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If Not This World Trade Organisation, Then What?

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Introduction

In its relatively short life, the World Trade Organisation (WTO) has come in for brief praise and a remarkable barrage of criticism. Most of the publicly expressed praise is located somewhere within the mantra that “we need international trade rules”. Criticism of the WTO, on the other hand, is diverse. It is made from a wide range of perspectives that embrace, at one end of the spectrum, the view that the WTO and/or trade liberalisation is an inherently undesirable thing, to, at the other end, a criticism of the WTO based on its failure to achieve sufficient trade liberalisation. At the recent Fifth WTO Ministerial Conference in Cancún, the negotiating positions of member states and aspirant members ranged across this spectrum. As might be expected, no state appeared to embrace the extreme anti-WTO or anti-liberalisation position. However, there was considerable resistance to further liberalisation in some sectors, motivated either by concerns about its economic and social effects or by the desire to secure tit-for-tat liberalisation. While opposition to trade liberalisation was generally qualified, a strong pro-liberalisation position was in evidence. It appears, in fact, that the failure of the Ministerial Conference to achieve a final consensus in the form of a substantive Ministerial Declaration is largely a consequence of developed-country dissatisfaction with the lack of liberalisation.¹

This article considers a range of interrelated criticisms that have been made of the WTO. The concern of the article is not only with criticisms emanating from the pro- and anti-liberalisation camps; it also discusses what might be described as politico-structural objections to the WTO. In assessing these criticisms and objections, reference

is made to the negotiating positions of some of the WTO member states, especially as those positions manifested themselves at Cancún. The article attempts to assess the validity of the various arguments with a view to determining the way forward. If the WTO, in its current manifestation, is paralysed by the intransigence of its member states and stigmatised by opposition from a wide range of interest groups, is there any approach to the creation of international trade rules that might serve us better?

Why not *this* WTO?

As the following discussion demonstrates in a number of places, the enterprise of dividing the anti-WTO arguments into those emanating from the pro-liberalisation perspective, those coming from an anti-liberalisation perspective and those that are politico-structural is a rough and rather slippery one. While some of the arguments fall relatively neatly into these categories, most of the more nuanced arguments present challenges to the diligent categoriser. Despite these reservations, the following attempt at categorisation is optimistically undertaken on the basis that it provides analytical assistance.

Arguments from the pro-liberalisation camp

In their purest form, criticisms of the WTO from the pro-liberalisation camp tend to be predicated on the basis of the economic doctrine of comparative advantage. The doctrine, which was developed in the work of nineteenth-century classical economists,² argues that optimal allocation of international resources will be achieved if each country produces only the commodities that it can most efficiently produce, and trades those commodities with other countries in order to obtain the commodities that it does not produce.³ There are a number of difficulties in using the doctrine of comparative advantage as a spiritual guide for the development of the world trading system. Foremost among these is the fact that it has always been unclear whether the doctrine is prescriptive or merely descriptive of the process of international trade.⁴ Even if the doctrine is capable of being used prescriptively, problems

1. See CAFOD, *The Cancún Ministerial Meeting, September 2003: What Happened? What Does it Mean for Development?*, Submission to the International Development Select Committee, September 2003, www.cafod.org.uk/policy.

2. e.g. D. Ricardo, *Principles of Political Economy and Taxation* (1817), reissued as *The Works and Correspondence of David Ricardo* (Straffa ed., 1951), Vol.1.

3. For an analysis of this doctrine, see J. Leonard, *Pollution and the Struggle for the World Product: Multi-national Corporations, Environment and International Comparative Advantage* (1998), Ch.1.

4. As Leonard notes, n.3 above, p.1: “A ... neutral way of thinking about the concept of comparative advantage is that it describes the array of social, economic and political forces that account for the general export and import patterns prevailing between nations.”

arise about its current applicability. The efficiency and welfare advantages predicted by the doctrine are based upon the movement of commodities, in the form of raw materials and manufactured goods, across borders. The twentieth century, however, marked an increase in the movement of the means of production across borders. This generally occurs by means of foreign direct investment by multinational enterprises, which establish subsidiary undertakings in another country for this purpose. The prevalence of foreign direct investment, which is facilitated by the WTO agreements, appears to raise some questions about the current applicability of the doctrine of comparative advantage as a prescription.⁵ Furthermore, it seems unlikely that the doctrine of comparative advantage is capable of addressing the current comparative disadvantage of developing countries.

