reducing tariffs to 0–5% over 15 years. ASEAN countries were free to decide on the rate and extent of their tariff reduction as long as the target of all tariffs at 0–5% was achieved at the end of the 15 years, i.e. the year 2008. ASEAN countries then voluntarily decided on their own liberalisation programme.

#### **B. Rate of Liberalisation of Goods Tariffs**

Initially the rate of tariff reductions was minimal and there were concerns that too many tariff lines would be left to be concluded in the later stages. Also, there was too slow a reduction in effective percentages in the initial years. Concerns about the risk of a large “cliff jump” in tariff reductions

towards the end of the process — causing unacceptable economic effects — were very real. Attempts were then made to accelerate liberalisation during the earlier years in order to preempt that situation. This would be to prevent the process from becoming far too difficult in the later years for the ASEAN countries to accomplish.

### ***C. Negotiated Targets For Liberalisation***

The Senior Economic Officials' Meetings (SEOM) then agreed on setting targets for the ASEAN countries to comply with, while maintaining the flexibility that countries could select tariff lines for liberalisation to suit their own development needs. The initial target was that by a certain early year, countries would need to have made a reduction in respect of an agreed percentage of tariff lines. The formula was then improved — to one where the percentage of tariff lines committed for reduction would need to account for an agreed percentage of the individual ASEAN country's intra-ASEAN trade. This meant that reductions were to be made only to those items actually traded within ASEAN. These agreed percentages were periodically and gradually increased.

### ***D. Acceleration of Overall Target***

In tandem with the gradual increases in the percentage of lines for tariff reduction, ASEAN Ministers and Heads of Government also agreed on accelerating the overall timeframe. In 1994, the original timeframe of 15 years (2008) was reduced to ten years (2003). In 1998, this timeframe was further reduced to nine years (2002) such that the original six ASEAN countries were committed to reduce all their tariffs to 0–5% by 2002. The next most profound development in ASEAN's tariff liberalisation efforts was the November 1999 decision by ASEAN's Heads of Government that all import tariffs on all products under the AFTA-CEPT scheme would be eliminated (0% or no tariffs) for the original six ASEAN countries by 2010 and for the remaining four newer ASEAN countries (Cambodia, Lao PDR, Myanmar and Vietnam) by 2015.

### ***E. Safety Valves to Underpin Accelerated Liberalisation***

Realism also had a role to play. In order to obtain agreement for accelerated liberalisation, the negotiators had to cater for sensitivities that may be

peculiar to the different countries. Failure or unwillingness to address this would have resulted in no agreement for acceleration, especially if countries felt that such sensitivities were not catered for. To build in these safety valves, ASEAN agreed that tariffs lines that were progressively reduced would be deemed to form an "Inclusion List" (IL). The AFTA-CEPT mechanism then classified the non-included tariff lines of products into four other categories; namely the "Temporary Exclusion List" (TEL), the "Sensitive List" (SL) and the "Highly Sensitive List" (HSL), as well as a "General Exceptions List" (GE). Items in these four lists were taken out of the percentages committed for liberalisation.

#### 1. *Temporary Exclusion List (TEL)*

Items in the TEL refer to products receiving protection from a delay in tariff reductions. These products can be held at tariffs higher than 20% until 1 January 2000, at which time they would all have to be brought into the Inclusion List (IL). Entry into the Inclusion List must be at the tariff rate of 20% or lower for the original six ASEAN countries.

#### 2. *Sensitive List (SL)*

As for the Sensitive List, that comprises unprocessed agricultural products which have been given a longer timeframe for liberalisation. These products have until 2010 to meet the reduction of tariffs to within the 0–5% range.

#### 3. *Highly Sensitive List (HSL)*

The Highly Sensitive List consists of the highly sensitive unprocessed agricultural products, namely sugar and rice, which have been given a longer timeframe before being phased into the AFTA-CEPT. These products have up to 2010 to reach a reduction of tariffs to not more than a 20% tariff rate.

#### 4. *General Exceptions List (GE)*

Items in the General Exceptions List refer to products which a country deems necessary for the protection of national security, public morals, protection of human, animal and plant life and health and the protection of artistic, historic or archaeological value. These products designated as GE

are permanently excluded from the AFTA-CEPT scheme. Initially countries are free to put a limited number of products into this list to cover special sensitivities. Notwithstanding this liberal allowance, ASEAN countries have now agreed to review their respective GE lists with a view to phasing them into the AFTA-CEPT scheme. What this means is that only those items in accordance with the WTO General Exceptions rules can in future remain in the GE list.

#### ***F. Encouraging the Liberalisation Process Through an Interim Reciprocity Rule***

To encourage faster liberalisation and phasing into the Inclusion List, ASEAN negotiators agreed that an item is only deemed to be in the IL when its tariff has been reduced to 20%, and that an ASEAN country can only enjoy the tariff reductions of other countries' included items if its own tariff is also in the Inclusion List. This effectively means that if an ASEAN country wants to enjoy the 20% or less for item A of another ASEAN country, it must reduce its own tariff for item A to at least 20%. This is a departure from the WTO's MFN principle, but as it is only for the interim process of liberalisation, it serves as a motivating factor and an accelerator. This was accepted by all ASEAN countries and is the main reason for ASEAN speeding up its process of liberalisation by encouraging the entry of the TEL into the IL and by driving tariffs down to 20%. Once the process is completed, full MFN principle will be automatically reinstated.

#### ***G. Setting of Interim Targets for Tariff Lines in the Inclusion List to Reach 0–5% Tariff and Later to Reach Zero Tariff***

The ASEAN Economic Ministers then agreed that once a product's line has been put into the Inclusion List at 20% tariff or below 20% tariff, the tariff will be further reduced to a 0–5% tariff rate within two years of its entry into the Inclusion List.

Interim targets were then set to ensure an orderly phase-in of the target elimination of tariffs by 2010 for the original six ASEAN countries and by 2015 for the four newer ASEAN countries. While the six ASEAN countries already have the bulk of their tariff commitments at the 0–5% rate, an additional set of targets was agreed for the four newer ASEAN countries to arrive at the 0–5% tariff rate level.

Flexibilities were accorded to the four newer ASEAN countries to have three more years from 2015 to 2018 for keeping some of their tariffs at the 0–5% tariff rate instead of reducing all the Inclusion List tariffs to zero by 2015.

These interim targets were agreed by the ASEAN Economic Ministers in September 2002 and are set out in Table 1 and Table 2 below.

Through this method of gradually accommodating the interests of ASEAN members, coupled with the use of fixed negotiated targets, the ten ASEAN countries were able to target all the tariffs in the Inclusion List for a reduction down to zero for the six original ASEAN countries by 2010 and by 2015 for the four newer ASEAN countries. Given the large difference in the development levels of the ten ASEAN countries, this was a unique approach to liberalisation of trade in goods.

### H. Adherence to WTO Principles

While the process adopted by ASEAN was unique and a departure from the “request and offer” or “formula” approach adopted by the GATT and the WTO in their many negotiation rounds, all other GATT and WTO principles were faithfully observed by ASEAN. The biggest variation ASEAN adopted

**Table 1.** Percentage of tariff lines in Inclusion List (IL) to reach zero tariff

	ASEAN-6	Vietnam	Laos and Myanmar	Cambodia
60%	2003	2006	2008	2010
80%	2007	2010	2012	—
100%	2010	2015, with flexibility up to 2018	2015, with flexibility up to 2018	2015, with flexibility up to 2018

**Table 2.** Percentage of tariff lines in Inclusion List (IL) to reach 0–5% tariff

	ASEAN-6	Vietnam	Laos and Myanmar	Cambodia
80%	—	2003	2005	2007
100%	2003	2005, with flexibility up to 2006	2007, with flexibility up to 2008	2009, with flexibility up to 2010



was the reciprocity rule which differs from the full MFN principle in the WTO. Such interim non-compliance with the MFN principle was deemed a necessity to encourage voluntary phasing-in and was seen as a more acceptable approach to the ten ASEAN countries than the GATT/WTO's request and offer or formula approaches. ASEAN also followed the GATT/WTO targets of completing their FTA in goods within ten years and ensuring that its AFTA-CEPT covers in excess of 90% of all its tariff lines, even though the AFTA-CEPT was notified to the GATT/WTO under the Enabling Clause. ASEAN also continues to work progressively on the elimination of non-tariff barriers (NTBs).

### **I. Singapore's Role in the AFTA-CEPT**

In Singapore, tariffs are practically non-existent. Singapore's role in ASEAN is therefore to lead by example, and it effectively became the first to achieve all the targets set while awaiting the rest of the ASEAN countries to reach their targets at their own pace within the accommodating approach described above. As Singapore's legendary Ridzwan Dzafir chaired the Committee of Trade and Tourism in the early years of ASEAN, Singapore initiated many of the approaches described earlier and strived to work towards a gradual process that the other ASEAN countries could accept. We need to understand this background to how the ASEAN countries themselves journeyed towards free trade in goods when we consider ASEAN's later FTAs with its Dialogue Partners.

### **II. ASEAN's Development in Trade in Services**

With the smooth implementation of the AFTA-CEPT in Goods, the ASEAN Economic Ministers in April 1994 decided that ASEAN should explore the establishment of a Framework Agreement on Trade in Services. The subsequent negotiations were very much guided by the WTO's General Agreement on Trade in Services (GATS) and in just over a year, the ASEAN Framework Agreement on Services (AFAS) was signed by the ASEAN leaders in December 1995.

#### **A. Coverage of AFAS**

AFAS aims to eliminate restrictions to trade in services and enhance cooperation in services within ASEAN. Commitments are made in

accordance with the disciplines of cross-border supply (mode 1), consumption abroad (mode 2), commercial presence (mode 3) and the presence of natural persons (mode 4). All concessions in services must be extended to all ASEAN members on a most favoured nation (MFN) basis. This MFN obligation under AFAS only extends to preferential arrangements between ASEAN countries and does not cover those between an ASEAN country and a non-ASEAN country.

### ***B. The Ambitious Nature of AFAS***

Negotiation on commitments and liberalisation commenced in 1996 and initially the focus was on seven priority sectors — air transport services, business services, construction services, financial services, maritime transport services, tourism services and telecommunication services across all four modes of supply. ASEAN was therefore extremely ambitious and the Ministers felt that ASEAN with just ten countries working so closely together could achieve a breakthrough that had eluded the WTO's GATS, signed earlier in 1995. ASEAN was attempting to negotiate commitments in four of the five “difficult” services sectors that bedeviled the Uruguay Round negotiation on services.

### ***C. Progress of the ASEAN Negotiations***

While ASEAN achieved five rounds of services negotiations (as against the WTO's laggardly second round) progress has nonetheless been relatively slow. Offers made to date have been minimally GATS-plus and do not provide for significant market opening beyond GATS. In many cases the commitments in AFAS reflect existing services regimes in ASEAN countries.

A key reason for the slow progress was that ASEAN countries were mindful that concessions given in AFAS could compromise their position at the GATS negotiations currently in progress at the WTO in Geneva. The slow progress at GATS in Geneva held back attempts to make progress at AFAS.

### ***D. MFN Obligations***

Another reason for the slow progress was the free-rider effect of the MFN obligation adopted in 1995 as this impeded ASEAN member countries from making generous services offers to each other, since these would then

have to be extended to other ASEAN countries that were unwilling to make similar offers in those sectors.

ASEAN recognised in late 1998 that to accelerate the pace of services liberalisation, an alternative approach was needed. After trying various modalities that proved futile, the Ministers tasked officials in September 2001 to develop a modality for services liberalisation that would allow countries that were ready to move ahead to do so first, and to widen the scope of negotiations to all sectors instead of just the seven sectors previously identified.

#### ***E. ASEAN-Minus-X Modality***

In 2002, the Ministers agreed to apply the ASEAN-X modality to various areas including services liberalisation to remove the free-rider effect. The ASEAN-X formula allows two or more ASEAN countries that are ready to proceed with their agreed liberalisation to do so first on a reciprocal basis — meaning that liberalisation need only be extended to the two or more participating countries. The details of such agreements are to be fully transparent and any other ASEAN country can join in at any later time when they are able to meet the same commitments and hence enjoy the commitments of the original participating ASEAN countries. This ASEAN-X modality agreement was signed in 2003.

#### ***F. Mutual Recognition Agreements***

In addition to working on commitments on liberalisation, ASEAN also worked towards mutual recognition agreements (MRA) to enhance services co-operation within ASEAN. The aim was to have MRAs to enable the qualification of professional services suppliers to be mutually recognised by signatory ASEAN member countries, hence facilitating an easier flow of professional services providers in the ASEAN region.

### **III. ASEAN's Development in Investment**

A Framework Agreement on the ASEAN Investment Area (AIA) was also signed in 1998. The Agreement covers all direct investments in the five sectors of manufacturing, fisheries, forestry, mining and agriculture. A further Protocol was signed in 2001 to extend the scope of the Agreement to cover services incidental to the five sectors mentioned above.

### **A. Coverage of the AIA**

With the AIA, ASEAN investors would be free to invest in and be accorded national treatment in the above five sectors and in services incidental to the five sectors, subject to listed reservations (i.e. exceptions). As in AFTA-CEPT, ASEAN countries are allowed to take reservations either in the form of inclusion within a Sensitive List (SL) which is periodically reviewed, or in a Temporary Exclusion List (TEL) which is subject to a schedule of expiry.

### **B. Eliminations of Reservations**

The original AIA Agreement set the deadline for the elimination of the reservations made in the TEL at 2010 for ASEAN investors and at 2020 for non-ASEAN investors. These deadlines have been accelerated periodically. For the manufacturing sector, the six original ASEAN countries had eliminated all reservations for ASEAN investors by 1 January 2003 and were committed to eliminate all reservations for all five sectors for all investors by 1 January 2010.

### **C. Expansion of the AIA**

In September 2003 ASEAN Ministers also agreed to broaden the AIA to include services elements such as (but not limited to) education services, healthcare, telecommunications, tourism, banking and finance, insurance, trading, e-commerce, distribution and logistics, transportation and warehousing, and professional services such as accounting, engineering and advertising. However, as the Ministers also agreed in 2004 on the development of the ASEAN Economic Community through an initial set of 12 priority sectors, the AIA negotiators decided that the expansion of the AIA scope should focus first on those services under the priority sectors, namely healthcare, air travel, e-commerce and logistics and distribution.

## **IV. ASEAN's Continuing Journey Towards Free Trade With Dialogue Partners**

The previous sections cover ASEAN's internal development towards free trade up to December 2006. ASEAN continues to improve on its AFTA-CEPT Agreement, the Services Framework Agreement and the ASEAN Investment Agreement. The developments after 2006 in this journey are ongoing, and they are part of the development of the ASEAN Economic Community.

The discussion above sets the scene for an account of ASEAN's current FTA negotiations with China, Japan, Korea, Australia and New Zealand together, and India. An understanding of ASEAN's own journey towards free trade will explain the negotiating stance taken by ASEAN in these negotiations with its Dialogue Partners.

### ***A. First Free Trade Area Discussion with ASEAN's Dialogue Partners (Australia and New Zealand)***

The first Dialogue Partner to propose an FTA relationship with ASEAN was Australia and New Zealand. An Expert Group was formed with representatives of all 12 countries participating. These experts proposed a gradual phase-in and merging of the two different free trade systems already in place in the 12 countries. The final meeting of the Experts in Siem Riep in 2000 reached agreement on a basis for phasing in, and it was proposed to the Ministers. They called this the "Angkor Agenda" as Siem Riep is also where Angkor Wat is located.

The presence of senior governmental officials in the 12 delegations implied that the "Angkor Agenda" had the "in-principle blessing" of the 12 governments and only details need be negotiated subsequently. The proposal was termed the AFTA-ANZCERTA Closer Economic Partnership (AACEP). It was to be a phasing-in programme such that Australia and New Zealand would allow all ASEAN countries to enjoy in 2005 the reduced tariffs of their own Australia-New Zealand Closer Economic Relations and Trade Agreement (ANZCERTA). In return the original six ASEAN countries would allow Australia and New Zealand to enjoy their AFTA-CEPT tariffs from 2010. The four newer ASEAN countries would allow Australia and New Zealand to enjoy their AFTA-CEPT tariffs in 2015. It was to be a relatively easy Agreement to negotiate as it involved only countries extending to others their reduced tariffs in either the AFTA-CEPT or ANZCERTA at fixed times and only details such as the Rules of Origins would need to be negotiated. However, due to political differences between two ASEAN countries and Australia in 2000, this proposal was not accepted by ASEAN in 2000.

### ***B. Discussions with Other Dialogue Partners***

The Japanese were next to propose an FTA arrangement with ASEAN and again an Expert Group was initiated to study the feasibility of such an

agreement. The Japanese and ASEAN Expert Group took quite a long time to complete its work.

A year after the Japanese and ASEAN Expert Group started, the People's Republic of China also proposed a FTA arrangement with ASEAN and another Expert Group was formed between ASEAN and Chinese experts to study the feasibility of such an FTA. The Chinese Group came prepared with a very detailed proposal and arrived at the first meeting with almost a completely written report. ASEAN countries commented on the Chinese proposals and gave their suggested amendments, and at the 4th meeting of the Expert Group, China accepted all of ASEAN's proposed amendments and finalised the work of the Expert Group within a year. This was then accepted by the Ministers and the first ASEAN Plus Dialogue Partner FTA negotiation started with the Chinese.

A year after the FTA negotiation between ASEAN and China commenced, the Japan and ASEAN Expert Group completed its report which was accepted by the Ministers and the second ASEAN Plus Dialogue Partner FTA negotiation started with Japan.

India also decided on having an FTA negotiation with ASEAN. The big difference in India's case was that the decision to commence an FTA negotiation with ASEAN was taken at the level of the Leaders' Summit between ASEAN and India without even having an Expert Group formed to study the feasibility of such an FTA. India proposed that an earlier study by an Indian academic and an ASEAN academic a few years earlier, calling for an FTA between India and ASEAN, be taken as justification to proceed with negotiations. Once a political decision was taken by the Summit and the ASEAN Heads of Government responded positively to the Indian Prime Minister's proposal, negotiations started immediately.

With China and Japan each having their ongoing negotiations for an FTA with ASEAN, the Republic of Korea finally accepted that its preferred route of having an ASEAN Plus China, Japan and Korea (ASEAN Plus 3) FTA was not likely to be possible at that time. It then proposed that an Expert Group be formed between ASEAN and the Republic of Korea to look into a possible FTA between them.

Meanwhile Australia, New Zealand and ASEAN continued their closer economic partnerships in economic projects. Through this period they had regular meetings where different bases for free trade relations were continually discussed. When the time was politically right, these discussions were encapsulated into a set of agreed guidelines and the Ministers finally agreed to launch negotiations in 2004 using the guidelines. However, as 2004 was

so close to the first 2005 timeframe of the Angkor Agenda, there was insufficient time to work towards a phasing-in as envisaged earlier and the ASEAN, Australia and New Zealand FTA negotiation began on a basis closer to ASEAN's other FTA negotiations. The Angkor Agenda was filed away.

Finally, in 2006 the European Union and ASEAN also commenced discussion for an FTA and a Study Group was formed to look into the feasibility of such an agreement.

### ***C. Assignment of Duties***

ASEAN's Senior Economic Officials' Meeting (SEOM) Leaders proposed to the ASEAN Economic Minister that all these simultaneous negotiations be placed under the supervision of the SEOM Leaders meeting four times a year. SEOM Leaders could vet all the negotiations for the Ministers. SEOM also agreed that each of ASEAN's negotiation teams be under the leadership of one of the SEOM Leaders with the rest of the ASEAN delegations being from the level below the SEOM Leaders. They also agreed that the SEOM Leader heading ASEAN's team be the Chief Negotiator of ASEAN and that he or she be the Co-Chairperson of all the negotiations with individual Dialogue Partners.

Thailand was appointed to take the lead as ASEAN Co-Chair in the first FTA negotiation — the ASEAN Plus China FTA (ACFTA). The Philippines' SEOM Leader was appointed to lead the ASEAN Plus Japan Closer Economic Partnership (AJCEP) negotiations as ASEAN's Co-chair. Malaysia was appointed to lead the ASEAN Plus India FTA negotiation (AIFTA) as ASEAN's Co-Chair. Brunei's SEOM Leader was appointed to lead the ASEAN Plus Australia and New Zealand's FTA (AANZFTA) negotiations as ASEAN's Co-Chair. Singapore's SEOM Leader was appointed to lead the ASEAN Plus Korea FTA (AKFTA) negotiations as ASEAN's Co-Chair. Vietnam was appointed to lead the ASEAN Plus European Union FTA (AEUFTA) negotiations as ASEAN's Co-Chair.