Despite the shortcomings of the doctrine of comparative advantage, a prevalent criticism of the WTO is that it is incapable of realising the benefits promised by the doctrine because, rhetoric aside, it is not really concerned with removing barriers to international trade. Rather, the argument goes, it is a pretext for keeping up protectionist barriers in some areas. In particular, it is argued that the WTO rules are dedicated to keeping up protectionist barriers for the developed world so that enterprises based in the developed world have access to the markets they want, while enterprises of the developing world do not have access to the markets of the developed world that would be particularly valuable to them. A version of this argument was a central concern of the Cancún Ministerial Conference, where the developing countries were pushing for reductions in developed-country subsidies for domestic agricultural production and in developed-country tariffs in order to improve developing-country ability to compete in world agricultural markets. The failure of the developed world to make concessions, even on the specific issue of access to the international cotton markets,⁶ starkly

illustrates this particular criticism of the WTO. It is clear, however, that what developing countries want and need is a more equitable system of trade liberalisation and not unfettered liberalisation. This is evident in developing-country arguments for improved systems of Special and Differential Treatment (SDT).⁷ It is also clear that their resistance at Cancún to the so-called Singapore issues⁸ was not merely due to the need to take an aggressive negotiating position in order to bolster their arguments about access to agricultural and textile markets. Developing countries are clearly apprehensive about the conclusion, in particular, of a WTO Multilateral Investment Agreement (MIA),⁹ which they consider would further compromise not only their ability to control their economy but also their sovereignty. This concern is clearly related to more general anti-liberalisation objections to the WTO and is considered in more detail below.

While some developed countries stood in the way of significant liberalised concessions in agriculture and textiles, it is clear that developed countries in general were unhappy with the outcome of the Cancún Ministerial Conference because of the failure to secure greater liberalisation in relation to the Singapore issues.¹⁰ There is considerable evidence to suggest that the implosion of the Ministerial Conference was a consequence not of the disputes over agriculture and textiles, but of the aggressive pursuit by the developed countries of agreement to proceed towards the conclusion of an MIA.¹¹ As noted above, this was resisted by developing countries. For reasons that are further explored below, it is also likely to be a focal point for staunch resistance by activists and campaigners around the world. The controversy does, however, illustrate the point that the developed countries have a somewhat schizophrenic position on trade

5. See F. Macmillan, *WTO and the Environment* (Sweet & Maxwell, 2001), pp. 226–230.

6. This issue was raised by Benin, Burkina Faso, Chad and Mali: see WTO, *Poverty Reduction: Sectoral Initiative in Favour of Cotton—Joint Proposal by Benin, Burkina Faso, Chad and Mali* (WT/MIN(03)/W/2, 15/8/03); and WTO, *Poverty Reduction: Sectoral Initiative in Favour of Cotton—Joint Proposal by Benin, Burkina Faso, Chad and Mali—Addendum* (WT/MIN(03)/W/2/Add.1, 3/9/03). Despite support in Cancún from Argentina, Australia, Bangladesh (on behalf of Least Developed Countries), Bangladesh, Cameroon, Canada, Guinea, India, Senegal and South Africa, as well as the personal intervention of the WTO director-general Supachai Panitchpakdi, no progress was made on this issue due to opposition and/or obfuscation from the United States and the European Union: see WTO, *Cancún Ministerial Conference: Summary of 10 September 2003* (www.wto.org/english/thewto_e/minist_e/min03_e/min03_10sept_e.htm, accessed September 12, 2003); WTO, *Cancún Ministerial Conference: Summary of 11 September 2003* (www.wto.org/english/thewto_e/minist_e/min03_e/min03_11sept_e.htm, accessed September 12, 2003); WTO, *Cancún Ministerial Conference:*

Summary of 12 September 2003 (www.wto.org/english/thewto_e/minist_e/min03_e/min03_12sept_e.htm, accessed September 13, 2003).

7. See Christian Aid, “Recipe for Disaster 2: Special and Differential Treatment”, *Recipe for Disaster: Cancún Briefing Papers/09.03*, www.christian-aid.org.uk/cancun/briefing.htm (accessed September 12, 2003). The concept of SDT has itself come under attack from those advocating a more rigorous liberalisation of international trade: see, e.g. H. Nottage, “Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment” (2003) 6 *Journal of International Economic Law* 23.

8. The Singapore issues, so named because they were left over from the First WTO Ministerial Conference in Singapore, are investment, competition, government procurement and trade facilitation (customs restrictions).