While each set of negotiations was conducted on its own, the SEOM would co-ordinate all these six sets of negotiations and vet them for the Ministers' signatures. As is customary in ASEAN, the more senior level organisation will only review those issues in respect of which the more junior organisation fails to reach consensus. Hence if the ten ASEAN countries reach full consensus on each of the six FTA negotiations, the SEOM will endorse the consensus decision as ASEAN's own agreed position. If there is no consensus among ASEAN members at the six negotiating groups, then the negotiation at the SEOM will produce ASEAN's consensus position. Only if the SEOM is

unable to reach consensus would the ASEAN Economic Ministers be responsible for coming to an agreement on a common ASEAN position.

#### ***D. Packaging of the ASEAN Plus FTAs***

The ACFTA, AJCEP, AKFTA and the AIFTA were negotiated under a Framework Agreement which outlines the various parts of the FTA that are to be negotiated separately. After signing the Framework Agreement it is usually the Dispute Settlement Agreement which becomes the second agreement to be signed, followed by the Trade in Goods Agreement. Thereafter, it would usually be the Trade in Services Agreement, followed by the Investment Agreement.

An Economic Co-operation Agreement is typically incorporated in the Framework Agreement. Given the differing levels of development in ASEAN, it was recognised by ASEAN and all its Dialogue Partners that as we moved towards freer trade, we would need to assist each other in economic development through a series of Economic Co-operation programmes and projects. Hence the Economic Co-operation elements in the Framework Agreement became very much part of the FTA.

The AANZFTA and the AEUFTA are different from the other four FTAs as it was agreed that these agreements should be negotiated on a single undertaking basis and hence only one Final Agreement would be signed, incorporating in one Agreement all the commitments in goods, services and investment.

### **V. ASEAN Plus China FTA: Trade in Goods**

The Chinese approached their negotiations with ASEAN with the aim of following ASEAN's own process of taking gradual steps to accommodate the differing stages of development amongst the ten ASEAN countries. It is fortunate for ASEAN that the first ASEAN Plus Dialogue Partner FTA was with China as the accommodating approach taken by the Chinese made it such that subsequent Dialogue Partners had to accept this general "ASEAN way" of liberalisation.

#### ***A. Normal Track and Sensitive Track***

The Chinese saw that ASEAN's own journey into freeing trade in goods involved a Normal Track (the Inclusion List) and a Sensitive Track (the Sensitive List and Highly Sensitive List and General Exceptions) and they



realised that something similar in approach was needed for the ASEAN Plus China FTA. As a developing country, China also needed this gradual and segmented approach towards liberalising trade in goods. They and ASEAN however felt that since ASEAN had already phased in most of its tariffs into the AFTA-CEPT Inclusion List, the AFTA-CEPT concept of a gradual phase-in of the Inclusion List from a Temporary Exclusion List would not be needed for the ACFTA. The ACFTA therefore does not have a Temporary Exclusion List; instead a Normal Track approach was taken to commit all tariffs put into this Track to a process of reductions starting with their existing tariff rates and gradually reducing them towards the elimination of tariff rates.

### **B. *The Modality for the Normal Track***

The negotiators in ACFTA then agreed that the liberalisation process should be one where countries can place a pre-determined number of tariff lines into a Sensitive Track provided that these Sensitive Track tariff lines do not exceed 10% of a country's total import value. The remaining 90% of product tariffs by import value would be covered in the Normal Track by an agreed modality of tariff reduction and elimination. The six original ASEAN countries and China agreed to cap their sensitive track at 400 tariff lines while the four newer ASEAN countries were permitted no more than 500 tariff lines in their Sensitive Track.

All the remaining tariffs in the Normal Track are to be reduced by steps such that for the six original ASEAN countries and China all tariffs above 20% will need to be reduced to 20% on 1 January 2005 with a further slide down to 12% in 2007, 5% in 2009 and 0% on 1 January 2010.

Tariffs that are between 15% to 20% need to be reduced to 15% in 2005, 8% in 2007, 5% in 2009 and eliminated on 1 January 2010.

Tariffs at 10% to 15% need to be reduced to 10% in 2005, 8% in 2007, 5% in 2009 and eliminated on 1 January 2010.

Tariffs at 5% to 10% will then be reduced to 5% in 2005 and eliminated on 1 January 2010. Any tariffs at or below 5% are to be held at a standstill and are required to be eliminated by 2009.

For Vietnam the rate of reduction on tariffs in the Normal Track starts at 60% in 2005 and will go through eight periods of staged reduction until tariffs are wholly eliminated on 1 January 2015. There will be eleven stages of increased tariff coverage, as against the five stages (as described in the preceding paragraphs) for ASEAN 6. For Cambodia, Lao PDR and

Myanmar, the agreed stages are the same eight periods and eleven stages of increased tariff coverage, but in Vietnam's case, the gradient of tariff reduction will be more gradual and a longer time will be allowed for tariffs to reach the final, elimination stage.

China also agreed with the ASEAN "Inclusion" approach such that a country can only enjoy the tariff concession of the other parties only when they too place their tariff item into the Normal Track and that once in place, they need to continue to adhere to the reduction and elimination modality agreed.

The ACFTA also followed ASEAN's system of setting targets such that for ASEAN 6 and China, at least 40% of all their tariff lines placed in the Normal Track need to be reduced to 0–5% no later than 1 July 2005. This percentage will then increase to 60% of all its tariff lines in the Normal Track by 1 January 2007.

On 1 January 2010, for both ASEAN 6 and China, all tariff lines in the Normal Track would have to be eliminated save for each country having the flexibility to have no more than 150 tariff lines being kept back for elimination on 1 January 2012.

For the four newer ASEAN countries the rates of reducing 50% of their lines to 0–5% are slower, i.e. 1 January 2009 for Vietnam, 1 January 2010 for Lao PDR and Myanmar and 1 January 2012 for Cambodia.

Elimination of tariff rates are then again phased in to specific target dates and on reaching the end date of 2015, the four newer ASEAN countries are allowed to have no more than 250 tariffs lines being kept back for elimination three years later on 1 January 2018.

### ***C. The Modality for the Sensitive Track***

ASEAN and China also agreed that tariff lines placed by each country into their Sensitive Track be further classified into a Sensitive List and a Highly Sensitive List. However there are ceilings for the number of tariff lines to be included in the Highly Sensitive List for each country. ASEAN 6 and China agreed that no more than 40% of their Sensitive Track be classed in the Highly Sensitive List subject to a cap of 100 tariff lines, and Cambodia, Lao PDR and Myanmar also agreed not to exceed placing 40% of their Sensitive Track in the Highly Sensitive List subject to a cap of 150 tariff lines.

ASEAN 6 and China agreed to reduce their tariffs in the Sensitive List to 20% no later than 1 January 2012 and these tariffs should then be reduced subsequently to 0–5% no later than 1 January 2018.

Cambodia, Lao PDR and Myanmar agreed to reduce their tariffs in their respective Sensitive List to 20% by 1 January 2015 and later to 0–5% no later than 1 January 2020.

Vietnam was allowed to have a longer timeframe to negotiate the number of tariff lines in its Sensitive Track which can be placed in its Highly Sensitive List as well as the rate at which tariffs in the Sensitive List would need to be reduced to by 1 January 2015. Nonetheless, Vietnam would need to comply with having all its Sensitive List tariffs reduced to 0–5% no later than 1 January 2020.

The countries agreed that tariffs in the Highly Sensitive List should be reduced to 50% no later than 1 January 2015 for ASEAN 6 and China and no later than 1 January 2018 for the four newer ASEAN countries.

China also agreed to follow ASEAN's concept of reciprocity and agreed that tariff lines placed by a country in the Sensitive Track must be at a rate of 10% or below in order for that country to enjoy reciprocity of the other countries' reduced tariffs. This will therefore serve to encourage faster liberalisation of tariffs in the Sensitive Track.

#### **D. Overall Summing Up**

China, while maintaining the target coverage of 90% of all goods being made free within ten years of progressive reductions, has kept very much to WTO objectives and to a method of liberalisation which ASEAN had evolved for its own AFTA-CEPT, a method of accommodating differing levels of development. The ASEAN Plus China Trade in Goods Agreement confirmed and applied the concepts that the four newer ASEAN member countries be given more flexibilities and a longer timeframe and a more gradual approach to liberalisation of their tariff reductions. China also agreed to apply the same approach as ASEAN had in its AFTA-CEPT where a further two years of flexibility were accorded to some tariff lines at the end of the formula reductions.

### **VI. ASEAN Plus Korea FTA: Trade in Goods**

ASEAN and Korea signed their Agreement on Trade in Goods in August 2006. Thailand had asked to be excluded from this Agreement for the time being. Like China, Korea agreed to negotiate this agreement along the same lines as the gradual, accommodating process which ASEAN used in its own AFTA-CEPT agreement. Korea also offered to initially do more

than even ASEAN 6. It is more than what China agreed to. Tariff lines are again to be in either a Normal Track or a Sensitive Track. 90% of all tariff lines are to be in the Normal Track for elimination of tariff rates, thus complying with the target of 90% coverage of all products for tariff elimination.

### ***A. Schedule of Tariff Reductions in the Normal Track***

Korea wanted separate treatment for Vietnam as it considered Vietnam to be more developed than the other three newer ASEAN countries. The resulting schedule of tariff reductions was therefore divided into three categories: A category for ASEAN 6 and Korea (Thailand initially agreed to sign on later to this category); a second category for Vietnam; and a third category for Cambodia, Lao PDR and Myanmar. This is a further departure from the ASEAN Plus China FTA.

ASEAN 6 and Korea agreed on a similar stepped approach to tariff reductions as used in ASEAN Plus China, but as Korea also wanted to finish the tariff liberalisation for ASEAN 6 and Korea by 1 January 2010, the rate of tariff reduction is steeper since its Agreement was to be signed a year later than China's. Five "time steps" were agreed upon for the five stages of tariff reductions, starting its reduction from 20% as in the ACFTA.

Vietnam had agreed to reduce its tariffs in the Normal Track from 60% in eleven stages of tariff percentages over eight time steps to arrive at zero tariff for their Normal Track tariffs on 1 January 2016.

Cambodia, Lao PDR and Myanmar agreed to reduce their tariffs in the Normal Track from 60% in the same eleven stages (measured in terms of tariff percentages) as in Vietnam's case. But Cambodia, Lao PDR and Myanmar were allowed to spread their reductions over seven time steps to arrive at zero tariffs for their Normal Track tariffs on 1 January 2018.

### ***B. Normal Track Modalities***

In addition ASEAN and Korea agreed to thresholds to commit to further tariff reductions within the schedules mentioned earlier.

Korea agreed to eliminate its tariff (to zero tariff) for at least 70% of all its tariff lines in its Normal Track upon entry into force of the Agreement. This was a much faster commitment than the Chinese had agreed to. Korea also committed to eliminate its tariff for at least 95% of all its tariff lines in

its Normal Track no later than 1 January 2008, and to eliminate all of its tariff in its Normal Track no later than 1 January 2010.

ASEAN 6 agreed to reduce its tariff for at least 50% of its tariff lines placed in its Normal Track to 0–5% duty no later than 1 January 2007, eliminate duties for at least 90% of all its tariff lines placed in its Normal Track no later than 1 January 2009, and generally to eliminate duties on all tariff lines in the Normal Track no later than 1 January 2010. But there will be flexibility such that they can have up to 5% of Normal Track tariff lines held back for the elimination of duties to no later than 1 January 2012. To assist two of the ASEAN 6 countries which needed even greater flexibility, Korea and the other four (of the ASEAN 6) countries agreed that these countries could have more than 5% being held back for the elimination of duties, though no later than 1 January 2012.

Vietnam agreed to reduce duties on 50% of its tariff lines placed in its Normal Track to 0–5% duty by 1 January 2013, eliminate duties on at least 90% of its tariff lines placed in the Normal Track no later than 1 January 2015, and to eliminate duties on all its tariff lines in its Normal Track no later than 1 January 2016; again with the flexibility of having up to 5% of its Normal Track tariff lines held back for the elimination of duties, though no later than 1 January 2018.

Cambodia, Lao PDR and Myanmar agreed to reduce 50% of tariff lines placed in their Normal Track to 0–5% duty by 1 January 2015, eliminate duties on at least 90% of their tariff lines placed in the Normal Track no later than 1 January 2017, and eliminate duties on all their tariff lines in their Normal Track no later than 1 January 2018. Again, there is the flexibility to have up to 5% of Normal Track tariff lines held back for elimination, though no later than 1 January 2020.

### ***C. The Modalities for the Sensitive Track***

Like the ASEAN and China FTA, ASEAN and Korea similarly agreed that 10% of their tariff lines placed in the Sensitive Track should be further classified into a Sensitive List and a Highly Sensitive List. The number of tariff lines which a country can place in the Sensitive Track is subject to a ceiling of 10% of all tariff lines and 10% of total import value for ASEAN 6 and Korea, 10% of all tariff lines and 25% of total import value for Vietnam and just 10% of all tariff lines for Cambodia, Lao PDR and Myanmar.

Ceilings were agreed upon for a number of tariff lines that can be placed in the Highly Sensitive List such that ASEAN 6 and Korea can only

have 200 tariff lines in numbers or 3% of all tariff lines accounting for 3% of total import value in their Highly Sensitive List. The four newer ASEAN countries also agreed to a cap of 200 tariff lines, or 3% of their tariff lines being placed in their Highly Sensitive List. No capping of import value was applied to the four newer ASEAN countries. This compares to a 4% cap of tariff lines in the ASEAN and China FTA, but the number of tariff lines in the Highly Sensitive List is larger for Korea and ASEAN 6.

Tariffs in the Sensitive Lists of all countries have to be reduced to 0–5% in two steps. For ASEAN 6 and Korea, tariffs in the Sensitive Lists are to be reduced to 20% no later than 1 January 2012 and subsequently reduced to 0–5% no later than 2016.

Vietnam's tariffs in their Sensitive List are to be reduced to 20% no later than 1 January 2017 and these should subsequently be reduced to 0–5% no later than 1 January 2021.

For Cambodia, Lao PDR and Myanmar, they have to reduce their tariffs in their Sensitive Lists to 20% no later than 1 January 2020 and these should be reduced subsequently to 0–5% no later than 1 January 2024.

#### ***D. Modalities for Highly Sensitive List***

To cater for Korea's sensitivities in their agricultural products and their need for some tariffs to be excluded from tariff deductions, a much more complicated approach had to be negotiated for the modalities for the Highly Sensitive List. It is this Korean need for rice to be excluded that kept Thailand from being party to this agreement at the signing in 2006. This approach to the Highly Sensitive List is generally less liberal than that in the ASEAN and China agreement.

Tariff lines in the Highly Sensitive List can be placed in five groups:

- Group A For tariff lines subject to a 50% tariff cap  
ASEAN 6 and Korea are to reduce all tariffs placed in Group A to no more than 50% no later than 1 January 2016. Vietnam would need to reduce their Group A tariffs to 50% no later than 1 January 2021 and the remaining three newer ASEAN countries need to reduce their Group A tariffs to 50% no later than 1 January 2024.
- Group B For tariff lines subject to tariff reduction by 20%  
ASEAN 6 and Korea are to reduce the tariffs rates in Group B by no less than 20% no later than 1 January 2016. Vietnam

would reduce their Group B tariff by no less than 20% no later than 1 January 2021, and the remaining three newer ASEAN Countries are to reduce their Group B tariffs by no less than 20% no later than 1 January 2024.

- Group C For tariff lines subject to tariff reductions by 50%  
The dates for the countries to arrive at reductions of no less than 50% for tariff lines placed in this group are the same as those indicated for Group B.
- Group D For tariff lines subject to tariff rate quotas  
Countries are allowed to apply tariff rate quotas on imports of goods placed in Group D in accordance with agreed conditions set out in their schedules at the time of signing the Agreement.
- Group E For tariff lines exempted from tariff concession — the Exclusion List  
Countries can maintain their applied tariff rates for tariff lines placed in Group E. The number of tariff lines which each country can place in Group E is subject to a maximum ceiling of 40 tariff lines.

Korea also agreed to follow ASEAN's concept of reciprocity, and agreed that tariffs in the Sensitive Track must be at a rate of 10% or below in order to enjoy the reduced tariffs of other countries on a reciprocal basis. However if a specific tariff is in Group E or falls within the category of excluded tariffs, then even if the tariff rate is below 10%, the country excluding that tariff line will not enjoy the reduced tariff rates of other countries for the same tariff lines.

### ***E. Overall Summing Up***

The Korea Plus ASEAN Trade in Goods Agreement therefore went further to entrench the process of gradual accommodation and of according more flexibilities to the newer ASEAN countries. However, this agreement introduced the concept of Vietnam being treated in a different manner from the other three newer ASEAN countries. This agreement also raised ASEAN's expectation that the Dialogue Partners have to do more and take on earlier and more liberalisation ahead of ASEAN's own commitments. While this Agreement meets the 90% coverage of goods in the FTA it also introduced new concepts like an Exclusion List as well as allowing some

high tariffs peaks to be reduced by only 50% or by only 20% of applied rates at the time of signing. This is less liberal than the ASEAN Plus China Agreement where the Highly Sensitive List tariffs need to be reduced to 50% by fixed dates. However, there are tariffs in the AKFTA Highly Sensitive List that will drop to 20%. Having said that, the total number of lines allowed in the Highly Sensitive List in the AKFTA is higher than the total number of lines allowed in the ACFTA.

Thailand has since reached an agreement with Korea. It will sign the AKFTA which, at the time of writing, is awaiting ratification by the Thai Parliament. In the process of subsequent negotiations Thailand managed to get further concessions from Korea to compensate for the exclusion of rice from Korea's list of commitments. The remaining nine ASEAN countries agreed to allow Thailand to get this slightly better deal than what they themselves obtained in the interest of having all ten ASEAN countries participate in the AKFTA Trade in Goods Agreement.

## **VII. ASEAN Plus Japan Comprehensive Economic Partnership: Trade in Goods**

The Japan Plus ASEAN Comprehensive Economic Partnership (AJCEP) took a much longer time to negotiate. Although the negotiation started before the ACFTA started, it finished three years after the ACFTA Trade in Goods Agreement was signed and two years after the AKFTA Trade in Goods Agreement was signed. The difficulties faced were due to Japan concurrently negotiating bilateral FTAs with a few ASEAN countries and wanting to harvest all it had agreed bilaterally with individual ASEAN countries into the AJCEP. The ASEAN countries were not prepared to accept this as it was felt that what one ASEAN country had committed to Japan should not bind another ASEAN country. ASEAN countries that had made commitments to Japan on an item might simply not be able to make similar commitments on that item as their ASEAN neighbours. Japan argued that ASEAN should give to each other (as ASEAN brothers) what they had given to Japan. Eventually all tariffs would reach zero and extending their bilaterals to all of ASEAN would speed up the process of liberalisation.

ASEAN's argument was that in the interim, they could not just extend liberalisation in this manner. ASEAN wanted Japan to negotiate as the Chinese and Koreans had done, i.e. against a common AJCEP agreement where a common list of goods would be covered and a common formula for liberalisation adopted. Only then would a common ASEAN Plus Japan



Trade in Goods Agreement result. The Japanese wanted an AJCEP to consolidate all their bilateral FTAs for the purpose of cumulation. They eventually accepted that this had to be done against a common list of goods and a common formula for liberalisation. This argument took two full years to resolve, hence the delay in arriving at an Agreement.

### ***A. The Common List of Goods and Formula***

Japan eventually accepted ASEAN's position and realised that Japan also might need to ensure that what it had committed to one ASEAN country need not be extended to other ASEAN countries. This was due to the ten ASEAN countries being at varying stages of economic development. Japan itself might also have no difficulty in liberalising an item in relation to a particular ASEAN country, but may have difficulty doing the same with another ASEAN country which might be more competitive than Japan (at least in relation to that item).

The Japanese then looked at the ASEAN Plus Korea Agreement and realised that Japan and ASEAN could use the AKFTA concept of having "exclusions" to take out these sensitive items. Japan realised that following the AKFTA in having some tariffs held at up to a 50% tariff rate and limiting reductions in their tariff peaks to their pre-agreement applied rates would also solve some of its own sensitivities.

Japan was also keen to show that it could compare favourably with China and Korea and finally decided upon a common goods approach and a common formula approach for use across ASEAN in the AJCEP. This could then be used for purposes of cumulation, while maintaining its bilateral FTAs with many ASEAN countries.

### ***B. The AJCEP Formula for Tariff Reductions***

The agreed formula for the AJCEP broadly involved allowing Japan to have up to 1% of its trade volume excluded from the AJCEP, with 2.2% of its trade volume within the Highly Sensitive List where the tariff rate will not be more than 50%.

Japan will be allowed to have 4.8% of its trade volume classified within a Sensitive List with tariffs to be reduced to 0–5% by 2018. This is less than the 6% in the ACFTA and the 7% in the AKFTA for the Sensitive List, making the AJCEP more liberal than the ACFTA and AKFTA.

For the Normal Track comprising the remaining 92% of its trade volume, Japan committed to the elimination of tariffs. Japan offered to immediately eliminate tariffs on 88% of its trade volume upon the Agreement coming into force but required that the remaining 4% be eliminated in phases no later than 2023. Whilst the 88% immediate elimination is welcomed by ASEAN, the AJCEP initiated a dual Normal Track and henceforth there was to be a Normal Track 1 and a Normal Track 2.

The 92% of trade volume in the Normal Track was further committed to cover at least 92% of Japan's tariff lines. Normal Track 1 which covers 88% of the trade volume would be eliminated on entry into force in 2008.

### **C. Normal Track 2 in AJCEP**

Japan proposed that the tariff elimination for the 4% of tariff lines in Normal Track 2 be in four categories:

- The first category gradually reduces and eliminates tariffs on the items listed in this category in six (6) equal annual instalments, achieving tariff elimination by 2013.
- The second category gradually reduces and eliminates tariffs on the items listed in this category in eight (8) equal annual instalments, achieving tariff elimination by 2015.
- The third category gradually reduces and eliminates tariffs on the items listed in this category in eleven (11) equal annual instalments, achieving tariff elimination by 2018.
- The fourth category reduces and eliminates tariffs on the remaining Normal Track 2 items in sixteen (16) equal annual instalments, hence completing all Normal Track Tariff eliminations by 2023.

With this spread of tariff elimination, Japan's proposal would result in the elimination of 92% of their goods tariffs over a period longer than ten years. Since Japan required that the total tariff lines in Category 4 not exceed 2% of their total tariff lines, the agreement would still meet the WTO guideline of covering 90% of all goods trade within ten years of the commencement of the FTA when tariffs under the first three categories under Normal Track 2 are eliminated by 2018.

#### **D. Sensitive List in AJCEP**

The modality for tariff reductions on the remaining 4.8% of Japan's trade volume in the Sensitive List employs six categories:

- The first category reduces tariffs on the listed items in eleven (11) equal annual instalments to a rate of 3.8%.
- The second category reduces tariffs on the listed items in eleven (11) equal annual instalments to a rate of 3.9%.
- The third category reduces tariffs on the listed items in eleven (11) equal annual instalments to a rate of 4.0%.
- The fourth category reduces tariffs on the listed items in eleven (11) equal annual instalments to a rate of 4.2%.
- The fifth category reduces tariffs on the listed items in eight (8) equal annual instalments to a rate of 5%.
- The sixth category reduces tariffs on the remaining listed items in eleven (11) equal annual instalments to a rate of 5%.

This effectively means that all the 4.8% of the tariff lines in the Sensitive List will arrive at 0–5% by 2018.

#### **E. Highly Sensitive List in AJCEP**

The 2.2% of tariff lines (by trade volume) in the Highly Sensitive List is a lot more complicated and is essentially divided into three broad categories, as follows:

- The first category covers items that are to remain at their tariff rate at the date of entry into force of the agreement. This covers tariffs that are held at a higher rate of tariffs where Category 3 reductions (below) are not envisaged. Some of these tariffs can be reduced from their applied MFN rate and frozen at entry into force.
- The second category covers items subjected to tariff rate quotas.
- The third category covers items facing tariff reduction such that they remain at a rate higher than 5%. A total of 20 different formulas of reduction are listed for this category. This category also includes reduction by a declared percentage of reduction or a reduction of a specific tariff amount (e.g. Yen per kilogram).

### ***F. Exclusion List***

Although exclusions are not defined in the Highly Sensitive List, they are in a sense more sensitive than the Highly Sensitive items and the 1% of trade volume for Japan consists of hundreds of products in this excluded category. Many of these exclusions are at low tariffs that are highly sensitive because of their bilateral FTAs with ASEAN and other countries. This is much higher than the 40 excluded items in the AKFTA. The Chinese in the ACFTA did not negotiate any excluded items.

### ***G. ASEAN Countries' Commitments in AJCEP***

Whilst the AJCEP commits Japan to the above-mentioned modalities, Japan did not want these modalities to be encapsulated in the Agreement. Instead it offered ASEAN commitments according to a schedule that would meet the above formulas/modalities. Japan therefore negotiated with the ten ASEAN countries using these modalities as a "guide" and agreed with each ASEAN country a schedule of commitments that would meet these guidelines. ASEAN countries were asked to agree that other ASEAN countries need not meet these guidelines in full so as to give Japan more flexibility in its concessions to individual ASEAN countries. The main aim that we noticed was that products reflecting Japan's interest in cumulation were all included by the affected ASEAN countries in their schedules (i.e. by Japan).

### ***H. Overall Summing Up***

This negotiation took much longer as it took two long years to get Japan away from its initial attempts to marry all its bilateral FTAs into an ASEAN Plus Japan FTA. The final Agreement was mainly a Trade in Goods Agreement. Services and investments were left to be negotiated at a later date. The flexibilities that ASEAN and Korea agreed upon in the AKFTA opened up the concept of exclusions and a means of maintaining tariff peaks that enabled Japan's concerns to be met and the results of its bilateral FTAs being maintained while it entered into one common ASEAN Plus Japan Agreement.

## **VIII. ASEAN Plus India FTA: Trade in Goods**

The negotiation with India was the first FTA that ASEAN negotiated with a developing country after concluding negotiations with China.

Although Korea still lists itself as a developing country, it did not insist on negotiating as a developing country in terms of coverage of the Trade in Goods Agreement. China also was prepared from the beginning of the ACFTA that tariff reductions and eventual eliminations of tariff would cover 90% of all goods. India however wanted to claim its developing country status in having a much lower coverage for the FTA in Goods.

After almost a year of negotiating the level of coverage, the ASEAN-India FTA (AIFTA) Trade in Goods Agreement was agreed to only cover 80% of total tariff lines (or 75% of total import value) under the Normal Track. The Normal Track would be separated into two lists. Normal Track 2 covers products whose tariff reduction and eventual elimination would be over a longer period of time than the products in Normal Track 1. Tariff lines in Normal Track 2 are subject to a ceiling of 9% of tariff lines, and not exceeding 3.37% of total import value. India therefore followed the “Normal Track 2” approach of slower liberalisation that the Japanese had proposed in the AJCEP.

### **A. *The Two Normal Tracks***

India agreed to treat the Philippines separately from the rest of ASEAN 6 such that a separate rate of reductions was agreed with the Philippines. Like Korea and in some ways China, India also wanted to treat Vietnam separately from Cambodia, Lao PDR and Cambodia. Hence we have four separate Tables of Tariff Reductions in Normal Track 1 and four separate Tables of Reduction in Normal Track 2. This is therefore a further classification of ASEAN into four categories.

For Normal Track 1, Brunei, Indonesia, Malaysia, Singapore, Thailand and India agreed to start with a 30% tariff rate in 2009, with a view to reaching zero tariff by 31 December 2012 in respect of the five different “stages” of current tariffs. This gradual elimination will occur over ten time periods.

For the Philippines, the duration for tariff reduction is extended by five additional annual periods such that both India and the Philippines only need to reach zero tariff for each other by 31 December 2017.

Vietnam was accorded better treatment than the Philippines.

Cambodia, Lao PDR and Myanmar also would only need to reduce their tariffs in Normal Track 1 by 31 December 2017 but at a much more gradual rate of reductions.

Normal Track 2 allows for tariffs in this list to have its elimination spread out until 31 December 2015 — three years later than Normal Track 1 for Brunei, Indonesia, Malaysia, Singapore, Thailand and India.

The Philippines however would have to eliminate their Normal Track 2 tariffs a year later than their Normal Track 1 deadline (i.e. in 2018). Incidentally, in Normal Track 1, the Philippines' enjoyment of India's tariff reduction is such that India would follow the same formula as the Philippines in the rate of tariff reductions, resulting in the Philippines enjoying India's liberalisation later in exchange for being allowed to liberalise later.

The newer ASEAN countries will only need to eliminate their Normal Track 2 tariffs by 31 December 2020.

### **B. *The Sensitive Track in AFTA Trade in Goods***

Each country can place up to 10% of their total tariff lines in the Sensitive Track.

For Brunei, Indonesia, Malaysia, Singapore, Thailand and India, tariffs on products in the Sensitive Track need only be reduced to 5% by 31 December 2015. For the Philippines and India, tariffs on products in their Sensitive Track need to be reduced to 5% by 31 December 2018. Similarly for the four newer ASEAN countries, tariffs on products in their Sensitive Track need be reduced to 5% by 2020.

### **C. *Special Products and Tariffs Placed in the Highly Sensitive List***

Five groups of products form the Highly Sensitive List for India. India's rate of reductions of their tariff are as follows:

Crude Palm Oil:	Reduction to commence at 76% in 2009, reducing to 37.5% on 31 December 2018
Refined Palm Oil:	Reduction to commence at 86% in 2009, reducing to 45% on 31 December 2018
Coffee:	Reduction to commence at 95% in 2009, reducing to 45% on 31 December 2018
Black Tea:	Reduction to commence at 95% in 2009, reducing to 45% on 31 December 2018
Pepper:	Reduction to commence at 70% in 2009, reducing to 50% on 31 December 2018
Crude Petroleum Oil:	For Brunei only, reduction to commence at 3% in 2009, reducing to 0% on 1 January 2012

The ASEAN countries can also place tariff lines into their Highly Sensitive List and these shall be further classified into three categories:

Category 1: A reduction of applied MFN rates to 50%

Category 2: A reduction of applied MFN rates by 50%

Category 3: A reduction of applied MFN rates by 25%

Such tariff reductions need to be achieved by 31 December 2018 for Brunei, Indonesia, Malaysia, Singapore and Thailand; by 31 December 2021 for the Philippines; and by 31 December 2023 for the four newer ASEAN countries.

#### **D. Overall Summing Up**

The Sensitive Track is not as complicated as those in the ACFTA, AKFTA and AJCEP as the coverage in the AIFTA allows for non-coverage or exclusions of up to 10% of all tariff lines. Hence countries have a lot of leeway in not reducing more tariff lines. The five groups of products in India's Highly Sensitive List were demanded to be included by ASEAN countries as these reflect important export concerns of the ASEAN countries. To have them excluded would mean that up to four ASEAN countries will see no reason to sign onto an ASEAN Plus India FTA Trade in Goods, hence India agreed to their inclusion in the Highly Sensitive List. This Highly Sensitive List became a negotiated Inclusion List for some reductions of tariff peaks unlike the AJCEP and the AKFTA's Exclusion List approach of keeping items where no reductions are made once an item is included in the Highly Sensitive List.

The AIFTA therefore caters to India's sensitivities which ASEAN eventually agreed to accept. Hence the negotiation took a long time in spite of the strong political will which existed from the start of negotiations.

### **IX. ASEAN Plus Australia-New Zealand FTA: Trade in Goods**

The commencement of formal negotiations for this FTA with Australia and New Zealand (AANZFTA) was guided by the past Trade in Goods Agreement that ASEAN had concluded with the other Dialogue Partners. This negotiation is therefore a diluted and lesser form of the Angkor Agenda that was proposed in 2000 to the ASEAN Economic Ministries.

This is also the first FTA negotiation that ASEAN has done on a single undertaking basis covering goods, services, investment and economic co-operation, all in one complete Agreement. Contrary to earlier fears that a single undertaking would increase pressure for more liberalisation, the result was in fact the opposite. In the AANZFTA we found that the need to complete all the agreements together resulted in the services and investment sections being not pushed as strongly, in order not to delay the completion of the more critical trade in goods section.

### ***A. Normal Track and Sensitive Tracks***

This AANZFTA Trade in Goods Agreement is therefore closer to the ACFTA and the AKFTA. It returns to the “one Normal Track” approach of tariff elimination for 90% of all tariff lines and a Sensitive Track for the remaining 10% of tariff lines. The agreed threshold for the Sensitive Track is that Sensitive Track 1 (ST1) shall not exceed 6% of tariff lines and Sensitive Track 2 (ST2) shall be for the remaining, but not exceeding 4%, of tariff lines, such that ST2 includes not more than 1% of tariff lines that can be held at standstill or excluded from reductions.

### ***B. The Modality for Normal Track***

The agreed modality is one in which 90% of all tariff lines would have their tariffs eliminated by 2013 for ASEAN 6 and 2010 for Australia and New Zealand. Vietnam is to eliminate tariffs in 90% of tariff lines by 2018 and Cambodia, Laos PDR and Myanmar are to eliminate tariffs for 90% of tariff lines by 2021.

Upon entry into force of the Agreement, Australia and New Zealand will do more first and eliminate tariffs on 80% of tariff lines while the ASEAN 6 will reduce tariffs on 54% of tariff lines to 0–5% (as in a similar concept found in the AKFTA). Vietnam will have to reduce 54% of tariff lines to 0–5% in 2011 whilst Cambodia, Laos and Myanmar only need to reduce 54% of their tariff lines to 0–5% in 2014.

Whilst Australia and New Zealand will achieve tariff elimination on 90% of tariff lines by 2010, four of the ASEAN 6 will only need to eliminate tariffs on 80% of tariff lines in 2010, and the remaining two are given the flexibility of eliminating tariffs on 54% of their tariff lines in 2010.



In 2011, the group of four countries will have to increase their level of tariff elimination to 85% of all tariff lines while the other two would need to increase their level of tariff elimination to 63% of all tariff lines.

In 2012, the same four will raise their level of tariff elimination to 88%; and they will reach 90% elimination of tariff lines in 2013.

The remaining two of the ASEAN 6 countries will have to arrive at elimination of duties for 80% of tariff lines in 2012 and then join the other four countries in achieving 90% by 2013. These two remaining ASEAN 6 countries would thereby enjoy cuts that are less “steep” between 2009 and 2012.

Vietnam’s route to tariff elimination begins only in 2011 and it has to reduce 54% of tariff lines to 0–5% in 2011 and to zero percent in 2012. The percentage of tariff elimination of its tariff lines is then to reach 60% of tariff lines in 2013 and that is gradually increased in steps of 10% per year until 2015. When it reaches 80% in 2016 it has to increase this to 85% and then to 90% in order to complete its Normal Track by 2018.

For Cambodia, Lao PDR and Myanmar, the process of tariff elimination begins only in 2014 when they would have to reduce 54% of tariffs to 0–5%. These 54% of tariff lines will then need to be reduced further to zero percent in 2015. As in Vietnam’s case, their next threshold would be 60% elimination in 2016 and henceforth 70% elimination in 2017, 80% elimination in 2018, and in 2019 this threshold will be increased to 85% elimination before they each need to reach the 90% mark for the elimination of duties on all tariff lines so as to complete their Normal Track commitments by 2021.

The start rate of tariff reductions is similar to ACFTA, i.e. a 20% tariff rate for ASEAN 6, with a view to achieving elimination of duties in six yearly periods (i.e. 2008–2013) measured in five separate tariff stages (i.e. for current tariffs above 20%, current tariffs between 15–20%, between 10–15%, etc.). Since Australia and New Zealand kept somewhat to the earlier Angkor Agenda proposal of earlier elimination of tariffs, they both did not negotiate for stepped reductions. Rather, they committed to the elimination of their tariffs within one year — upping the 80% elimination of duties on all their tariff lines on entry into force to the 90% mark for elimination required of the Normal Track by 2010.

Vietnam committed to tariff elimination, starting from a 60% tariff rate in 2008. This is followed by eleven annual periods of reduction for a total of nine different stages of tariffs. Cambodia, Lao PDR and Myanmar also

agreed to start at a 60% tariff rate in 2008, followed by 14 annual periods of reduction (over the same nine stages of tariffs).

The modalities of the Normal Track therefore followed the earlier ACFTA and AKFTA approaches but took into consideration the earlier Angkor Agenda concepts of allowing ASEAN 6 to liberalise later while Australia and New Zealand liberalised first. The AANZFTA also followed the AKFTA approach of giving more flexibility to the same two ASEAN 6 countries. Similarly the Australians and New Zealanders followed the AKFTA in recognising that Vietnam is more developed than the other three newer ASEAN countries and subjected Vietnam to a faster rate of liberalisation than the other three newer ASEAN countries.

### **C. *The Modalities for Sensitive Track 1 (ST1)***

Australia and New Zealand negotiated on the basis that the 6% of tariff lines in ST1 for the ASEAN 6 countries should be gradually reduced such that 2% of tariffs lines ST1 should be reduced to 0–5% by 2013, 1% should be reduced to 0–5% in 2014, the next 1% should be reduced to 0–5% in 2015 and the final 1% should be reduced to 0–5% in 2016. Unlike the ACFTA and AKFTA, the AANZFTA required that these 6% of tariff lines in ST1 should be eliminated in 2017. This is quite different from the Sensitive List in the ACFTA and AKFTA being allowed to sit at 0–5%. The AANZFTA also determined a stepped reduction approach in ten annual periods (over six tariff percentage stages, starting at 30% tariffs); in a way similar to the Normal Track. In a sense the ST1 in the AANZFTA is like Normal Track 2 in AJCEP as its end goal is tariff elimination. It is called ST1 rather than NT2 because all the earlier targets were for tariffs to reach 0–5%.

A similar approach over a longer timeframe was proposed for Vietnam and an even longer timeframe for Cambodia, Lao PDR and Myanmar to eliminate their tariffs on these 6% of their tariff lines: by 2022 for Vietnam, and 2025 for Cambodia, Lao PDR and Myanmar.

Australia and New Zealand offered to start with 3% of ST1's 6% percent of tariff lines to go to 0–5% in 2012 instead of ASEAN 6's 2% in 2013. They also committed to increase by 1% every year so that they would reach the 0–5% tariff rate for a total of 5% of tariff lines by 2014, before

eliminating all their tariffs on these 6% of tariff lines by 2015, thereby achieving this two years ahead of ASEAN 6.

#### **D. *Sensitive Track 2 (ST2)***

For Sensitive Track 2, which is capped at the last remaining 4% of tariff lines, the AANZFTA left it to further bilateral negotiation.

Up to 1% of all tariff lines from within this 4% can be subject to standstill or exclusions. This 4% can also cover tariff rate quotas. In a sense the AANZFTA followed the AKFTA in having exclusions and the AJCEP in having up to 1% of tariff lines in this standstill and excluded category. These were not envisaged earlier in the Angkor Agenda proposed in 2000.

#### **E. *Overall Summing Up***

Like the AJCEP, the AANZFTA used the above proposed modalities as a guideline for their many rounds of negotiations bilaterally with all the ten ASEAN countries, and the intensive market access negotiations finally superseded these modalities. In the process of an actual line-by-line “request and offer” approach, agreements were reached that were close to these guidelines but may not be completely in line with these guidelines. These guidelines are therefore not tabled in the agreement. This is similar to what the Japanese did in the AJCEP where the actual listing of schedules of actual tariff reductions took the place of the agreed modalities seen in the ACFTA, AKFTA and AIFTA.

### **X. Overview of the Five ASEAN FTAs with China, Korea, Japan, India and Australia and New Zealand**

The above recollection of how these five FTA Trade in Goods Agreements developed shows ASEAN’s inventiveness and imaginative approach to trade negotiation. Each of these five FTAs is with very different Dialogue Partners of differing development levels and differing sensitivities in trade and market access. ASEAN was able to adapt along the way and found solutions to cater to each particular situation. The range of modalities eventually agreed upon covered the whole scope of trade negotiations as evolved in Geneva as well as the process of accommodating negotiations that ASEAN evolved in its own journey towards free trade in goods from the 1980s until the present time.

The recollection is therefore also a tribute to ASEAN's closeness and cohesiveness in reaching these compromises. There were many instances where the rest of ASEAN agreed to allow one or two individual ASEAN countries to obtain a better deal with a Dialogue Partner than they themselves obtained. This is in spite of all the five FTAs not being Agreements between ASEAN as one entity and a Dialogue Partner but Agreements amongst 11 individual countries (12 in the case of AANZFTA) committing to each other. Hence, to allow one or two ASEAN countries to get a better deal is in a sense only at the expense of the other ASEAN countries themselves.

This shows that ASEAN has matured such that they approached this journey with the Dialogue Partners as one unified ASEAN brotherhood. ASEAN decided to address their market access interests in each other's markets through their own ASEAN internal CEPT-AFTA and the improved ASEAN Trade in Goods (ATIGA) Agreement, rather than through these FTAs with the Dialogue Partners.

These Agreements were possible only because of the tremendous guidance provided by the Leaders of the Senior Economic Officials' Meetings (SEOM Leaders), who met to co-ordinate and sanction all these negotiations and also to endorse all the compromises and special leeways identified to get all ten ASEAN countries on board. The ASEAN Economic Ministers (AEM) are also to be credited for taking the important political decisions to push the SEOM Leaders forward in order to resolve the various mental and policy roadblocks along the critical stages of this momentous journey towards free trade. The five Co-Chairmen and ASEAN's Chief Negotiators (usually SEOM Leaders) also need to be acknowledged for being ASEAN's true negotiating sons and daughters who often rose above and beyond their pure national objectives to reach ASEAN consensus.