9. See e.g. WTO Working Group on the Relationship between Trade and Investment, *Communication from China, Cuba, India, Kenya, Pakistan and Zimbabwe: Investors’ and Home Governments’ Obligations* (WT/WGTI/W/152, 19/11/02).

10. See CAFOD, n.1 above.

11. See *Cancún Ministerial Conference: Summary of 14 September 2003* (www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm, accessed September 26, 2003).

liberalisation. In general, it may be possible to characterise them as more in favour of an undifferentiated ("one size fits all") approach to trade liberalisation, but their failure to make significant compromises on market access suggests a qualified embrace of the pro-liberalisation position.

Overall, an extreme pro-liberalisation position is not only theoretically questionable as a result of its reliance on the doctrine of comparative advantage; it is also evident that it is not embraced by any member state of the WTO. On the other hand, there is clearly some basis for the argument that in some respects, the WTO is "too protectionist". Given that the negative effects of this are largely experienced by developing countries, which (in the main) do not advocate "one size fits all" liberalisation, it may well be that this objection is more politico-structural than purely pro-liberalisation.

Arguments from the anti-liberalisation camp

Like the pro-liberalisation camp, the anti-liberalisation camp is very broad. In many respects, the main anti-liberalisation arguments are politico-structural in the sense that they are concerned with trade liberalisation in the form that it takes under the auspices of the WTO. The basis on which the anti-liberalisation arguments are separated from those categorised as politico-structural is that the former are concerned with the internal political economy of the WTO, whereas the latter are concerned with its position in the architecture of international law and politics.

The most extreme anti-liberalisation argument against the WTO is that, being dedicated to the goal of free international trade, it is an instrument of global capitalism. This is the familiar argument of many anti-capitalist, anti-globalisation activists. Not only is the embrace of capitalism decried on the basis of adverse welfare effects, it is also condemned for its inherent instability. In a traditional Marxist analysis, the production of surplus value means that capital must always look for new markets in order to realise its surplus value. However, the realisation of surplus value requires capitalisation of that value by turning the new market into a new site of capitalist production. Eventually, however, the whole world will be a capitalist market and there will be nowhere new to go, which will lead to crisis and paradigm shift.¹²

An argument that owes much to the influence of Marxist theory, but which lays claim to greater popularity among those critical of the WTO, is that the WTO's free-trade mandate means that it is dedicated to the promotion of the interests of

multinational business enterprises over the interests of individuals.¹³ This argument postulates that the positions taken by the developed countries within the WTO are a consequence of the close relationship between governments and business enterprises in Western-style liberal democracies. Certainly, when one considers the provisions of the major new Uruguay Round agreements, the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement)¹⁴ and the General Agreement on Trade in Services (the GATS),¹⁵ it is hard to escape the conclusion that the direct primary beneficiaries of these agreements are international business enterprises. It is unsurprising, therefore, that the focus of developing-country ire with respect to the operation of the WTO agreements is frequently multinational enterprise. Examples of this abound, and include, in relation to the TRIPs Agreement, the pharmaceutical corporations,¹⁶ in relation to the GATS, the privatised water corporations,¹⁷ and in relation to the Agreement on Agriculture, international agribusiness.¹⁸

At Cancún, concerns about the way in which the WTO agreements facilitate the increase in international corporate power found particular voice in relation to the Singapore issues. These issues, left over for resolution from the First Singapore Ministerial Conference, are investment, competition, government procurement and trade facilitation (customs barriers), but the greatest of these is investment. Ever since the suspension of negotiations over the OECD Multilateral Agreement on Investment, the developed countries have pushed for an approach at the WTO that would secure what they consider to be the benefits of such an agreement. This strategy is a clear manifestation of the identity of interest that exists between the governments of developed countries and the multinational corporate sector. As with progressive liberalisation in the services sector under the auspices of the GATS,

13. See, e.g. Macmillan, n.5 above, p.226.

14. On the way in which the corporate sector drove the US position on the negotiation of the TRIPs Agreement, see M. Blakeney, *Trade Related Aspects of Intellectual Property Rights* (Sweet & Maxwell, 1996), Ch.1.

15. On the relationship between GATS and the articulation of corporate power, see F. Macmillan, "Making Corporate Power Global" (1999) 5 *International Trade Law and Regulation* 3.

16. See, e.g. P. Drahos, "Intellectual Property and Human Rights" (1999) 3 *Intellectual Property Quarterly* 349.

17. See, e.g. D. Fernandes, "Suez' World Water Wars: The Skirmish at the WTO over Privatization", *CorpWatch*, September 9, 2003 (www.corpwatch.org/issues/PRT.jsp?articleid=8390, accessed 12 September 2003). See, further, Macmillan, n.5 above, Ch.7.