### ***A. Why Only Trade in Goods Coverage***

This chapter concentrated on the various Trade in Goods Agreements as we have five completed Agreements to work on. At the time of writing, three of these have been signed and two more (AIFTA and AANZFTA) are about to be signed. These two agreements are just waiting for a gathering of the Ministers of the countries in order to complete them.

The sequence of the five complete negotiations has certainly affected the outcome and we are sure that the outcome would have been a lot

different for all five Agreements if we had indeed started with the Angkor Agenda in 2000, or if the Agreement with China had not been the first Agreement to be negotiated. Similarly the Agreement with Japan would not have been possible without the inventiveness of the Highly Sensitive Track in the Korean Agreement. If the Japanese had not pushed for the dual Normal Track approach for a slower tier of tariff elimination, the Indians would have taken an even longer time to convince ASEAN of the need for a slower tier to achieve the higher percentage of coverage in the Goods Agreement that ASEAN wanted.

### **B. *Services and Investments***

For services, only the ACFTA, AKFTA and services elements in the AANZFTA have been completed. Since the AKFTA Services Agreement is yet to be ratified by the Koreans and the AANZFTA has not yet been signed at the time of writing, it is best that a comparative analysis of the Services Agreements be done later.

Similarly with investment; only the AANZFTA has some elements involving investment agreed under the single undertaking agreement. At the time of writing, the ACFTA and AKFTA are still being negotiated, albeit nearing completion.

Both the AJCEP and AIFTA have not yet addressed the negotiations of services and investments at the time of writing. Hence it is again best to deal with an analysis of these Investment Agreements at a later stage.

### **C. *Singapore's Role in the "ASEAN Plus Dialogue Partner" FTAs***

As this book is about Singapore's approach to trade policy and negotiation, we need a few paragraphs about the role which Singapore played in the various negotiations. Like the case of ASEAN's own internal AFTA-CEPT, Singapore would usually be the first ASEAN country to have met all the targets listed under the modalities described above. Often, we would have no Sensitive Track and no Sensitive Lists in all these Agreements and often we would have reached more than 90% elimination of all our tariff lines on the day of signing these Agreements. Also, Singapore had already concluded bilateral FTAs with New Zealand, Australia, Korea, India and Japan before these ASEAN negotiations commenced.

Singapore again led by example and took on the role of persuading our Dialogue Partners of the need to adopt ASEAN's mode of accommodating

negotiations, and the need for a step-by-step approach. As we were already enjoying free trade with these Dialogue Partners we were able to come across as honest brokers in these negotiations, and we helped the Dialogue Partners to understand what needed to be done in negotiating with ASEAN.

The result of these five Agreements in Trade in Goods have bound the ASEAN countries closer together, and Singapore is delighted to have been able to contribute towards this as a necessary step in working together to develop the ASEAN Economic Community.

### **Appendix: Treaties and Agreements**

The full text of the Agreements mentioned in this chapter are available on the website of the ASEAN Secretariat:

AFTA: <http://www.asean.org/12039.htm>

AIA: <http://www.asean.org/4947.htm>

AFAS: <http://www.asean.org/4949.htm>

ASEAN-China: <http://www.asean.org/4979.htm>

ASEAN-Japan: <http://www.asean.org/4973.htm>

ASEAN-Korea: <http://www.asean.org/4980.htm>

The text of the ASEAN-India FTA Agreement and the ASEAN-Australia-New Zealand FTA Agreement will be posted on the ASEAN Secretariat website once these Agreements are signed.

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## CHAPTER 13

# THE ROAD TO FREE TRADE AGREEMENTS

*By Ng Bee Kim and Minn Naing Oo*

### **I. The Evolution of Singapore's Free Trade Agreements**

As a tiny country negotiating free trade agreements (FTAs) with the rest of the world, Singapore prides its FTAs on being consistent with the rules and obligations of the World Trade Organisation. In terms of the market access commitments that we make to our bilateral and plurilateral FTA partners, we also ensure that our FTAs better the commitments made at WTO, i.e. WTO-plus. In terms of scope, we aim for our FTAs to be as comprehensive as possible, covering areas which are not yet fully developed under the WTO.

Singapore's FTA journey started with the Agreement between New Zealand and Singapore on a Closer Economic Partnership (ANZSCEP), which came into effect on 1 January 2001. This is a comprehensive FTA covering items from trade in goods and services, to customs procedures, investment, competition and government procurement.

On 30 November 2002, the Agreement between Japan and Singapore for a New-Age Economic Partnership (JSEPA) came into force. In addition to the usual chapters relating to trade liberalisation, the JSEPA also covers a range of economic cooperation initiatives in financial services, human resource development and tourism promotion.

From the JSEPA, Singapore then went on to negotiate and sign other FTAs in quick succession, including that with the European Free Trade Association (1 January 2003), Australia (28 July 2003), the United States (1 January 2004), India (1 August 2005), Jordan (22 August 2005), Korea (2 March 2006), Panama (24 July 2006), New Zealand, Chile and Brunei in the Trans-Pacific Strategic Economic Partnership (with the latest date of



entry into force for Brunei on 8 November 2006). The most recent FTA to enter into force, after eight rounds of negotiations, was the China-Singapore FTA — 1 January 2009.

Others which have been signed but have not yet entered into force include the Peru-Singapore FTA and the Gulf Cooperation Council-Singapore FTA.

Over the course of negotiations with various parties, and with the conclusion of more and more FTAs, Singapore's FTAs have developed and matured, both in scope and sophistication. FTAs that were concluded later tend to be wider in scope, including chapters with "hard commitments" in areas such as competition policy, intellectual property, as well as government procurement, and chapters with "soft commitments" such as cooperation in tourism promotion, human resource promotion and science and technology research. In commitments for trade in services, Singapore's later FTAs reflect the more transparent and liberal, though more difficult, method of using the negative listing approach (which treats all sectors and services as free from measures and restrictions unless listed otherwise), as compared to positive listing (commitments are made to give preferences only in the sectors and services listed). Mutual recognition agreements on conformity assessment for a number of goods, such as electrical and electronic goods, pharmaceutical goods and telecommunications equipment, have also been signed with various FTA partners, including Australia, Japan and the United States, with the aim of facilitating trade and reducing costs for businesses.

The US-Singapore FTA (USSFTA) is widely considered a "gold standard", cutting-edge agreement that enhances business opportunities and further strengthens the close bilateral relations between Singapore and the US. As the first trade agreement concluded between the US and an Asian nation, the USSFTA marked a watershed in economic history. It was also the first agreement about which Singapore negotiators co-authored a book detailing their experiences in the negotiations. Not only have both parties gone way above their WTO commitments with the Agreement, the USSFTA is also better than the North American Free Trade Agreement (NAFTA) in several areas. Besides significant gains to both sides in the traditional FTA areas of trade in goods, services and investment, the USSFTA also includes provisions on competition policy, the protection of intellectual property rights (IPR) and e-commerce. The USSFTA was also the first FTA that Singapore had decided to use the negative listing approach for commitments in services.

Most recently, the China-Singapore FTA (CSFTA), the first comprehensive bilateral FTA that China has signed with another Asian country,

also saw extensive coverage of trade in goods, trade in services, rules of origin, trade remedies, sanitary measures, technical barriers to trade, customs procedures, economic cooperation and dispute settlement, among others. The Agreement provides preferential coverage for about 95% of Singapore's exports to China. In addition to gains made in market access, both parties also made strides in other areas of cooperation and collaboration. The key areas of cooperation include trade and investment promotion, Singapore's participation in China's regional development, tourism cooperation, human resource development and facilitation of the "Go Global" efforts of Chinese companies.

## **II. Motivations for Having Free Trade Agreements: Singapore's Perspective**

Having seen how the FTAs form a crucial part of our trade policy, and the progression of our various FTAs, we may wish to examine in greater depth the motivations behind the seemingly mad pursuit of such agreements. Why did Singapore start negotiating FTAs? Why does Singapore, a small country, expend its resources in negotiating free trade agreements? Indeed, why do other countries negotiate FTAs with Singapore — a small island state with already low tariffs and seemingly nothing to offer? These were questions that we would often encounter in conversations with friends, members of the public and certainly with colleagues in the civil service. These were also questions that we saw being asked with increasing frequency from around 2002. Then, Singapore had just concluded the Japan-Singapore Economic Partnership Agreement (JSEPA). A year earlier, we had signed our first bilateral FTA, the Agreement between New Zealand and Singapore for a Closer Economic Partnership (ANZSCEP).

## **III. Other Roads to Rome**

Being a trade-dependent country, Singapore is a fervent supporter of free trade and sees inherent value in trade liberalisation at all levels. As mentioned earlier, the multilateral framework of the WTO remains the bedrock of Singapore's trade policy as it provides access to multiple markets and is the only guarantor of a rule-based global trading system.

The multilateral trading system has worked reasonably well. Since its formation in 1947, tariffs around the world have come down significantly. Good progress was made especially in the last ten years during which time

the Uruguay Round was concluded, the WTO was formed, China joined the WTO and the Doha Development Agenda was launched. The latter is a significant milestone as it is the first set of negotiations launched after the Cold War and the formation of the WTO.

Despite the progress made in the multilateral system, the last ten years were also the period in which over half of more than 200 FTAs in the world were notified to the WTO. Clearly, Singapore is not alone in seeking other roads to the Rome of trade liberalisation.

#### **IV. Building Superhighways**

FTAs and the WTO are not substitutes for each other but can be complementary and mutually reinforcing — Singapore has always sought to negotiate FTAs which can act as “building blocks” to greater regional or multilateral trade liberalisation.

Although multilateral negotiation is the ideal way to promote global free trade, it is also a long and difficult process involving a multitude of players, currently 153. Agreement has to come from all parties and negotiations tend to be based on the lowest common denominator. On the other hand, an FTA is a marriage between two or more like-minded partners, working on the basis of the highest common factor. It is therefore natural that WTO-consistent and WTO-plus FTAs will always be at the forefront of trade liberalisation.

In addition, FTAs generate positive competitive dynamics and put pressure on trade liberalisation at the multilateral level. For example, the formation of APEC and the prospect of a free trade area among the economies of the Pacific Rim facilitated the conclusion of the Uruguay Round. Similarly, the EU’s plans for expansion made internal reform of the Common Agricultural Policy a necessity, which in turn created better conditions for the launch of the Doha Development Agenda. A 1995 study by the WTO Secretariat concluded that “[t]o a much greater extent than is often acknowledged, regional and multilateral integration initiatives are complements rather than alternatives in the pursuit of more open trade”.

#### **V. Beyond Market Access**

FTAs are political realities and, in some cases, political necessities. The EU, North American FTA, ASEAN FTA and Closer Economic Relations

between Australia and New Zealand preceded the WTO partly to maintain peace and stability in different regions of the world.

In addition to the economic benefits, strategic and political considerations too have factored in the launch of FTAs. Across the globe, FTAs are a signal of close relations as well as a vehicle in which closer ties might be forged through increased trade and other cooperation efforts. Just as the obligations and market access gains in Singapore's FTAs reflect its commitments to trade liberalisation, the partnerships formed will go a long way in maintaining a secure and politically and economically stable environment.

What is important is that FTAs should not be inward-looking and exclusionary, and must produce genuine trade liberalisation. If they are confined to countries that share similar geographical, developmental or historical backgrounds, such FTAs will disadvantage non-member countries. Developing countries will be at a particular disadvantage. It is not good to have a world divided into trade blocs. Singapore's FTAs are therefore always premised on the concept of "open liberalisation", i.e. open to accession by other like-minded countries. Our FTAs are also WTO-plus in that the commitments made go beyond what is done at the WTO.

## **VI. Addressing the Risk of a Fragmented World**

There are large free trade areas developing in the world today. First, the 34 nations of the Western Hemisphere have hoped to create the Free Trade Area of the Americas (FTAA). Whilst talks have stalled, there is no denying that if the FTAA comes into being, a formidable common market of 800 million people, with a combined productive capacity of US\$11 trillion and trade volume of US\$3.4 trillion, will be created.

Another area is the EU, which underwent enlargement in May 2004, gradually expanding even further. This has increased the area of the EU by a quarter and its population by a fifth to 450 million. The EU is much more than a free trade area, with its common currency and borders.

Giving the countries above a run for their money are ASEAN and China, which aim to achieve an FTA by 2010. When concluded, this will be the largest FTA in the world in terms of population size, comprising 1.7 billion people.

The recently proposed Free Trade Area of the Asia-Pacific (FTAAP), if successful, would see a membership of the 21 APEC member economies, including some of the world's fastest growing ones, and developed nations that constitute almost half of world trade.

While these developments are positive and natural, there is at the same time a need to guard against the world breaking up into competing and inward-looking groupings or trade blocs. This is also a key impetus for Singapore's FTA efforts. Singapore's FTAs not only benefit Singapore directly, they also help Southeast Asia establish broader and stronger links with the rest of the world. The US had decided to pursue an FTA with Singapore partly because the USSFTA is an important symbol of cross-Pacific cooperation, and signals the strong commitment of the US to engage Southeast Asia especially against the backdrop of a growing China. The US has since used the "world class" USSFTA as a template in its FTA negotiations with other Southeast Asian countries. Similarly, after concluding the JSEPA with Singapore, Japan has concluded similar "New-Age Economic Partnerships" with other ASEAN countries, using the JSEPA as a template, as part of their strategy to further develop their links and integrate with the ASEAN region.

## **VII. Other Countries' Perspectives**

Having examined some of our motivations in signing FTAs, it may well be asked why our FTA partners have chosen to sign FTAs with Singapore in particular. After all, Singapore is already a very open economy, and virtually tariff-free. It has also always welcomed foreign investments with open arms. In terms of the services sector too, there are few areas where foreign participation is restricted, and these are primarily in the professional and financial services sectors. Coupled with Singapore's small market size, there seems little reason for a country to launch into a complex, wide-ranging treaty that requires protracted discussions with considerable outlay in resources, risks ire from domestic constituencies and opens its markets to a partner that seemingly offers little in return in terms of preferential trade and investment market access. Clearly, as might be seen from our earlier perspectives above, there are strategic and political motivations for countries to sign treaties with one another. But aside from these calculations, what was in it for Singapore's FTA partners? What were their considerations?

Over the course of more than eight years spent negotiating FTAs, promoting their use among the business community and interacting with counterparts from partner countries, a collage of possible reasons emerges as to why other countries might want to enter into FTAs with Singapore. The following is an account of our observations.

### **VIII. A Good Starting Point and Confidence-Builder**

That Singapore has signed FTAs with countries in various parts of the world may testify to Singapore's appeal as an FTA partner. But what is possibly more noteworthy is that of these FTAs, an FTA with Singapore was either the first or second bilateral FTA for several of the countries. Why this is so may also reveal some of the reasons that simply make Singapore a good FTA partner.

First, Singapore's very openness and smallness could paradoxically make it an attractive FTA partner, especially for countries that are just starting out on the path of bilateral trade agreements. Unlike a larger country with substantial capabilities in manufacturing at low costs, Singapore offered little threat to domestic producers of being driven out of business by a flood of cheaper imports. Our openness and good trade relations with other nations meant too that Singapore would not have too many defensive areas in the negotiations or frictions to deal with. Singapore's well-known pragmatic approach in dealing with issues may have given some confidence as well to partners that we would not make unreasonable demands, and that we would work with them to find solutions to thorny issues.

It should not be too surprising then that Singapore was the first country that Japan chose to do an FTA with. Until commencing FTA talks with Singapore, Japan's trade policy had focused on the multilateral system and the WTO. Careful and methodical in its approach, the Japanese government and bureaucracy would have considered Singapore a safe place to start in exploring new territory in its trade policy. The risk of not concluding the agreement was low given that Singapore did not have many sensitive sectors, particularly agriculture. In addition, Singapore would not have posed a significant threat to Japanese domestic industries, unlike a larger partner. Further, Singapore and Japan have cooperated bilaterally on many areas for a long time, which would have given them the confidence to propose cooperation elements that made it a "new-age" agreement.

Culturally too, Singapore would have been more familiar to the Japanese in terms of negotiating style and modalities, and this would have aided the negotiating process. As first-timers in negotiating FTAs, the Japanese negotiators would have wanted to be at ease with their counterparts and would have expected Singapore negotiators to understand their style and empathise with them on their sensitive issues. This would have helped the dynamics and mood of the negotiations, which would aid in the speedy conclusion of the agreement.

Similar considerations might have weighed on the minds of Indian policy-makers when they decided to embark on a comprehensive, wide-ranging trade agreement with Singapore. The Comprehensive Economic Cooperation Agreement is India's first ever CECA; the only FTA-type arrangement that encompasses improvements to an existing Avoidance of Double Taxation Agreement between India and Singapore.

Having gained experience with Singapore, these countries might then go on to sign more agreements with other trade partners. This was the case with Japan, when it subsequently sealed FTAs with several other countries in quick succession. Both Japan and India also went on to commence negotiations for an FTA with ASEAN.

It should also be noted that the Singapore-Australia FTA (SAFTA) was Australia's first FTA in many years after its cross-straits deal with New Zealand. Again, that it chose to commence negotiations with Singapore after a 20-year hiatus was probably not a coincidence.

It could be said that the argument of starting small, with an open economy, was one that Singapore itself espoused. Singapore's first bilateral FTA was with New Zealand, a country that was similar in many aspects to Singapore in its trade and economic policy profile and approach. Having gone through the exercise with New Zealand, when it found itself on the other side of the table, Singapore was then able to better empathise with others who were new to the FTA game and deal with their concerns more effectively. Our positive experience with New Zealand also gave us the confidence to, together with New Zealand, start the first ever FTA that spans three continents — the Trans-Pacific Strategic Economic Partnership — with two other like-minded, small and open economies, Chile and Brunei.

## **IX. Ambition and “Coming Out”**

While Singapore might be an easy choice for a first FTA, we were definitely not “easy” when it came to the quality expected of the eventual Agreement. Singapore's partners expected that when they entered into FTA talks with Singapore, we would want the resulting Agreement to have rules and commitments of a high standard. Here again, some of Singapore's FTA partners must have realised that it would have been beneficial to go through the process of sealing a high-quality Agreement with Singapore before moving on to other larger and more exacting partners who might demand even higher levels of protection for trade and investments and

market access commitments. Notably, Australia and Korea both negotiated an FTA with Singapore before commencing talks with the US.

For some others, perhaps, even if they did not go on to do FTAs with larger economies like the US, a deal with Singapore showed that they were able to conclude good-quality trade agreements. It was a statement of the seriousness of intent of the country to pursue trade and investment liberalisation and facilitation. An ambitious FTA represented the openness of the economy to foreign trade and investment, and its confidence that it would be able to honour the obligations undertaken. It signalled that the economy was open for business, and gave the assurance that there were rules to keep markets open and protect investors. An important aspect of this was the adoption of an investor-state dispute resolution mechanism in an FTA. In giving foreign investors the right to take the host government through a dispute settlement process, it gave bite to the obligations and commitments in the investment chapter of the FTA. Further, having a high-quality agreement under their belts would allow these countries to start from higher ground for subsequent FTAs. Their subsequent FTA partners would tend to look at previously concluded agreements to gauge the level of commitments and quality the country was capable of.

## **X. The Home Crowd**

For still others, like the US, unless a high-quality agreement was guaranteed, an FTA might not even have been contemplated. Quality was essential in ensuring that it passed Congressional and other domestic scrutiny. Therefore, in deciding to negotiate with Singapore, the US had to be sure that a high-standard Agreement would be the end-product. This meant comprehensive coverage, including areas such as intellectual property, which was not present in most FTAs up till then, as well as substantially improved market access commitments. In terms of the disciplines too, the USSFTA would include some of the most stringent rules to ensure that the market access and investor protection proffered were of the highest standard.

One other domestic reason why a country might want to pursue a quality agreement is to use it as a tool to help effect change in its own domestic arena. The government could argue that certain regulatory changes or new legislation were necessary because of the FTA. The changes could thus be attributed to external causes, and perhaps easier to implement in some cases. Although this might be truer in the case of negotiating with more



powerful partners, the fact that Singapore would seek high standards may have been sufficient to help some countries achieve this aim in some instances despite Singapore's relative size.

## **XI. Inspiration**

A high-quality FTA is useful for at least one other reason. It can be employed as a template or reference for future agreements. The USSFTA was used as a template for successive FTAs that the US negotiated. It was also similarly employed by Singapore in other negotiations following its conclusion. Indeed, even countries that were not party to a particular Agreement may take inspiration from it, and FTAs such as the USSFTA and SAFTA have been cited in this connection.