18. See, e.g. Russo, "Will Agricultural Issues Derail WTO Talks?", *CorpWatch*, September 10, 2003 (www.corpwatch.org/issues/PRT.jsp?articleid=8408, accessed September 12, 2003). Cf. S.L. Boyd, W.A. Kerr and N. Perdakis, "Agricultural Biotechnology Innovations versus Intellectual Property Rights: Are Developing Countries at the Mercy of Multinationals?" (2003) 6 *Journal of World Intellectual Property* 212.

12. See, further, M. Hardt and A. Negri, *Empire* (Harvard University Press, 2000), pp.221-239.

the greatest beneficiaries of an MIA would be multinational enterprises.¹⁹ This is essentially because liberalisation in the supply of services and in investment facilitates foreign direct investment, which is the central method by which multinational enterprise spreads its influence across national borders.²⁰ Securing foreign direct investment is important to developing countries, and is probably high on the list of reasons why most developing countries seek to become members of the WTO. However, the Cancún Conference shows that developing countries have come to see that foreign direct investment is not an unalloyed good.²¹

The resistance of developing countries at Cancún to a WTO MIA may plausibly be regarded as, in part, based upon a position taken in November 2002 by China, Cuba, India, Kenya, Pakistan and Zimbabwe in a Communication to the WTO Working Group on the Relationship between Trade and Investment.²² This Communication deals with the behaviour of multinational enterprises as the primary source of foreign direct investment. Of multinational enterprises, the Communication notes:

“They command enormous physical and financial resources, including proprietary technology and world-wide recognition of their brand or trade names. Their global scale of operations give them unique ability to respond to exchange rate movements in any part of the world, minimise their global tax bill and circumvent financial restrictions imposed by governments, ability to minimise the political risks, access to information on world markets and the ability to bargain with the potential host countries from a position of strength arising from their global position.”²³

The Communication points out that, although there has been some emphasis in the WTO discussions on an MIA on the rights of foreign investors in host countries, there has been little reflection on their obligations. Thus, the signatory countries call for the imposition, within the context of a WTO MIA, of obligations on multinational enterprises based on four general principles, as follows:

- foreign investors would respect the national sovereignty of the host member and the right of each member government to regulate and monitor their activities;
- non-interference in internal affairs of the host member and in its determination of its economic and other priorities;

- adherence to economic goals and development objectives, policies and priorities of host members, and working seriously towards making a positive contribution to the achievement of the host members' economic goals, development policies and objectives; and
- adherence to socio-cultural objectives and values, and avoiding practices, products or services that may have detrimental effects.²⁴

According to the Communication, these general principles should be backed up by specific obligations in the areas of restrictive business practices, technology transfer, effect on balance of payments, ownership and control, consumer and environmental protections, disclosure and accounting, and the obligations of the home governments of multinational enterprises.²⁵

This position reflects that of scholars and other commentators who have expressed concern about the rise of unaccountable global corporate power as a consequence of lowering national barriers to trade and investment and giving “rights” to the private sector that are not mirrored by obligations nor by equivalent “rights” for national governments or individuals.²⁶ Part and parcel of this concern is the adjustment in the nature and scope of national sovereignty in the wake of economic liberalisation. It now seems hardly controversial to express these concerns. The recognition in the international community of a need to regulate the exercise of power by multinational and transnational business enterprises dates back, at least, to the 1976 OECD Declaration on International Investment and Multinational Enterprises. This concern seems to have gained a new urgency in the twenty-first century, which has seen the promulgation in close succession of a new version of the OECD Guidelines for Multinational Enterprises,²⁷ the United Nations Global Compact,²⁸ and the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.²⁹ The first two of these initiatives are hortatory and voluntary.³⁰ The new United Nations Norms are written in mandatory language and address themselves both to transnational business enterprises and to states. This very worthy

19. See, further, Macmillan, n.15 above.

20. See Leonard, n.3 above, Ch.1; and Macmillan, n.5 above, pp. 226–230.

21. On the relationship between foreign direct investment and development, see, e.g. Magee, “Information and the Multinational Corporation: An Appropriability Theory of Foreign Direct Investment” in *The New International Economic Order: The North South Debate* (Bhagwati ed., 1977); and Hymer, “The Multinational Corporation and the Law of Uneven Development” in *Economics and World Order* (Bhagwati ed., 1972).

22. n.9 above.