The USSFTA was concluded about ten years after NAFTA. The intervening years presented the US with an opportunity to learn from its experience of implementing NAFTA, and from the experience of its other partners. When the US started negotiating with Singapore, it was then able to use the knowledge gained to craft improved disciplines. It was also able to work with Singapore to use the USSFTA as a canvas to update the content of its trade agreements to reflect the changes that had taken place and to anticipate future developments. For instance, the USSFTA declared a permanent moratorium on the imposition of customs duties on "digital products", a term that was coined to encompass products ranging from computer software to CDs.

## **XII. The Bigger Game**

While many of the reasons focused on the particular country negotiating with Singapore, at least one FTA was the result of a greater aim, to conclude an FTA that would eventually span the Asia-Pacific. This was indeed the intent of the four founders of the Trans-Pacific Strategic Economic Partnership (TPSEP) — Chile, New Zealand, Brunei and Singapore. The countries were meant to seed the oyster of a region-wide FTA. Individually, neither New Zealand nor Brunei needed a new FTA with Singapore as they already had earlier deals with the island republic. So entering into the TPSEP (or P4) was for a larger and longer-sighted objective. Singapore was clearly seen as a good partner to plant the seed of a regional FTA with.

For countries like Korea, Japan and China, it may also be said that the bilateral negotiations are stepping stones to reach the larger markets of

Southeast Asia, with 500 million people and an abundance of natural resources. As Singapore is small and non-threatening, countries like Korea, Japan and China may see the bilateral FTAs (KSFTA, JSEPA and CSFTA) as low-cost and low-risk pathfinders to gain a foothold in the region and eventually bring about an ASEAN-Korea FTA, ASEAN-Japan FTA and ASEAN-China FTA respectively.

### **XIII. Conclusion**

Singapore's FTA journey has now seen it seal a network that covers more than 67% of its trade. Arising out of our heavy reliance on trade, and Singapore's firm belief of the need to advance trade liberalisation at all levels, FTAs have proven to be beneficial to Singapore. Similarly, the partners that make up this network must have also deemed it to be in their interest to conclude those agreements. As pointed out above, many of them chose Singapore as a first or early FTA partner. Some of the possible motivations have been explored in this chapter. Others may become more apparent as time passes. In any event, it is imperative for Singapore that the motivations remain, so that we may be able to join others in a world of freer market access, governed by rules that protect trade and investment, and lay a plank for prosperity and development for ourselves and our partners.

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## CHAPTER 14

# MULTILATERAL OR REGIONAL — WTO “AND/OR” FTAs? AN ACADEMIC’S VIEW OF THE TRENCHES

*By Michael Ewing-Chow*

### I. Introduction

A former professor of mine was fond of telling us, “Beware of men who ask binary questions because such men already know the answers they want to get”.

When Singapore first started negotiating our first free trade agreements (FTAs), there was fear and loathing from many quarters. Some felt that we were undermining the multilateral process for trade liberalisation represented by the WTO.<sup>1</sup> Others were concerned that we were undermining the regional economies by potentially allowing Trojans into the ASEAN Free Trade Area (AFTA) by the backdoor.<sup>2</sup>

Both of these early criticisms were perhaps evidence of binary thinking about trade liberalisation. Indeed, while most neo-classical economists accept that there is a need to further the global trade liberalisation efforts, how this should be done is less clear.

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<sup>1</sup> See Sree Kumar, “Why FTAs Necessary”, *Today*, 8 March 2001; Yang Razali Kassim, “Asia Pacific’s Changing Economic Landscape”, *Business Times*, 6 June 2001.

<sup>2</sup> See Hugh Chow, “No AFTA ‘Back Door’ in FTA Strategy”, *Straits Times*, 28 February 2001; *Business Times* (Malaysia), 15 June 2001; Tan Sri Ramon Navaratnam, “A Vital Role for Singapore in ASEAN Trade Relations”, *New Straits Times*, 16 June 2001; “FTA backdoor into ASEAN”, *Business Times* (Malaysia), 19 June 2001; Asad Latif, “FTAs ‘Complement ASEAN’s Integration’”, *Straits Times*, 13 July 2001; “Singapore Can Sign Deals That Do Not Affect AFTA”, *New Straits Times*, 8 Jan 2002.

In 2006, former Assistant for International Economic Affairs to Henry Kissinger, Fred Bergsten, wrote somewhat presciently in an op-ed for the *Financial Times* that:

The indefinite suspension of the Doha round of world trade talks creates big risks for the world economy. A new explosion of discriminatory bilateral and regional agreements is likely to substitute for global liberalisation. This will inevitably erode the multilateral rules-based system of the World Trade Organisation (WTO). The backlash against globalisation will generate more protectionism in the vacuum left as momentum toward wide-ranging reduction of barriers ceases, especially as the world economy slows and global trade imbalances continue to rise. Financial markets will become more unstable as international economic cooperation breaks down further.<sup>3</sup>

Bergsten called upon APEC to launch a Free Trade Area of the Asia-Pacific (FTAAP) initiative to provide:

a “plan B” to get world trade policy back on track — to spur the revival of Doha, to offer an ambitious alternative to restart the process of liberalisation on the widest possible basis if that primary goal fails, and to counter the proliferation of preferential deals among small groups of countries.<sup>4</sup>

However, again, this statement perhaps evidences a binary approach to trade liberalisation with the underlying assumption that it should be multilateral in preference to regional or bilateral.

Unlike many trade law academics who cut their teeth in GATT or WTO negotiations, my first introduction to trade negotiations occurred when I was appointed as a consultant for Singapore’s early FTA negotiations right after we had concluded our first one — the Agreement between New Zealand and Singapore on a Closer Economic Partnership (ANZSCEP). In particular, I became involved in the Mexico-Singapore FTA which unfortunately faced significant political hurdles when then Mexican President Vicente Fox and his Alliance for Change took over from the more trade liberal government of President Ernesto Zedillo in December 2000.

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<sup>3</sup> Fred Bergsten, “Plan B for World Trade: Go Regional”, *Financial Times* (London), August 16, 2006.

<sup>4</sup> *Ibid.*

Now, Singapore was not the only country to embark on FTA negotiations at that time. At the end of the 20th century, there was a surge in bilateral FTAs following the failure of the Third WTO Ministerial Conference held in Seattle in 1999 where an uneasy coalition of environmental and labour rights activists as well as protectionist lobby groups caused a collapse in trade negotiations. During this time, Singapore also embarked on a series of bilateral FTAs.<sup>5</sup> The official position was that Singapore saw FTAs as possible complements to the multilateral trade liberalisation process offered by the WTO.<sup>6</sup>

While I had no attachment to the WTO or the GATT, like many other trade academics, I had some reservations as to the wisdom of the FTA initiative, believing that Seattle was only a blip on the road to trade liberalisation. I saw the value of having alternatives but I was somewhat concerned that we were acting prematurely and thus diverting our attention from the main game of WTO negotiations. This changed after Cancun.

## II. A Change of Views

The WTO Fifth Ministerial Conference in Cancun, held in September 2003, was tasked in the 2001 Doha Ministerial Declaration “to take stock of progress in the negotiations, to provide any necessary political guidance, and take decisions as necessary”. Sadly, the collapse of the talks on 14th September meant that these three ends could not be satisfactorily achieved.

Although it would appear from the WTO’s summary of the Conference proceedings that the lack of agreement on modalities for the “Singapore issues”<sup>7</sup> precipitated the collapse of the talks,<sup>8</sup> the chief reason behind the collapse in Cancun was ultimately due to the lack of progress on reducing

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<sup>5</sup> Michael Ewing-Chow, “Southeast Asia and Free Trade Agreements: WTO Plus or Bust?”, (2004) 8 *SYBIL* 193, 200.

<sup>6</sup> Margaret Liang, “Singapore’s Trade Policies: Priorities and Options”, (2005) 22 *ASEAN Economic Bulletin* 1, 13–14.

<sup>7</sup> The four issues are transparency in government procurement, investment, trade facilitation and competition. They are referred to as the Singapore issues only because they were raised at the First WTO Ministerial Conference in Singapore back in 1996.

<sup>8</sup> The WTO’s summary of the Conference proceedings is available online at <[http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm)>.

agricultural subsidies, and the cold treatment given to the cotton proposal raised by Benin, Burkina Faso, Chad and Mali.<sup>9</sup>

The issue of agricultural subsidies was of primary importance on the Cancun agenda as developing producer countries represented by the Group of 21 were increasingly incensed by generous subsidies in the form of tax reliefs or import taxes given by developed states, particularly Japan, France and the United States, which distorted demand both in the importing country concerned as well as in the producing country. With farmers being powerful lobby groups in these countries, political willingness to remove such subsidies and to impose agricultural reform is weak, especially in light of domestic elections, thus perpetuating the problem.

The Group of 21 was formed prior to the Cancun Ministerial in an incensed response to the proposal submitted by the EU and the United States for the Cancun Ministerial, as it made no mention of reducing export subsidies, although it required agricultural reforms to be made.<sup>10</sup> Such a scheme was unsatisfactory to many developing countries, and the Group of 21, led by Brazil, China and India, was formed to push the richer developed nations to make more ambitious strides in reducing subsidies and freeing farm trade.

Nevertheless, despite the difficulties arising from the standoff between the US and the EU on one hand and the Group of 21 on the other, it must be noted that accommodating political stances had been arrived at on Day 3 of the Conference before the Agriculture Facilitator (then Singapore's Minister for Trade and Industry, BG George Yeo),<sup>11</sup> but surprisingly, there was no airing and concretisation of the progress made over the past few days on Day 4, suggesting that such stances had been reversed after the government officials involved in the agricultural meetings reverted to their home countries for approval. This permitted underlying tensions between the developing and developed countries to rise to the fore, and ultimately led to the collapse of the Conference via the "vehicle" of the "Singapore issues", when dispute raged over whether some or all of the issues should be discussed or postponed to a later time.

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<sup>9</sup> See "The WTO Under Fire", *The Economist*, 18 September 2003, available online: <<http://www.globalpolicy.org/socecon/bwi-wto/wto/2003/0918underfire.htm>>.

<sup>10</sup> *Supra* n. 9.

<sup>11</sup> "BG George Yeo's Mexican Beach Adventure: Cold Food, Little Sleep...and Some Tricky International Diplomacy", *The Sunday Times*, 21 September 2003.

While several ministers from states belonging to the Group of 21 expressed “joy” over the collapse,<sup>12</sup> many others rightly expressed sorrow over the lost opportunities for further beneficial economic gains due to the lack of compromise.<sup>13</sup> In particular, the poorest nations stand to lose the most as they have little to offer in bilateral trade negotiations with richer nations, and thus risk being sidelined in the global pursuit for economic growth. As such, while the reluctance of rich developing countries to remove or substantially reduce agricultural export subsidies is blameworthy, the unwillingness of certain developing countries to compromise and insistence on having “no deal”<sup>14</sup> other than one which comes substantially close to their preferred positions was curious.

Therefore, after Cancun, I began to rethink the accepted academic position on FTAs. It began to dawn on me that perhaps the road to greater multilateral trade liberalisation would not be as smooth as many had initially anticipated or as rational. As I thought about it more, it occurred to me that Singapore, a country very dependent on trade, would be in an untenable position were it to stick with the “academically sound” option of only multilateral trade liberalisation.

### III. WTO or FTAs

Now, ideally, a global trading system would maximise the benefits from exploiting the competitive and comparative advantages of all countries and reduce transactional costs. These benefits and savings should then be passed on to the consumer. FTAs should not exist in such a multilateral trading system, as they potentially create preferential bilateral or regional markets that disrupt a level playing field. This could cause trade that would normally flow to other countries to divert and flow between countries benefiting from the preferential treatment, thus distorting trade.<sup>15</sup> An example of this which is often cited is that when the US reduced or eliminated tariffs on exports from Peru, Ecuador and Bolivia in the 1991 Andean Free

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<sup>12</sup> Jeffrey Schott, “Unlocking the Benefits of World Trade”, *The Economist* (US Edition), 1 November 2003.

<sup>13</sup> *Supra* n. 9.

<sup>14</sup> “Commentary: Cancun Sees World Split”, *The Straits Times*, 16 September 2003.

<sup>15</sup> Jaime Serra Puche, “Regionalism and the WTO”, in The WTO Secretariat, *From GATT to the WTO: the Multilateral Trading System in the New Millennium* (The Hague: Kluwer Law International, 2000), 123.



Trade Pact, demand for canned tuna from the Philippines, Indonesia and Thailand fell in favour of tuna from Ecuador.<sup>16</sup>

Unfortunately, we do not live in a world where states altruistically place the global welfare and common interest over their own immediate self-interest.<sup>17</sup> Ideally, states should balance their short-term self-interest against long-term self-interest as part of a community of nations which would achieve significant aggregate gains from trade liberalisation. However, the global trading system operates in a political reality that is increasingly cautious about trade liberalisation, and many countries continue to impose significant barriers to trade in goods and services.

This is even so despite explicit agreement on important principles of trade law such as the principle of non-discrimination, as manifested in GATT Articles I and III. Article I on MFN Treatment provides that the benefits accorded by any GATT member state to the products produced in another state are automatically granted to other member states as well, while Article III on National Treatment obliges members not to treat “like” imports from another contracting party in a manner which affords protection to domestic production.

Sadly, contrary to the spirit of promoting free trade as manifested in such principles, many developed countries continue to impose trade barriers on agricultural produce, textiles and clothing, in which developing countries have a comparative advantage in producing. In addition, WTO member states are increasingly turning to non-tariff barriers (NTBs) to curb the degree to which imports compete with their domestic products. Often, interest groups and protectionist power players can influence the trade policies of a country and governments may be persuaded to make trade policy decisions that are motivated by political rather than economic considerations.

Yet, despite these limitations of the multilateral system, many people have been critical of the alternative that FTAs provide. The criticism of

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<sup>16</sup> William Choong, “You and FTA: For Freer or For Poorer”, *The Straits Times*, 25 Aug 2002, 39.

<sup>17</sup> A notably laudable exception to this statement occurred on 30 August 2003 when an interim waiver (until TRIPS is amended) was made to the compulsory licensing rule in Article 3(f) of TRIPS for eligible poorer countries who are unable to manufacture much needed medicines, thus permitting them to import such cheaper generics. See “Decision removes final patent obstacle to cheap drug imports”, WTO Press Release, Press/350, 30 August 2003, available online: <[http://www.wto.org/english/news\\_e/pr350\\_e/pr350\\_e.htm](http://www.wto.org/english/news_e/pr350_e/pr350_e.htm)>.

FTAs can be summed up into three main categories: first, FTAs will cause trade diversion and distortion; second, FTAs will overwork limited trade negotiating resources; and, finally, FTAs will create a chaotic network of trade rules which are not harmonised and therefore will add to transaction costs.

In light of present realities, FTAs are perhaps a “second best”<sup>18</sup> alternative to direct multilateral trade negotiations in fostering trade liberalisation. As a tool of state policy-making, they have numerous advantages. Apart from diplomatic and national security benefits and positive public relations with potential investors, they permit countries that wish to liberalise their economies at a faster and deeper pace to do so,<sup>19</sup> instead of being held back by less willing states in a phenomenon called the “convoy problem”.<sup>20</sup> They encourage foreign direct investments and also expose local industries to a limited degree of foreign competition, allowing them some time to adjust prior to greater competition at the regional and multilateral levels.

Further, FTA negotiations are more likely to succeed than multilateral trade negotiations as fewer parties are involved, resulting in an increase in the efficiency and flexibility of trade discussions, especially amongst like-minded countries.<sup>21</sup> The modalities of negotiating a bilateral or even regional FTA, when compared to the inevitably more difficult multilateral negotiating process of a large and diverse WTO membership, enable deeper understanding of the concerns of other parties and the more ready development of trust amongst the negotiating parties. These advantages potentially enable FTA parties to commit themselves to trade liberalisation standards higher than those of the WTO. The problem is that due to the absence of strong incentives through “horse-trading” of key interests between the big players, real significant gains are difficult to obtain via the

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<sup>18</sup> *The World Trade Report 2003*, available online: WTO website <[http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report\\_2003\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report_2003_e.pdf)> at 49.

<sup>19</sup> S. Laird, “Regional Trade Agreements: Dangerous Liaisons?” (1999) 22 *The World Economy* 1179, 1183.

<sup>20</sup> Ramkishan S. Rajan, Rahul Sen and Reza Siregar, “Singapore and the New Regionalism: Bilateral Trade Linkages with Japan and the US”, August 2002 (Second revision), available online: <<http://www.economics.adelaide.edu.au/staff/rrajan/unpub/FTAsShort.pdf>> at 3.

<sup>21</sup> Robert Lawrence and Charles Schultze, *An American Trade Strategy: Options for the 1990s* (Washington DC: Institute for International Economics, 1989).

modality of bilateral FTAs between a typically bigger economy and a smaller one. Nonetheless, some gains are better than none and in the case of some of Singapore's FTAs, they have forced us to become comfortable with certain rules such as "negative listing" for services and very liberal investor-to-state arbitration rules. This required some significant amount of coordination with all the affected stakeholders and a lot of housekeeping but I believe that once done, we then were in a stronger position as far as being prepared for trade liberation was concerned.

The concern that FTAs would drain limited negotiating resources has also not been proven to be the case. Many countries have actually developed trade negotiating resources through the FTA negotiating process. The trade negotiating team for Singapore, for example, has more than doubled Singapore's capacity since Singapore began its FTA efforts. Of course, Singapore is in the happy position of being able to pay for capacity building, and in the Singapore-Mexico FTA situation, being our first FTA negotiation with a NAFTA member, we were able to pay for foreign counsel like Christopher Thomas and Greg Tereposky to train the team on NAFTA and in particular the workings of Chapter 11, the investment protection chapter. Even then, retention has been a problem and many have moved internally within the civil service or have left the service. The upside of this, however, is that the experience of trade negotiations have added to the expertise of many who have been involved and this has created capacity in the relevant ministries, the Attorney-General's Chambers (AGC) and even in academia and therefore indirectly expanded Singapore's capacity in this regard.<sup>22</sup> The trade negotiation network suggested by Ong Ye Kung back in 2001 to alleviate this migration of personnel was foresighted, though in recent years, due perhaps to a pipeline of sufficient expertise having been developed in-house by MTI and AGC, this has not been much used.

Finally, the prediction that chaos rather than harmony would be the result of bilateral or regional development of trade rules rather than a multilateral process has also not come to pass. Instead, a comparison of most of the recent FTAs shows a similarity of structure and even at times a similarity in the text. The obvious reason for this is that the trade negotiators, and even more so the lawyers involved in the "legal scrubbing" of the text, often look to existing models for guidance rather than venturing into the

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<sup>22</sup> Indeed, just in academia, the number of trade law-related courses have increased significantly since we started our FTA initiatives thus indirectly also providing a pipeline for new negotiators.

unknown. Further, not all trade issues need to be harmonised. Only those disciplines which would be a barrier to trade or would add more directly to trade costs would need to be harmonised. Other “protective” rules like competition, investment and the environment may well be better developed through the easier modalities of negotiating and implementing a bilateral or regional FTA than the multilateral process. The main transactional cost has been the need for Rules of Origin (ROOs) to determine qualifying goods for preferential FTA treatment. Often the cost of certifying that the ROOs are met are sufficiently high that traders prefer to use the GATT rates where such rates result in lower or almost equivalent costs to the cost of ROO certification.

Nonetheless, even if FTAs generally have been less bad than initially anticipated, it should be noted that smaller and poorer developing economies have less bargaining power and are at a disadvantage when negotiating FTAs with more developed states, since they would not be able to bring enough to the bargaining table. This can be ameliorated to some degree by banding with other similar states and negotiating as a bloc.<sup>23</sup> Regardless, even if such smaller states are forced to give many concessions in FTA negotiations, it may be better to give such concessions earlier and to endure some pain, than to be placed at a long-term competitive disadvantage *vis-à-vis* competitors who are participants in an FTA and are thus at the receiving end of FTA benefits.<sup>24</sup>

#### IV. WTO and FTAs

How should we then evaluate this FTA phenomenon against the established institution of the WTO? In this regard, the epistemic standard of “legitimacy”, as suggested by Buchanan and Keohane,<sup>25</sup> of “minimal moral acceptability, comparative benefit and institutional integrity”<sup>26</sup> may be an effective (even if largely utilitarian) method to evaluate institutions (or regimes) for trade liberalisation. While Buchanan and Keohane point

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<sup>23</sup> WTO Annual Report of the Director General, 2001.

<sup>24</sup> This is the “domino regionalism” theory which has been used to explain the recent sharp increase in FTA membership. See the World Trade Report 2003 at 50, *supra* n. 18.