23. n.9 above, para.1.

24. n.9 above, para.12.

25. n.9 above, paras 13–21.

26. See, e.g. Macmillan, n.15 above.

27. OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, DAF/IME/WPG (2000)15/FINAL, 31 October 2001.

28. This is an initiative on corporate citizenship: see www.unglobalcompact.org. The operational phase of the Global Compact was launched on July 26, 2000.

29. UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), approved August 13, 2003 by UN Sub-commission on the Promotion and Protection of Human Rights, Resolution 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003).

30. See, further, WTO Working Group on the Relationship between Trade and Investment, n.9 above, paras 3–11.

new initiative,³¹ however, shares two interrelated problems with the proposals by developing countries for investor obligations in a WTO MIA. The first is that multinational or transnational enterprises have risen above the regulatory control of nation states. Accordingly, to impose regulatory obligations on their “home” governments may lack meaning in some cases. The second problem is that the legal architecture of international law addresses itself to the constitution of power between nation states *inter se* and between nation states and international bodies. Corporate power is not recognised in this constitution. This is a matter to which this article will return.

As is evident from the foregoing discussion, the concerns about the unaccountable power of multinational corporate actors are, in part, focused on the effects of their behaviour with respect to matters such as human rights, protection of the environment and sustainable development.³² This can, however, also be seen as part of a wider criticism of the WTO: because free trade is the trump card under the WTO, it ignores or overrides other values that have a claim to recognition, such as the protection of human rights, the protection of the environment and the right to development.³³ A reasonable argument might be made that the Uruguay Round considerably upped the ante here. Although by no means the only agreements implicated in this criticism, the TRIPs Agreement, the GATS and the new-look Agreement on Agriculture seem to have raised particular concerns in this respect.³⁴ This criticism of the WTO impacts with particular force on the citizens of developing countries, but they are by no means the only victims of the failure of the system of

international economic law properly to integrate and recognise such fundamental rights.

Politico-structural arguments

The criticisms of the WTO that may be described as politico-structural are mainly, but not exclusively, concerned with the increasingly fraught split between the position of the developed and the developing world. This fracture became particularly evident at Cancún with the emergence of the so-called Group of 22 developing countries, which formed around the relatively powerful states of Brazil, China and India. It may be argued that this fracture is inevitable given the fact that the WTO, as part of the system of international law, is inscribed with the legacy of the colonial period and may, therefore, be considered to be part of the supporting structure of the international empire of the West. This means that the “one size fits all” mentality of the WTO is bound to perpetuate existing inequality. A level playing field does not ensure a fair match when one of the teams is hobbled. The politico-structural nub of this objection to the WTO is that the “one size fits all” approach to trading rules denies to developing countries strategic protectionist advantages that were essential to the developed countries in securing their own economic development.³⁵ Furthermore, the WTO is seen as being implicated by association with the other two institutions of international economic law, the World Bank and the International Monetary Fund (IMF). Thus, negotiations in the WTO are taking place in the harsh light of the parlous consequences for some developing countries of the structural adjustment policies of the IMF and the World Bank.³⁶ Despite the hostility and accusations of post-colonial imperialism quite reasonably engendered by some of the activities of the IMF³⁷ and the World Bank,³⁸ the WTO does little to distance itself from them.³⁹

31. See, further, F. Macmillan, “Regulating Multinational Enterprises” (2003) 24 *The Company Lawyer* 355.

32. See, e.g. WTO Working Group on the Relationship between Trade and Investment, n.9 above, para.19; Macmillan, n.5 above, Ch.8; and Office of the High Commissioner for Human Rights, *Human Rights and Trade* (Paper for the 5th WTO Ministerial Conference, Cancún, Mexico, September 10–14, 2003), pp.16–19.

33. See, e.g. Office of the High Commissioner for Human Rights, n.32 above; and Macmillan, n.5 above.

34. On TRIPs and human rights, see, e.g. Office of the High Commissioner for Human Rights, n.32 above, pp.7–9, 14–16; M. Blakeney, “Intellectual Property Rights and Global Food Security” (2000–01) 5 *Bioscience Law Review* 127; and Drahos, n.16 above. On TRIPs, the environment and sustainable development, see, e.g. M. Blakeney, “Biotechnology, TRIPs and the Convention on Biological Diversity” (1998–99) 4 *Bioscience Law Review* 144; G. Dutfield, *Intellectual Property Rights, Trade and Biodiversity* (2000); and F. Macmillan, “The World Trade Organisation and the Transfer of Environmentally Sound Technologies” (2001) 7 *International Trade Law and Regulation* 178. On TRIPs and development, see, e.g. Office of the High Commissioner for Human Rights, n.32 above, pp.7–9. On GATS, human rights and development, see, e.g. Office of the High Commissioner for Human Rights, n.32 above, pp.6–7, 11–13; and N. Klein, *No Logo* (Flamingo, 2001), Chs 9–11. On GATS, the environment and sustainable development, see, e.g. Macmillan, n.5 above, Ch.7; and F. Macmillan, “The World Trade Organization and the Regulation of Trade in Environmental Services”