<sup>25</sup> Allen Buchanan and Robert O. Keohane, “The Legitimacy of Global Governance Institutions”, (2006) 20 *Ethics and International Affairs* 405.

<sup>26</sup> *Ibid.*, 424.

out that their “three substantive conditions are best thought of as what Rawls calls ‘counting principles’: the more of them an institution or regime satisfies, and the higher the degree to which it satisfies them, the stronger its claim to legitimacy”.<sup>27</sup>

Therefore, the “legitimacy” of the WTO as a trade facilitating institution may well be examined by applying these standards to the WTO and contrasting it with the FTA regime.

If we assume minimal moral acceptability in the belief that generally trade liberalisation is an economically good thing, we are left with the two conditions of comparative benefit (it must be more effective at trade liberalisation than other equivalent institutions or regimes) and institutional integrity (the internal rules of the institution or regime must be consistent with its stated purpose).

The big problem with the WTO in recent years is that its mandate is no longer clear. As Debra Steger puts it:

This is a major problem in the Doha Round that is contributing to its current impasse. The old analogy used by trade policy “insiders” was that trade liberalisation within the GATT was like a bicycle — you had to keep pedalling, or you would fall off. Sylvia Ostry observed some years ago that it would be more appropriate to describe the post-Uruguay Round WTO as a bus with many drivers, and no one knows where it is going.<sup>28</sup>

While especially developed country negotiators would describe the purpose of the WTO as solely dedicated to trade liberalisation, it is clear that the developing country members of the WTO (which now form the vast majority of its membership) also view development as a key goal of the organisation. There is presently, it is fair to say, no common understanding on what the mandate of the WTO is. However, if one takes into account the views of two-thirds of its membership, it is clear that the WTO serves the development agenda, and is no longer solely concerned with the goal of accelerating trade liberalisation.<sup>29</sup>

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<sup>27</sup> *Ibid.*

<sup>28</sup> Sylvia Ostry, “The Uruguay Round North-South Grand Bargain: Implications for future negotiations”, in Daniel L. M. Kennedy and James D. Southwick (eds.), *The Political Economy of International Trade Law, Essays in Honor of Robert E. Hudec* (Cambridge: Cambridge University Press, 2002), 285–300.

<sup>29</sup> Debra P. Steger, “The Culture of the WTO: Why It Needs to Change”, 10 *JIEL* (2007), 483–495.

I like Ostry’s metaphor of a bus. Indeed, the problems arise from the metaphorical vehicle of the WTO itself. As highlighted above, the steering mechanism, and perhaps even the engine and the provisions in case of a blow-up — corresponding to the decision-making process, the Secretariat and the dispute settlement mechanisms respectively — will probably require future development and fine-tuning. Indeed many proposals have been submitted on these fronts. However, if WTO negotiations do not occur under the shadow of a real competitor regime able to provide comparative benefit, it is too easy for those reforms to stall due to the consensus method of decision-making in the WTO.

Thus, rather than seeing FTAs as an “either/or” alternative to the WTO, perhaps like Bergsten, we can see FTAs as incentivising progress on the multilateral front. However, unlike Bergsten, we could perhaps see the end result not as getting the multilateral process to move forward but rather trade to be liberalised by any method, even one which may be second best. This is particularly true if the second best option is actually the only current option and therefore the alternative is not “either/or” but rather “and/or”.

Going back to the Buchanan and Keohane model, if one continues to believe that the WTO *raison d’être* is trade liberalisation, one could perhaps point out that the “comparative benefit” of the FTA regime at the moment outweighs that of the WTO while the trade negotiations are stalled. Should the WTO overcome its current impasse, the equation might change again and if so, the legitimacy of the FTA regime as a trade liberalisation option might correspondingly be reduced in favour of the multilateral process.

As far as institutional integrity goes, much depends on whether the FTA is one that encourages open regionalisation instead of a closed club only for selected members. FTAs founded upon the concept of “open regionalism” were espoused in the 1995 APEC summit as the key to reviving the languishing multilateral Doha Round discussions<sup>30</sup> by encouraging closer integration

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<sup>30</sup> In particular, negotiations on agriculture have stagnated, and this has affected negotiations in other areas, such as in services. As of 1 June 2003, WTO members have failed to adhere to deadlines to conclude modalities for the negotiations on industrial tariffs and non-tariff barriers, and to amend and clarify the Dispute Settlement Understanding. As a result, decision-making on these two issues, if any, is likely to be deferred to the Cancun Ministerial in September. See “WTO Members Miss Additional Key Deadlines: Preparations for Cancun Ministerial Set to Intensify”, WTO Doha Development Agenda Negotiations in 2003 Report No. 3, (Geneva: WCI Consulting Private Limited, June 2003).

between the economies of states. Open regionalism requires FTAs to be drafted in a transparent manner that encourages and permits other states to join in later. In addition, such an FTA must also be committed to outward-looking trade and development policies, trade and investment liberalisation and consistency with GATT and WTO law and policy.<sup>31</sup> FTAs structured in such an “open” manner would permit the benefits from increased productivity to trickle down to those not part of the FTA, and would minimise the “them versus us” psychology<sup>32</sup> inherent in a discriminatory trade bloc.

Sadly, as pointed out by Sung-Hoon Park, the lack of clear modalities as to how open regionalism is to be achieved has hampered greater trade liberalisation via the concept amongst APEC member states.<sup>33</sup> However, the application of the concept to other bilateral and regional FTAs should not create similarly insurmountable problems if “good faith”<sup>34</sup> sensitivity is displayed to the difficulties faced by potential new FTA members who are poorer developing economies when applying a conditional MFN model<sup>35</sup> to the concept.

In this regard, clauses such as Article 79:2 of the ANZSCEP could help facilitate greater trade liberalisation. The article states that in facilitating the accession of new members,

[t]he terms of such accession or association shall take into account the circumstances of the Member of the WTO, State or separate customs territory, in particular with respect to timetables for liberalisation.

It is argued, however, that a better clause would go further and single out “reciprocal liberalisation commitments” when taking into account the

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<sup>31</sup> P. Drysdale, A. Elek and H. Soesastro, “Open Regionalism: the nature of Asia Pacific Integration”, in P. Drysdale *et al.* (eds.), *Europe, East Asia and APEC, A Shared Global Agenda?* (Cambridge: Cambridge University Press, 1998), 103.

<sup>32</sup> A.H. Qureshi, “The Role of GATT in the Management of Trade Blocs” (1993) 27 *Journal of World Trade* 101, 105.

<sup>33</sup> Sung-Hoon Park, “Regionalism, Open Regionalism and Article XXIV GATT: Conflicts and Harmony”, in Francis Snyder (ed.), *Regional and Global Regulation of International Trade* (2002: Hart Publishing, Oregon), 270.

<sup>34</sup> Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (New York: Routledge, 2000), 521.

<sup>35</sup> To resolve the problem of free-riding states if an unconditional MFN model is adopted.

circumstances of the potential new member concerned, since the degree to which FTAs can hasten the liberalisation of the multilateral trading regime depends in part on some accommodation of the interests of poorer developing new members by the more developed “older” member states.

Indeed, on the sidelines of the APEC Ministers Responsible for Trade (MRT) meeting in Jeju, Korea, the ministers of Brunei, Chile, New Zealand and Singapore announced the conclusion of the Trans-Pacific Strategic Economic Partnership Agreement (“Trans-Pacific SEP”) on 3 June 2005. This Trans-Pacific SEP was indeed built on the commitments made under the ANZSCEP, and the inclusion of like-minded parties such as Brunei to the already ongoing trade negotiation process demonstrated the potential of the Trans-Pacific SEP to grow into a larger strategic agreement for trade liberalisation. While it must be admitted that all four members of the FTA are relatively small, trade liberal economies, the architecture of the Agreement made things easier. Article 20.6, paragraph 1 of the Trans-Pacific SEP specifically provides that

[t]his Agreement is open to accession on terms to be agreed among the Parties, by any APEC Economy or other State. The terms of such accession shall take into account the circumstances of that APEC Economy or other State, in particular with respect to timetables for liberalisation.

Thus, if both the WTO as an institution and some FTA regimes have institutional integrity in that the internal rules provide for open trade liberalisation, allowing non-members to relatively easily slot into an existing agreement by accession, then the issue is not really a disjunctive choice between the WTO and FTAs but rather how best to calibrate the conjunctive option. I believe that Singapore has chartered the correct path for itself, taking into account both its short-term and long-term interest by strategically embarking on FTAs vital to its position as a trade hub while continuing to be very invested in the WTO multilateral process through direct interventions in the trade negotiations, active participation in various attempts to restart the process and a continued commitment to regional WTO law and policy capacity building through activities like the Regional Trade Policy Course that Margaret Liang oversees at the National University of Singapore. Basically, it does not matter which vehicle takes us to the destination of further trade liberalisation; so long as they are not mutually exclusive, a combination of the vehicular options allows for legitimate strategies towards the final destination.



## **V. Conclusion**

I started with Bergsten and I shall end with Bergsten who envisages that:

[A]n FTAAP would embed these Asia-only arrangements in a broader Asia-Pacific framework. It would prevent the creation of a new division across the Pacific, with its adverse security as well as economic consequences for relations between East Asia and the United States. The United States and China would be the natural leaders of an FTAAP process and could simultaneously improve the prospects for resolving their bilateral trade tensions through such a regional framework.

If this is indeed one possibility, then Singapore's "open regionalism" FTAs have prepared us to be part of that final FTAAP infrastructure. The trick will be how to include other less developed Asian states in a way that the multilateral process at the moment does best by reducing their negotiation costs and allowing them to obtain the gains derived from the concessions "horse-traded" between the bigger economic powers. Nonetheless, principles may be gleaned from Singapore's FTA initiatives. First, avoid putting all eggs into one basket and, where options are not mutually exclusive, avoid closing off those options. Second, problems may be alleviated by strategic solutions properly implemented. Finally, an open approach is generally more legitimate than one based on closed doors.

## **(B) Reflections**

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## CHAPTER 15

# THE CHINA-SINGAPORE FREE TRADE AGREEMENT

*By Ng Bee Kim*

### **I. Introduction**

As Singapore Prime Minister Lee Hsien Loong and PRC Premier Wen Jiabao clinked their champagne glasses inside the Great Hall of the People in Beijing on 23 October 2008 to celebrate the signing of the China-Singapore Free Trade Agreement (CSFTA), another milestone in Singapore-China bilateral relations was built. The CSFTA, the result of about two years of negotiations, will add a new and important dimension to bilateral relations. As information about the contents of the FTA is readily available, this chapter will give a behind-the-scenes account on how the idea of CSFTA was started, some highlights of and lessons from the negotiation process, as well as the significance of the CSFTA.

### **II. Genesis of the CSFTA**

Since Singapore and China established diplomatic relations in 1991, bilateral relations have steadily strengthened. An important cornerstone was the flagship Suzhou Industrial Park project that was started in 1994. Since then, despite our differences in size, China and Singapore grew to become close strategic and economic partners. By 2004, bilateral trade had already shot up to US\$26.7 billion, from US\$3 billion in 1990. In the same year, China ranked as Singapore's 4th largest trading partner, after Malaysia, the US and the EU, while Singapore was China's 8th largest trading partner. Bilateral investment flows were strong and growing. China was Singapore's top investment destination in 2004. Similarly, more Chinese companies were investing in Singapore as they sought new overseas markets. For

example, about 1,500 Chinese companies had operations in Singapore in 2004, up from 509 in 1999. It was therefore timely to bring bilateral economic relations to the next level.

The CSFTA was envisaged to be a new key pillar in bilateral relations. From a narrow perspective, it was about finding our respective items of interest and combining these into a win-win package. More broadly, the FTA would help entrench our bilateral relations into the future. China was a fast-rising power with evolving needs, and it was beginning to play a bigger role in the region. It was in Singapore's interests to see China succeed and anchor its presence in the region. Sealing a CSFTA would also add the missing link in Singapore's widening FTA network.

The idea of a China-Singapore FTA was formally raised during the inaugural Joint Council for Bilateral Cooperation (JCBC) meeting between Singapore and China in May 2004. The JCBC meeting, which is a high-level political platform co-chaired by the Deputy Prime Minister (or their equivalent) in both countries, was set up to provide strategic oversight on the key joint political and economic initiatives. The leaders of both countries would regularly take stock of bilateral relations, as well as propose new ideas to deepen and broaden our cooperation, keeping in mind each other's evolving needs. Indeed the JCBC, which is convened annually, would prove to be a key platform for political leaders on both sides to move the CSFTA along to its successful conclusion.

After the idea was raised during the 1st JCBC, then Deputy Prime Minister Lee Hsien Loong and former PRC Vice-Premier Wu Yi agreed that it was desirable to establish a CSFTA as early as possible. At the 2nd JCBC in September 2005, both sides then explored how best to push the CSFTA idea further. Soon after, in a bilateral meeting between PM Lee and PRC Premier Wen Jiabao in October 2005, both agreed to establish a Joint Expert Group (JEG) to undertake a comprehensive feasibility study on the CSFTA. The JEG was established in April 2006 and the comprehensive study was completed within six months in October 2006.

Its key conclusions are that a comprehensive bilateral FTA, which is also consistent with WTO rules, would: (a) deliver further important trade and economic benefits in both countries; (b) support and reinforce bilateral trade and investment linkages, and play an important part in the closer integration of the two economies over the long term; (c) be trade-creating for the world as a whole, thereby strengthening each country's multilateral and regional trade policy objectives.

The report was endorsed by the leaders at the 3rd JCBC in August 2006 and both sides then agreed to officially launch the CSFTA negotiations.

### III. The Negotiations

Every set of negotiations provides a window into some aspects of the culture and mindset of a country. It was no different for the China-Singapore FTA. For CSFTA negotiations, the broad negotiating principles set out by the leaders had played an important role in framing and guiding the talks throughout. Indeed, when China agreed to launch the CSFTA negotiations in August 2006, PRC Vice-Premier Wu Yi also offered “five points” of advice for the negotiations. These were based on her own personal experience of being involved in 15 years of negotiations with a plethora of countries for China’s access into the WTO. They were as follows: (i) negotiations have to be conducted with sincerity; (ii) each side has to make concessions; (iii) each side must accommodate the other’s concerns; (iv) both parties must seek a convergence of interests; and (v) both parties should work for a win-win outcome. While these may sound like motherhood statements, they proved to be important principles that both sides would return to when the talks encountered some hitches.

The CSFTA negotiations, like other FTA talks, had its own set of challenges. A key challenge was that China has assumed strong commitments in its accession to the WTO. It was therefore very careful about taking on new commitments and adopting additional rules. Moreover, China was in a state of macroeconomic transition. In recent years, its emphasis was on shifting its economic model from an investment and export-driven one to more consumption-led growth. Its approach towards growth and foreign investment thus became more selective, with a focus on quality rather than quantity. This macroeconomic landscape presented challenges for the negotiations, especially on market access issues.

In relation to the above, a specific issue to overcome was what Singapore could offer as a small country *vis-à-vis* a large FTA partner like China. At first glance, such a concern is understandable. The fact is that Singapore is a small, open and almost completely duty-free economy. However, such a perspective is narrowly centered on trade in goods. Further mutual benefits could still be explored in other areas of the FTA such as services, investment, technical barriers to trade, sanitary and phytosanitary measures as well as various forms of economic cooperation. For instance, we could also facilitate trade through mutual recognition agreements in areas

like electrical and electronic equipment that would eliminate duplicative testing of such products, leading to faster time-to-market for the products, and reducing business costs for companies. By offering concessions and advantages in these other areas, we made it attractive for other FTA partners to conclude agreements with us, and we took the same broad-based approach to the CSFTA.

Another issue encountered in negotiations, especially during the JEG study, was how the CSFTA would relate to the ASEAN-China FTA (ACFTA). China had proposed the ACFTA in 2001 and at the time of the JEG study, negotiations for the Services and Investment Chapters were still ongoing. Eventually, China agreed with Singapore that the CSFTA would not divert from the ACFTA. Instead, it would catalyse negotiations for the regional agreement through the dynamics of competitive liberalisation. Singapore and China also agreed that the overall approach was for the CSFTA to build upon the commitments made in the ACFTA. Otherwise, it would not be worthwhile expending time and effort to negotiate a bilateral FTA since both were signatories to the ACFTA. This became a fundamental principle in the negotiations.

These challenges notwithstanding, there were some factors unique to Singapore-China relations that also facilitated our negotiations. One of them was the cultural affinity between both countries. Even though the negotiations were officially held in English, the fact that the Chinese team could also fall back on Mandarin to communicate their positions, sometimes involving complex issues, was helpful in allowing both sides to get a better and fuller understanding of each other's positions. Understanding the other side's concerns loud and clear is important in any negotiation. This helped to build rapport between the teams over time.

As mentioned earlier, the CSFTA negotiations also took place at a time when the foundation of bilateral relations was already strong. This helped to create a collegial atmosphere that promoted candour in our discussions. Such frankness is necessary for both sides to avoid the creation of false expectations, express our concerns freely and collectively reach a viable deal. Otherwise, we would be pussyfooting and not go anywhere, or take a much longer time to conclude our discussions.

#### **IV. Timeline**

Overall, the CSFTA negotiations took eight rounds, spanning about two years, to be completed. They were held in either Singapore or Beijing. The

initial stage of talks, which took place over the first few rounds, was about understanding each other's requests and positions on various issues. The next stage was to share and shape mutual expectations about the potential outcome. This required both sides to be upfront about their key interests, and for both to stitch a win-win deal together.

This sounds much easier on paper. It is often a misperception that the only party that you are negotiating with is the external party. It is just as important to secure buy-in from domestic agencies as well. Coordinating ministries such as MTI and MOFCOM not only had to convince each other on their ideas about what they wanted out of the deal, we also needed to convince our respective domestic agencies to make the necessary trade-offs while keeping in mind the bigger picture. And all the time, the parameters of the big picture were changing or uncertain, and we needed to feel our way around them through negotiations while making decisions that may or may not have an impact on following ones.

As with all negotiations, the road was not all smooth for the CSFTA. Otherwise there would be no need for negotiations. It was challenging to seek a convergence of interests as both sides had strong sensitivities in certain sectors. During the tougher moments, it was critical just to keep the momentum of talks going, so as to prevent the FTA from going into deep freeze. The success of any FTA negotiations depends on much more than what happens in the negotiating room between two teams of trade officials. Lobbying efforts outside of the negotiating room are just as important to move the FTA along, and it was likewise for the CSFTA. The Singapore team had worked closely with their colleagues at the Ministry of Foreign Affairs and Beijing Mission to keep the CSFTA high on the political radar screens of both countries. Indeed, during the two years of negotiations, the status of the CSFTA was often the top item of discussion during key bilateral meetings, which also reflected the importance placed by both sides on the joint endeavour. Keeping it on the political agenda kept the engine of the FTA talks revving along. The MFA and Beijing Mission, being in tune with the latest currents in China, also provided valuable advice to the negotiating team which helped to shape our approach and the necessary political interventions along the way.

After a mix of negotiations, lobbying and political interventions, a significant breakthrough was eventually achieved in Round 7 of talks in July 2008 when both sides agreed to set aside the respective sensitive requests. This created the stage for a possible win-win deal to be put together by both sides. A confluence of developments further catalysed the negotiations.



The Prime Minister was then scheduled to visit Beijing in October 2008. Having the CSFTA signed during October 2008 would highlight the strategic significance of the FTA for our bilateral relations, and both countries agreed to work towards that.

The political will towards concluding the CSFTA rose to a high. And to meet the target timeline for signing the CSFTA in October 2008, Round 8 of talks (which turned out to be the final round) was brought forward to be held in the first week of September 2008 in Beijing. Incidentally, it was also the week when the 5th JCBC was to be held in Tianjin on 4 September. This was to be the first meeting between Deputy Prime Minister Wong Kan Seng and the successor to former Vice-Premier Wu Yi as China's co-chair, Vice-Premier Wang Qishan. It would be fair to say that the timing of the 5th JCBC on 4 September created even more impetus for both sides to work towards an even tighter deadline of closing the deal by 3 September so that we could report the conclusion of the FTA to the leaders on 4 September in Tianjin.

Hence, in the intervening period between Round 7 and Round 8, intense discussions were held between the lead negotiators over the phone. Domestic consultations were fast and furious. There was a hushed anticipation and excitement on both sides that the cards would fall into place during Round 8. Yet, as in all negotiations, nothing is agreed until everything is agreed. We did not pitch our hopes sky-high but were determined to work hard towards concluding the negotiations.

Round 8 indeed opened with some intense, or even rather tense, negotiations about the bottom-lines on each other's various key requests. By this final stretch, the team was living and breathing negotiations round-the-clock. While the formal across-the-table negotiations were important, the conversations between the negotiators along the corridors or during meals were just as critical in acquainting each other with our latest thinking, forging mutual understanding and shaping the final consensus for the FTA. Meanwhile, we were also negotiating internally within the team, with other agencies, with Headquarters to convince each other about the best way forward and get everyone on the same page. All the while, the clock was ticking.

Notwithstanding the intensity, the outstanding issues were settled over the days and the most contentious one, which was on trade in goods, was only resolved at the eleventh hour on the evening of 3 September, prior to the 5th JCBC. It was a race against time. A small team travelled by road from Beijing to Tianjin on the afternoon of 3 September. During the ride

itself, a final meeting was fixed, and when we alighted from the car, we rushed to the meeting room in the Renaissance Hotel in Tianjin where the last remaining issue was resolved between Permanent Secretary (T&I) Peter Ong and MOFCOM's Vice-Minister Ma Xiuhong. Vice-Minister Ma, on behalf of China, agreed to Singapore's request to remove tariffs in 2010, instead of 2012, for about 10% of our exports to China. With that, both sides affirmed that the CSFTA was concluded and agreed to put up a Joint Report on it so that our leaders could make an announcement on the successful conclusion of the CSFTA the following day during the 5th JCBC meeting. After two years of hard work, the FTA negotiations were closed.

The key outcomes of the CSFTA are as follows:

- All Singapore goods, except for about 260 products, will enjoy tariff-free access to China by 2010. These make up about 95% of Singapore's exports to China. Key exports that will benefit include petrochemicals, processed foods, and electronics and electrical products. Specifically, more than 85% of Singapore's exports to China will enjoy duty-free access upon the FTA's entry into force on 1 January 2009. The tariffs on the other 10% of exports will be eliminated on 1 January 2010. All Chinese exports to Singapore will be granted tariff-free access on 1 January 2009.
- Both sides will liberalise various services sectors beyond their WTO commitments. They include business services, hospital services and education services. Singapore also committed to recognise degrees from two Chinese Traditional Chinese Medicine (TCM) universities, while China will recognise degrees from two Singapore medical institutions. Approved Chinese TCM universities will also be able to conduct TCM External Degree Programmes in Singapore.
- Both sides will promote cooperation in areas such as standards and conformance as well as customs procedures. Both sides also look forward to negotiating mutual recognition agreements on electronics and electrical equipment and telecommunications equipment, in order to further facilitate trade in these areas.
- The FTA will promote greater movement of business persons between Singapore and China. Both sides will allow eligible business visitors, intra-corporate transferees and contractual service suppliers to enter and stay in each other's countries for a fixed period. Specifically, China committed to granting eligible Singapore business persons entry and stay in China for up to six months for business visitors, three years for

intra-corporate transferees, and one year for contractual service suppliers. Likewise, Singapore committed to granting eligible Chinese business persons entry and stay in Singapore for up to 90 days for business visitors, eight years for intra-corporate transferees, and 180 days for short-term service suppliers.

- The FTA also aims to encourage freer movement of professional bodies between Singapore and China through the negotiation of mutual recognition agreements in professional services areas such as accounting and auditing as well as architecture.
- Both sides agreed to further strengthen cooperation in areas such as trade and investment promotion, Singapore's participation in China's regional development, tourism cooperation, human resource development and facilitation of the "Go Global" efforts of Chinese companies.

## **V. Significance of CSFTA**

Overall, the CSFTA has two levels of significance. First, it brought bilateral relations into a new stage of development. Together with the Tianjin Eco-City project, both are new pillars of bilateral relations that will enhance our engagement of China in the years ahead. The CSFTA, in particular, will be an important institutional platform that will allow both sides to continually improve and enhance our bilateral trade and investment relations through periodic reviews. Indeed, during our closing remarks at the conclusion of the CSFTA, both Chief Negotiators expressed the pride of our teams in playing a small role in building another key milestone of bilateral relations. In terms of Singapore's trade policy, the FTA with China adds a major piece into Singapore's extensive FTA network. It expands the economic opportunities for our companies in one of the world's most important and fast-rising powers. The CSFTA was also concluded at a time of financial turmoil and global economic uncertainty in October 2008. This signalled both countries' commitment to the free trade agenda, an important message that bears repeating in these economically troubled times.

## CHAPTER 16

# THE JAPAN-SINGAPORE FREE TRADE AGREEMENT

*By Pang Kin Keong*

### **I. Introduction**

When I was asked to write about the Japan-Singapore FTA (JSEPA), I hesitated. I could not recall many details after these intervening years. Of concern also was that some of our considerations, approaches and observations should not be made public. Hence, while I agreed eventually, this chapter does not set out to capture every aspect of the negotiations.

### **II. The Singapore Team**

I list the Singapore team among the reasons why we were able to conclude the negotiations with the Japanese — their very first FTA and hence even more fraught with obstacles — relatively smoothly. Our members came from different departments and Ministries, and had their different agendas to fulfil. However, they were also willing to appreciate the overall interests, so that when compromises had to be made in their sectors, they came on board readily.

Furthermore, while members conducted a good part of their sectoral negotiations directly with their Japanese counterparts, we had regular debriefings for everyone to find out how each other's negotiation was progressing. At these sessions, team decisions were made for trade-offs across sectors, or to slow down or close negotiations on certain issues, in support of the overall negotiation. This way, everyone had the same big picture of what was going on and negotiated as a team, not separately. Like Albert Chua<sup>1</sup>

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<sup>1</sup> Singapore High Commissioner to Australia.

said, in many ways our team practised a “whole-of-government” approach even before the phrase was popularised.

The easy chemistry within the team helped in other ways. It facilitated the process of coming to agreement on the trade-offs and compromises. It made the often long-drawn negotiations, the arduous preparations and the constant review of positions throughout the negotiations much easier to bear. I suspect many members remember as clearly (maybe more) the many food and drink sessions among the team as the negotiations themselves.

The other aspect the team emphasised was that getting the FTA did not depend only on our technical performance during the negotiations. What took place outside the negotiating room was equally important. Therefore, it was also about political persuasion, and about identifying and striking up a good, comfortable relationship with key decision-makers and counterparts on the other side of the table. We did not neglect the importance of the social aspects of the negotiations.

I thought this chapter should also give space to the various team members, as they would have seen the negotiations differently from their different vantage points. I hence asked for contributions from members I could still contact (some have left the civil service, some are working overseas), and simply took the liberty to make minor editorial changes and delete some parts which I felt were too sensitive to put into print. By myself, I could not have recalled as well, or captured as vividly, the many different aspects of the negotiations.

### **III. Recollections of Individual Team Members**

Charlene Chang<sup>2</sup> wrote:

As we had expected, the sheer pervasiveness of bureaucracies was a force to be reckoned with. Nothing brought this home more starkly than in the Trade in Services negotiations, which spanned almost every conceivable aspect of the economy. The Singapore JSEPA Services team had to deal with just about every government agency in Singapore, including MOE, MCYS, MOH, MinLaw, MICA, MND, MOT, and all the related statutory boards. Despite the high level of cooperation and lack of in-fighting that the Singapore bureaucracy enjoys, it was still a mammoth task to coordinate negotiating positions for the various Service sectors. Not only did we have to establish bottom-lines

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<sup>2</sup> Second Deputy Director, Housing, Ministry of National Development.

and possible commitments for each and every sector, we also had to work with the agencies in charge of the sectors to formulate strategies to further Singapore's interests. It was probably even more difficult for the Japanese Services team, if the frequency of us meeting with different Japanese agencies to explain our positions was any indication. Aside from a few major sectors like financial services and telecommunications, MTI as the Singapore Services team basically had the mandate to represent the other Singapore agencies at the negotiating table. With the Japanese, however, we found ourselves having to meet directly with many other agencies governing areas not under the Japanese Services team's purview, even though these agencies were not officially part of the Japanese JSEPA team. Oftentimes, these meetings took place way past negotiating hours.

Albert Chua had this to say from the perspective of the Ministry of Foreign Affairs:

One of the key things was managing the political process — in getting the JSEPA idea accepted and the Study Group launched, in getting the Study Group's recommendation of proceeding with negotiations accepted, and during the actual negotiations.

In all of this, there were a few key roadblocks we needed to overcome. First, getting the Japanese, who were then fervent multilateralists in their trade policy, to consider the bilateral track. Institutionally, they were anti-bilateral FTAs. But we were helped by the failure to launch the Doha Round. Second, there were Japanese sensitivities in certain sectors, particularly agriculture. We were able to work with enlightened minds in the Japanese bureaucracy and political leadership to persuade them that the FTA would help to make Japan more competitive, and to push ahead with reforms.

The idea of launching the JSEPA came from the then Prime Minister, Mr. Goh Chok Tong. Political intervention proved important at critical junctures. For instance, when we were trying to get the JSEPA idea accepted and the Study Group launched, the Prime Minister, assisted by the then Foreign Minister, Mr. S. Jayakumar, helped to secure Japanese agreement. During a visit to Japan, the Prime Minister broached the idea with the late Japanese Finance Minister, Mr. Kiichi Miyazawa. Miyazawa then called Mr. Yohei Kono, who was then Japan's Foreign Minister, on the phone and told him it was a good idea. At that very moment, Singapore's Foreign Minister was at a meeting with Kono trying to persuade the latter to accept the JSEPA idea, but Kono overcame his reluctance only after he received the phone call from Miyazawa telling him that he (Miyazawa) supported the idea.

After the conclusion of the Study Group, when we were lobbying for a joint announcement (by the two Prime Ministers during the Singapore

Prime Minister's visit to Japan) to launch actual negotiations, intervention by our political leaders again proved important. Our Tokyo Mission under Ambassador Chew Tai Soo played a critical role in all this.

These points made by Albert Chua were perhaps the key reasons why the Japanese eventually agreed to the FTA with Singapore. Others were the failure to launch the Doha Round, which was another indication of the slowing of the WTO process; Japan's interest in buying a guarantee of their trade interests by pursuing bilateral FTAs (like many other countries were doing); and a desire for domestic reform.

Ng Bee Kim<sup>3</sup> assisted in leading the team, in addition to her sectoral responsibilities. She wrote:

Unlike the other issues which were discussed in small expert groups, negotiations on Goods, as requested by Japan, were held in the plenary. This was understandable in light of the sensitivity of agriculture to them and their influential domestic chemicals and petrochemicals industry. While we were prepared to take on board Japan's concerns in agriculture, better market access in chemicals and petrochemicals was a priority to Singapore. However, with little bargaining leverage in Goods, persuading Japan in this was an uphill task.

Perhaps because I was Singapore's lead in the Goods negotiations, constantly harassing them with demands, or perhaps because they were less comfortable dealing with women, the Japanese preferred to deal with Kin Keong (incidentally, the entire Singapore Goods team was made up of female officers). Negotiations were protracted and even tense at times, although never acrimonious. This led one Japanese negotiator to observe that the women on the Singapore team had "steel beneath the kimono". However, compromises were finally struck after many marathon days in the concluding round. We secured critical concessions in chemicals/petrochemicals at the eleventh hour, but the real satisfaction was the good spirit in which the Japanese presented these to us.

Valerie D'Costa,<sup>4</sup> who was formerly with the Infocomm Development Authority but is now with the World Bank in Washington, recalled:

Two things strike me about the JSEPA negotiations. One is the easy rapport which the Singapore team had. I negotiated several FTAs over a

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<sup>3</sup> Director-General (Trade), Ministry of Trade and Industry.

<sup>4</sup> Programme Manager, Information for Development, World Bank.

five- or six-year period, but the JSEPA team had the best chemistry. Several of us have stayed good friends even as our careers have taken different paths. I think we all felt a strong common purpose, and Ambassador Lim Chin Beng<sup>5</sup> and Kin Keong trusted our instincts and appreciated our efforts. We had a negotiating dynamic with Japan which was always interesting, though not always easy.

The second thing that strikes me is how diverse our team was — all different ages, various agencies, all different races, both genders. We didn't notice this, of course, because it is just the way things are done in Singapore. Our Japanese colleagues noticed it and commented on it. That made an impression on me. The inclusiveness and equality of our system isn't something to be taken for granted.

Linda Sein<sup>6</sup> remembered one late evening in 2001 when we were in the thick of the JSEPA negotiations:

A number of team members were trying to draft various options to some particularly tricky clause of the agreement. I can't recall today what the subject matter was about but that is secondary to the story. After coming up with five–six different permutations, we e-mailed our proposals to Kin Keong for his input. We had written in the e-mail that we felt that these suggested permutations were, in our opinion, the best options and that we had exhausted all other options. Kin Keong's e-mail came back almost immediately (he obviously was working late into the night as well), and written in bold red letters was his first sentence "EXHAUSTION IS NOT AN OPTION!" We were quite perplexed at first by this response until we read the rest of his e-mail. He had the misimpression that we had given up on trying to come up with a solution to the clause just because we were tired. We e-mailed him back to clarify this, and suggested that he should get some rest himself! This became an inside joke within the core JSEPA team such that whenever any of us felt the stress and intensity of the negotiations, we would remind each other that exhaustion was not an option and that would somehow lighten the mood.

I think that strong sense of camaraderie amongst the JSEPA team members and the ability to see the lighter side of work was important because the core negotiating team had, I think, twelve rounds of three to five days of negotiations consisting of ten to twelve hours each day (there were some days when negotiations stretched past midnight) within a

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<sup>5</sup> Chairman, Changi Airports International Pte Ltd; and Chairman, Ascott Group.

<sup>6</sup> Director, Corporate Planning Division, Corporate Services Group, Jurong Town Corporation.



period of nine months — more than one round per month. Add on the travel time of half a day each way when the team had to go up to Tokyo, and at least a week to week-and-a-half of preparations before each round, as well as another week of follow-up after each session — that added up, especially given the fact that JSEPA was a double portfolio for many of the team members.

Despite all this, JSEPA was a valuable learning experience with each chapter presenting its own challenges. For the Investment chapter, there was a variety of issues to tackle ranging from trying to agree on who should be the beneficiaries of the concessions accorded in the Investment chapter to the level of performance requirements that could be imposed. However, I think the most difficult issue for us was the clause on “expropriation & compensation”. I believe this was one of the issues that remained outstanding until almost the end of the negotiations. The team negotiating the Investment chapter did not want this issue to be the deal breaker for JSEPA. I cannot recall exactly all the steps that the Singapore team took to negotiate a deal but we succeeded through a mixture of concessions for some of Japan’s own sensitive issues, goodwill, innovative crafting of a side letter by our lawyers from the Attorney-General’s Chambers, and brinkmanship.

Tan Ken Hwee,<sup>7</sup> one of our two lawyers on the team, wrote:

My most vivid takeaway from the long (but rewarding) JSEPA negotiations is that the process of negotiating is often more important than the substance of the negotiations. For example, when we had large meetings, in cavernous meeting rooms where the parties sat physically far apart from each other, the parties would more often than not be far apart in negotiating positions as well. Conversely, when smaller groups met in a more intimate environment, it was much easier to reach agreement on the matters at hand.

Also, whilst the Singapore team often ascertained what the eventual trade-offs might be, and reached internal consensus to pursue those trade-offs very quickly, we discovered that this was sometimes not the case for the other side: as with wines which have to be allowed to breathe, certain issues needed time to percolate before the eventual compromise, however obvious it might be, could be accepted.

The leadership and guidance that we received was also a bulwark against which we could leverage and build on. It helped that, almost without exception, the team comprised highly motivated and focused

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<sup>7</sup> Senior State Counsel, International Affairs Division, Attorney-General’s Chambers.

individuals who were able to agree but also disagree with each other when it was necessary to do so. Personal emotions and sensitivities were almost always put on the back burner and if and when feathers were ruffled, they were quickly put right.

Finally, the cohesiveness and the determination of Singapore negotiators to break through inter-agency differences and to present a single unified negotiating contributed to the success of the negotiations.

Kevin Shum<sup>8</sup> worked with Charlene Chang on the Services negotiations. Here is his recollection:

I think it helped that most of us had worked together before, and in particular, many of us had worked together in the earlier FTA negotiations with New Zealand; we had at least some experience of what a FTA negotiation took, and in particular, Kin Keong's working style.

There was also a lot of trust with the Japanese, and this helped to move the negotiations along relatively smoothly. I remember long hour-long calls on an almost daily basis with my opposite number. We were frank, and this helped us to find common ground.

But I also remember long hours of waiting for the Japanese to come to a decision. It helped very much that as negotiators, we had the confidence of our colleagues in other Ministries, as well as Kin Keong's and Ambassador Lim's support. It gave us the confidence to negotiate decisively and with credibility, and to finally get a better deal than what we by all rights should have gotten.

Danielle Yeow<sup>9</sup> wrote:

I frequently look back on the JSEPA negotiations as one of my defining experiences as a legal adviser. The sheer complexity of the negotiations, cutting across innumerable issues, different sectors and a multitude of agencies, brought with it tremendous and satisfying challenges as I had to switch between different "frequencies" constantly in advising the various sectoral teams, quite apart from negotiating our own chapter on Dispute Settlement. The success of the mission was contributed greatly by the deep technical expertise of the various sectoral negotiators, and our shared vision of the ultimate objective of the mission. This was the critical unifying force

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<sup>8</sup> Currently on post-graduate studies; Director, Social Programmes, (Designate), Ministry of Finance.

<sup>9</sup> First Deputy Director-General, Intellectual Property Office of Singapore.

which propelled the various Ministries and agencies beyond self-interest and enabled the Singapore team as a whole to work out the necessary trade-offs and compromises in the national interest. I also recall that no questions were asked when support was needed by others in the team, whether in the form of mere presence at other sectoral negotiations to lend moral support, to “eyeballing” the voluminous texts in preparation for the signing ceremony by our then respective Prime Ministers.

The negotiations also brought home to bear several lessons. One of which was the virtue of patience and fortitude, in awaiting the outcomes of our counterparts’ internal consultations, as well as of “four-eyes” meetings. I remember numerous sessions which ran into the early hours of the morning, and coined phrases such as “watching the paint dry” which took on an entirely new meaning for the team. We worked tirelessly and without complaint, with considerable good cheer and spirits throughout, including a video-conference session on Christmas Eve that ran late into the day.

Another lesson was the value of flexibility in understanding our counterpart’s perspective. This facilitated the creation of innovative compromises and also extended to accommodating concerns which were important to them, but less clear to us. These small gestures of goodwill contributed to the good working relations with our counterparts.

Lam San Ling,<sup>10</sup> Valerie Tay and Ang Chuan Lim provided the following perspective from the Monetary Authority of Singapore (MAS):

In the area of financial services, the FTA came at an opportune time for both sides. Japanese financial institutions (FIs) were poised to reinvigorate their overseas business after undertaking domestic reforms and Singapore foreign investors were also looking for regionalisation and partnership opportunities. Both sides therefore shared large common interests in generating a positive agreement to encourage private sector linkages. The challenge was to find mutually reinforcing outcomes as both our regimes were already relatively open. To this end, negotiations in the Financial Services sector benefited from the approach taken in JSEPA to augment the traditional approach of binding liberalisation measures with various platforms that would enhance regulatory cooperation in support of greater bilateral financial services flows.

As we negotiated the agreement, we found that while substance was key to a good agreement, what was just as important, if not more so, was understanding of and communication with the different stakeholders, in

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<sup>10</sup> Executive Director, Capital Markets Intermediaries Department, Monetary Authority of Singapore.

particular the key decision-makers on the Japanese side. This last point was especially important towards the end of the negotiation where a breakthrough was achieved to close the financial services negotiation. It occurred after we actively explained and “marketed” the financial services package to the key Japanese negotiators.

For the MAS members — and we suspect for our Japanese regulatory counterparts as well — JSEPA was an eye-opener in pushing new frontiers without undermining the cornerstone of regulatory prudence.

Ying Shao Wei,<sup>11</sup> who has left the service, worked closely with me while he was at MTI:

My initiation into the whole JSEPA process started when Ambassador Chew Tai Soo sent back a memo from Tokyo in early 1999 about his discussions with a Japanese Vice Minister regarding an FTA with Singapore. I dutifully put away the memo in the MTI filing cabinets. Little did I know then that this was the start of a series of active lobbying, leading to a high-level Joint Study Group, followed by months of intense bilateral negotiations within a two and half-year window.

One striking thing about the JSEPA was the many syndication meetings before the actual negotiations. More happened and was decided in those small group meetings than at the actual formal settings. Ahead of any negotiating round, the three senior leads from the Japanese team would meet our Deputy Chief Negotiator behind closed doors. I was privileged to be in most of them. It was amazing how cordial these talks were, and how the Japanese used these informal sessions to elicit our support to address their various interests.

Like many on the Singapore team, I have lingering memories from the JSEPA process (and the civil service) of the friendships forged during the two and a half years. We continue to meet almost annually since the close of the negotiations.

I am equally grateful to Ambassador Lim Chin Beng, our Chief Negotiator, who took time to include his recollections in this chapter:

What a contrast between the make-up and negotiating style of the two sides. One was made up of serious veterans, all men, and the other was made up of young men and women who were more relaxed but equally serious about getting an FTA concluded. However, the most telling difference was how decisions were made.

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<sup>11</sup> Engagement Manager, McKinsey and Company.

As the Japanese team was made up of representatives from all the interested Ministries, they sometimes had difficult negotiations within their own side on what concession each representative had to give.

But the Singapore side was also made up of representatives from our various Ministries. So why the difference in the way we approached the negotiations? I think it was because the team members thought and acted as a team rather than as individuals representing only the interest of his or her Ministry. Kin Keong was a hard task master but at the same time gave some leeway to his team members to express their views, joke, relax and, in the process, got them to know each other well, know their problems and perform better as a team. It was a team that worked hard and played hard.

Finally, Simon Tay<sup>12</sup> (who was one of three academics brought on board the JSEPA negotiations) offered the following reflections:

I was one of three non-government participants invited to take part in the study and the negotiations. The Japanese experts included were influential trade and economic experts. None of us directly negotiated the terms or the text of the JSEPA. But I hope we did play a useful role. At times, the experts would be more supportive of liberalization than the officials, and spoke more freely in favor of the JSEPA than some of the officials. The Japanese professors even debated the more conservative officials on their own side. At the time, bilateral FTAs were not widely accepted by many in Asia, and there were occasions on which I had to defend Singapore's pursuit of bilateral FTAs among experts and policy makers. It has given me some satisfaction that in subsequent years, many of the countries that were skeptical of this strategy have followed suit themselves.

I remember how one senior Japanese official described Singapore as a "naked woman". By this, he meant that since our tariffs had been reduced or even removed in many sectors, it was not apparent what Japan would immediately gain from the FTA. The political signal factor was emphasized for Japan to show a kind of leadership. But the important and additional point was to help the Japanese understand why this was more than an FTA, and also an economic partnership; which is why it was an EPA that would help a deeper integration. The negotiating team had to create space and provisions to allow and promote "third level" cooperation between different institutions in media, education and other sectors. Sometimes we went beyond enabling the possibilities. On the sidelines of one negotiation in Tokyo, I remember some of us went to Keio University to discuss how Keio

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<sup>12</sup> Chairman, Singapore Institute of International Affairs; Associate Professor, Faculty of Law, National University of Singapore.

and the National University of Singapore might collaborate under the umbrella provisions of the EPA. Since I was an NUS faculty member, I went along. How did we answer the Japanese when they said Singapore was a naked woman? Yes, we are. But they could not collaborate and make babies with us unless there was an EPA. The Japanese laughed, but I hoped they saw the point I was making between the simple reduction of tariffs and the goals of economic integration and partnership.

When all the negotiations were done, I remember how thick the document was. This reminded me how much work was done, how many details are involved in the undertaking. If I remember, there was also a small hiccup because the treaty could not be simply stapled together but had to be stitched and threaded. The Japanese had an expert to do this but I don't think Singapore had one. When I heard this, it made me appreciate how the Singapore side had engaged a much larger economy with a deeper knowledge and more resources about treaties and about trade. It was humbling and made me appreciate all the more the achievement of the JSEPA.

### **III. Conclusion**

I have tried hard to come up with a summary that would wrap up succinctly and do justice to all these different perspectives given by the various team members. I gave up after a while. There probably isn't one paragraph that could adequately sum it all up. FTA negotiations are complex affairs. They are not just about the demands and concessions, and not just about the process. They also have to do with the tone and tenor of the negotiations, the interactions between and within the two teams, the political circumstances and intent, and more. They also involve many varied interests, often conflicting, not just across the table, but on the same side as well.

One of the anecdotes recounted by Ambassador Lim provides a fitting end to this chapter. He recalled how we got the concessions in chemicals and petrochemicals at the eleventh hour. The Japanese side had asked for a meeting between the two Leaders and Deputy Leaders to try and close the deal. We put forward our chemical/petrochemical proposal and, after some negotiation, the Japanese side asked whether this would definitely be our last item. They were concerned that if they agreed to this item, we would then ask for more. When we confirmed that this would be the last item we needed to close the deal, they agreed.

On that day, we concluded the JSEPA.

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## ANNEX

# LIST OF FTAs THAT SINGAPORE IS PARTY TO<sup>1</sup>

FTAs Concluded and in Force	Date of Signature	Date of Entry into Force
ASEAN Free Trade Area (AFTA)	28 January 1992 (Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area)	1 January 1993 (Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area)
	15 December 1995 (ASEAN Framework Agreement on Services)	26 May 2009 (7th Package of Services Commitments)
	7 October 1998 (ASEAN Investment Area)	21 June 1999 (ASEAN Investment Area)
ASEAN-Australia-New Zealand FTA (AANZFTA)	27 February 2009	1 January 2010
ASEAN-China (ACFTA)	4 November 2002 (Framework Agreement)	1 July 2003 (Framework Agreement)
	29 November 2004 (Trade in Goods)	1 July 2005 (Trade in Goods)

*(Continued)*

<sup>1</sup> This list is correct as at 1 June 2010.



*(Continued)*

<b>FTAs Concluded and in Force</b>	<b>Date of Signature</b>	<b>Date of Entry into Force</b>
	14 January 2007 (Trade in Services)	1 July 2007 (Trade in Services)
	15 August 2009 (Investment)	15 February 2010 (Investment)
ASEAN-India (AIFTA)	13 August 2009 (Trade in Goods)	1 January 2010 (Trade in Goods)
ASEAN-Japan (AJCEP)	14 April 2008	1 January 2009
ASEAN-Korea (AKFTA)	13 December 2005 (Framework Agreement)	1 July 2006 (Framework Agreement)
	24 August 2006 (Trade in Goods)	1 June 2007 (Trade in Goods)
	21 November 2007 (Trade in Services)	1 May 2009 (Trade in Services)
	2 June 2009 (Investment)	Not yet in force (as soon as Korea and at least 1 ASEAN member state notifies the completion of the domestic ratification process)
Australia (SAFTA)	17 February 2003	28 July 2003
China (CSFTA)	23 October 2008	1 January 2009
Hashemite Kingdom of Jordan (SJFTA)	16 May 2004	22 August 2005
India (CECA)	29 June 2005	1 August 2005
Japan (JSEPA)	13 January 2002	30 November 2002
Korea (KSFTA)	4 August 2005	2 March 2006
New Zealand (ANZSCEP)	14 November 2000	1 January 2001
Panama (PSFTA)	1 March 2006	24 July 2006
Peru (PeSFTA)	29 May 2008	1 August 2009
Switzerland, Liechtenstein, Norway and Iceland (ESFTA)	26 June 2002	1 January 2003
Trans-Pacific SEP (Brunei, New Zealand, Chile, Singapore)	18 July 2005	28 May 2006
United States (USSFTA)	6 May 2003	1 January 2004

*(Continued)*

*(Continued)*

<b>FTAs Concluded but not in Force</b>	<b>Date of Signature</b>	<b>Date of Entry into Force</b>
Costa Rica (CRSFTA)	6 April 2010	Not yet in force (targeted date is first half of 2011)
GCC (GSFTA)	15 December 2008	Not yet in force (will be in force after GCC countries complete ratification process)

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## GLOSSARY

ACP	African, Caribbean and South Pacific countries
AGC	Attorney-General's Chambers of the Republic of Singapore
AFAS	ASEAN Framework Agreement on Services
AFTA	ASEAN Free Trade Area
ACFTA	ASEAN-China Free Trade Agreement
AEUFTA	ASEAN-EU Free Trade Agreement negotiations
AFTA	ASEAN Free Trade Area
AIA	ASEAN Investment Area
AIFTA	ASEAN-India Free Trade Agreement
AJCEP	ASEAN-Japan Comprehensive Economic Partnership Agreement
AKFTA	ASEAN-Korea Free Trade Agreement
Angkor Agenda	A plan to merge AFTA and ANZCERTA
ANZCERTA	Australia-New Zealand Closer Economic Relations and Trade Agreement
ANZSCEP	Agreement between New Zealand and Singapore on a Closer Economic Partnership
APEC	Asia-Pacific Economic Cooperation forum
ASEAN	Association of Southeast Asian Nations
ASEAN plus Three	A grouping or process which comprises the ASEAN members, China, Korea and Japan (sometimes known as the "APT")

ASEAN plus Six	A grouping or process which comprises ASEAN members, China, Korea, Japan, India, Australia and New Zealand
ASEAN 6	“ASEAN Six” — the five original “Founding Fathers” (Indonesia, Malaysia, the Philippines, Singapore, Thailand) at the time ASEAN was established on 8 August 1967, and Brunei Darussalam which joined ASEAN subsequently on 8 January 1984
ASEAN 4	The so-called “newer” Members; namely Vietnam, the Lao PDR, Myanmar and Cambodia
ASEAN Minus X	Or “ASEAN-X”. A formula allowing two (or more) ASEAN members to strike agreement on a reciprocal basis without waiting for the participation of other ASEAN members
Beau Rivage Group	Late 1990s grouping comprising the Geneva-based representatives of certain smaller, developed and developing country WTO Members
BIT	Bilateral investment treaty
Buick Group	Group of APEC economies comprising Australia, Canada, Chile, “Hong Kong, China”, New Zealand, Singapore and the United States
Café au Lait Group	An Uruguay Round negotiating coalition co-chaired by Colombia and Switzerland, combining the majority of developing and smaller industrial countries
Cairns Group	Informal WTO grouping of 19 agricultural exporting nations, comprising Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, the Philippines, South Africa, Thailand and Uruguay
CARICOM	Caribbean Community
Carlisle I	Draft text submitted by Charles Carlisle in his capacity as Acting Chairman of the Informal Group on Anti-Dumping on 6 July 1990. A second, revised draft submitted in August 1990 is referred to as “Carlisle II”

CECA	(India-Singapore) Comprehensive Economic Co-operation Agreement
CEPT	ASEAN's Common Effective Preferential Trading Scheme
CFC	Chlorofluorocarbon
CG-18	Consultative Group of Eighteen, a GATT-era informal negotiating group
Cotton-4	Informal grouping of West African WTO members advocating cuts in cotton subsidies and tariffs; comprising Benin, Burkina Faso, Chad, and Mali
CSFTA	China-Singapore Free Trade Agreement
CTS	WTO Council for Trade in Services
CUSFTA	Canada-US Free Trade Agreement
DBS	Development Bank of Singapore
DDA	Doha Development Agenda
de la Paix Group	Also known, more explicitly, as the "Hotel de la Paix Group"; a GATT-era off-shoot of the Café au Lait Group
EC	European Communities, also being the name by which — for legal reasons — the European Union is known within the WTO
EDB	Singapore Economic Development Board
EEC	European Economic Community
ESFTA	European Free Trade Association-Singapore FTA
EU	European Union
FAO	Food and Agriculture Organisation
FOR	"Friends of the New Round", an informal WTO grouping started by Singapore whose core members were Australia, New Zealand, "Hong Kong, China" and Singapore
Friends of Fish	Informal WTO grouping, including Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines and the United States, which addresses the harmful effects of fisheries subsidies

Friends of Geographical Indications	Informal grouping of WTO members advocating the need to secure additional protection to geographical indications under TRIPS, Article 23. The “friends” include Cuba, the European Communities, Georgia, Guinea, India, Jamaica, Liechtenstein, Kenya, the Kyrgyz Republic, the Former Yugoslav Republic of Macedonia, Madagascar, Nigeria, Pakistan, Sri Lanka, Switzerland, Thailand, Tunisia and Turkey
Friends of the Development Box	Informal grouping of WTO members advocating protection for small subsistence farmers in the developing countries by having a “development box” in the WTO Agreement on Agriculture; comprising Cuba, Dominican Republic, El Salvador, Haiti, Honduras, Kenya, Nicaragua, Nigeria, Pakistan, Peru, Senegal, Sri Lanka, Uganda, and Zimbabwe
FTA	Free Trade Agreement
FTAAP	Proposed Free Trade Area of the Asia-Pacific, comprising the 21 member economies of APEC
GATT	General Agreement on Tariffs & Trade
GATS	General Agreement on Trade in Services
GDP	Gross domestic product
GE	“General Exceptions”; usually a clause listing the “exceptions” to trade disciplines. The term is used either to refer to GATT Article XX, or to a clause which resembles GATT Article XX in another treaty
G-9	Uruguay Round coalition comprising Australia, Austria, Canada, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland which joined with the G-20 (1982) to form the Café au Lait Group
G-20 (1982)	An informal Uruguay Round negotiating coalition consisting of Bangladesh, Chile, Colombia, Côte d’Ivoire, “Hong Kong, China”, Indonesia, Jamaica, Republic of Korea, Malaysia, Mexico, Pakistan, the Philippines, Romania, Singapore, Sri Lanka, Thailand, Turkey, Uruguay, Zambia and Zaire. Also known as the “Jaramillo track” or “Jaramillo process”, this coalition,

	together with the G-9, in turn became the larger Café au Lait Group
G-20 (2003)	Group of 20. Also known as the Group of 21. An informal WTO grouping which emerged during the 2003 Cancun Ministerial Conference, under the leadership of Brazil, India, South Africa
G-21	Group of 21. Negotiating bloc of developing countries created in the run-up to the 2003 WTO Ministerial Conference in Cancun; ultimately christened the “Group of 20” in honour of a key Conference document signed on 20 August 2003 by 20 countries, opposing the EC and US agriculture proposal
G-33	Group off 33. Developing country grouping spear-headed by Indonesia which is presently advocating the “special products” and “special safeguard mechanism” concepts in the context of the Doha Development Round agriculture negotiations
G-77	Group of 77. A loose coalition of developing country nations at the UN which was established on 15 June 1964 following the first session of UNCTAD. Currently, the G-77 consists of 131 members
GSFTA	Gulf Cooperation Council-Singapore FTA
GSP	Generalised System of Preferences
HSL	A “Highly Sensitive List” of products typically employed in ASEAN agreements
IMF	International Monetary Fund
Invisibles Group	Consultation group consisting of 15-20 senior capital-based officials meeting in Geneva or at the location of WTO Ministerial Conferences between 1995 and 1999. The term “Invisibles Group” was coined by then Deputy United States Trade Representative, Jeffrey Lang
IP	Intellectual property
IPR	Intellectual property rights
ITA-1	WTO Information Technology Agreement; a tariff-cutting agreement covering information technology



	products. The agreement came into force on 1 July 1997 following the Ministerial Declaration on Trade in Information Technology Products, Singapore, 13 December 1996
JCBC	(China-Singapore) Joint Council for Bilateral Cooperation
JEG	Joint Expert Group
JSEPA	Japan-Singapore Economic Partnership Agreement
La Résérve Group	Early name for the “Invisibles Group” following the group’s first meeting at the Hotel La Résérve in Geneva in December 1995
Like-Minded Group	Informal coalition of developing countries formed in the run-up to the Singapore Ministerial Conference in 1996, led by India and comprising India, Cuba, Egypt, Indonesia, Malaysia, Pakistan, Tanzania and Uganda. Its intention at the outset was to resist the inclusion of the so-called “Singapore issues” (i.e. investment regulation, trade facilitation, transparency in government procurement, and competition policy) in global trade negotiations
LDC	Least-Developed Country
MAS	Monetary Authority of Singapore
MCYS	Ministry of Community, Youth and Sports of the Republic of Singapore
McPhail I	Draft text produced by Hugh McPhail as Chairman of the Informal Negotiating Group on Anti-Dumping. Subsequent versions were termed “McPhail II”, and “McPhail III”
MERCOSUR	Mercado Común del Sur (Spanish), or Southern Common Market comprising Argentina, Brazil, Paraguay and Uruguay
MFA	Ministry of Foreign Affairs of the Republic of Singapore
MFA	Multi-Fibre Arrangement

MFN	Most-favoured nation treatment — i.e. the obligation not to discriminate between various foreign trading partners
MICA	Ministry of Information, Communications and the Arts of the Republic of Singapore
MINLAW	Ministry of Law of the Republic of Singapore
MITI	Ministry of International Trade and Industry, Japan. Since 2001, its role has been taken over by the current Ministry of Economy, Trade and Industry (METI)
MND	Ministry of National Development of the Republic of Singapore
MOE	Ministry of Education of the Republic of Singapore
MOH	Ministry of Health of the Republic of Singapore
MOFCOM	Ministry of Commerce of the People's Republic of China
MOT	Ministry of Transport of the Republic of Singapore
MRA	Mutual recognition agreement (e.g. for the mutual recognition of professional qualifications so as to encourage a free-flow of trade in services)
MTI	Ministry of Trade & Industry of the Republic of Singapore
NAFTA	North American Free Trade Agreement
NAMA-11	Informal grouping of developing countries at the WTO specifically focused on non-agriculture market access. The grouping comprises Argentina, Bolivarian Republic of Venezuela, Brazil, Egypt, India, Indonesia, Namibia, Philippines, South Africa and Tunisia.
NGO	Non-governmental organisation
NIC	Newly industrialising country
NT	National treatment — i.e. the obligation not to discriminate between foreign and national products, for example, or between foreign and national services, service providers, investments or investors

NTB	Non-tariff barrier
OECD	Organisation for Economic Cooperation and Development
OPEC	Organisation of the Petroleum Exporting Countries
Paradisus Group	Region-based WTO informal grouping comprising Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and Panama
PAP	Singapore People's Action Party
POSB	Post Office Savings Bank
PSA	Port of Singapore Authority
Quad	Abbreviation of "quadrilaterals", a term referring to Canada, the European Union, Japan and the United States within the WTO
RAM	Recently acceded (or "added") members of the WTO (e.g. the People's Republic of China)
ROO	Rule(s) of origin
RTA	Regional trade agreement; being a broad term which denotes not only FTAs but also customs unions
SAFTA	Singapore-Australia FTA
S&D	Special and differential treatment
SEOM	ASEAN Senior Economic Officials' Meeting
Singapore Issues	A term referring to four issues which have been advocated by the EU, Japan and Korea for inclusion in global trade negotiations; namely, investment regulation, trade facilitation, transparency in government procurement and competition policy. These four topics were named after the WTO Ministerial Conference which took place in Singapore in 1996. It was during the Singapore Ministerial Conference that work on these issues was initiated with the establishment of three new working groups (on trade and investment, competition policy, and transparency in government procurement) and an instruction to the WTO Goods Council to explore ways to improve trade facilitation

SingPost	Singapore Post Limited
SingTel	Singapore Telecommunications Limited
SL	A “Sensitive List” of products typically employed in ASEAN agreements
Square Brackets	The diplomatic/negotiating practice of placing portions of the draft treaty (or other) language included in negotiating texts within square brackets where such language is yet to secure the necessary agreement or approval of the negotiating parties
SVEs	Small and vulnerable economies
TBT	Technical barriers to trade
TEL	A “Temporary Exclusion List” of products; employed in the ASEAN context
TNC	Trade Negotiations Committee
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
TRIMS Agreement	Agreement on Trade-Related Investment Measures
Trans-Pacific SEP	Trans-Pacific Strategic Partnership Agreement between Brunei, New Zealand, Chile and Singapore
TPP	Or “Trans-Pacific Partnership”, a regional Asia-Pacific trade agreement currently being negotiated. At the time of writing, talks are taking place among Australia, Brunei, Chile, New Zealand, Peru, Singapore and the United States, with Vietnam having observer status
TRQ	Abbreviation for “tariff rate quota”, or what is also called a “tariff quota”. A tariff rate quota is sometimes viewed as a species of quantitative restriction (i.e. non-tariff barrier), but which also contains tariff restrictive (i.e. tariff barrier) features. Essentially, one consistent tariff rate is applied to imports up to a specified quantity (quota) of that article. This is then followed by a higher tariff rate for imports which exceed the quota level for that product. In this sense, it is not a quantitative restriction, because it does not actually restrict the quantity of imports of

the product. Instead, a tariff rate quota uses a quantitative measure to determine the application of differential (i.e. higher) tariff rates for out-of-quota or above-quota imports. In-quota imports enjoy a lower tariff rate or even zero duty treatment. Nonetheless, tariff rate quotas are generally prohibited under GATT Article XI, which deals with quantitative restrictions. There are exceptions for their lawful use, and they are typically found in the regulation of agricultural trade.

UN	United Nations
UNCTAD	UN Conference on Trade and Development
UNESCO	UN Educational, Scientific and Cultural Organisation
UNFCCC	UN Framework Convention on Climate Change
UPU	Universal Postal Union
UR	“Uruguay Round” of GATT negotiations leading to the establishment of the WTO
USITC	United States International Trade Commission
USSFTA	United States-Singapore FTA
VERs	Voluntary export restraints
WCO	World Customs Organisation
WHO	World Health Organisation
WTO	World Trade Organisation

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