(2001) 7 *International Trade Law and Regulation* 127. On the Agreement on Agriculture, human rights and sustainable development, see, e.g. Office of the High Commissioner for Human Rights, n.32 above, pp.9–11; and M. Ritchie, “WTO, Food and Agricultural Rules: Sustainable Agriculture and the Human Right to Food” (2000) 9 *Minnesota Journal of Global Trade* 9.

35. See, e.g. Blakeney, n.14 above, pp.157–166; and Christian Aid, “Recipe for Disaster 1: The ‘Development Round’” in Christian Aid, n.7 above. As the NGO, Christian Aid, pithily puts it, “Making trade work for economic development is not the same as liberalising trade”: *ibid*.

36. See, e.g. Christian Aid, “Recipe for Disaster 3: Agriculture” in Christian Aid, n.7 above.

37. See, e.g. S. Pahuja, “Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide” [2000] *Leiden Journal of International Law* 749.

38. For an overview of some of these activities, see J. Stiglitz, *Globalization and its Discontents* (Allen Lane, 2002).

39. Note e.g. WTO, “Ministerial Declaration: 14 November 2001” (WT/MIN(01)/DEC/1, 20/11/01) (“the Doha Declaration”), para.5: “We shall continue to work with the Bretton

The specific developing-country response to this structural issue of entrenched inequality is to call for an enhanced SDT system. The Doha Declaration, which emerged from the Fourth Ministerial Conference, made reference to a proposed Framework Agreement on Special and Differential Treatment⁴⁰ and provided that “all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational”.⁴¹ In particular, developing countries have pushed for a move from a hortatory to a mandatory approach to SDT.⁴² In the wake of Doha, the WTO’s Trade and Development Committee were charged with taking forward the work on SDT. By the time of the Cancún Ministerial Conference, 88 proposals had been made, upon 24 of which agreement seemed possible. Inevitably, in addition to being numerically paltry, these proposals offered few real benefits to most developing countries. No clear agreement on improving the SDT regime seems to have been reached.

The apparent structural bias of the WTO in favour of developed countries has also manifested itself in a number of other criticisms. Brief reference to three of these criticisms constitutes a useful indication of the range of concern. First, it is argued that powerful member states of the WTO have used WTO obligations as a bottom line for making bilateral agreements with other less powerful member states that impose higher obligations on those states.⁴³ Secondly, critics point to the way in which those same powerful member states simply refuse to take notice of WTO rules in some circumstances. A telling example of this was the refusal by the United States to allow its Helms Burton Act, imposing trade sanctions on Cuba, to become the subject of a WTO dispute resolution on the ground that the Act was related to its national security and, therefore, not justiciable before the WTO dispute settlement body.⁴⁴ The third argument concerning the tendency of powerful states to take advantage of their power within the WTO system is that, although it is said to be a rule-based system, the rules do not work the same way for all members. The US approach to the taking of compulsory

licences under Art.31 of the TRIPs Agreement provides a useful illustration. After four people in the United States died as a result of exposure to anthrax, the US government declared that it would take a compulsory licence of a patented anti-anthrax medication under Art.31.⁴⁵ However, despite the deaths of millions of people as a result of AIDS-related illnesses in sub-Saharan Africa, the United States resisted the use of Art.31 by African national governments in respect of anti-AIDS retrovirals. The fact that the US government backtracked on the anti-anthrax compulsory licence does little to undermine the suggestion of inconsistent application of the rules.

Criticisms of the WTO that focus on the structural division between the developed and the developing world are to a considerable extent subsumed in a much more general structural criticism, which is that the WTO is not democratic. In many ways, the foregoing discussion might be regarded as a demonstration of this argument. If the WTO is democratic, how can it be that the 30 or so developed countries, out of a total membership of 146, call the shots? Of course, this phenomenon might be explained by, among other things, the fact that developing countries take different positions on different issues and do not, therefore, vote effectively as a bloc. It appears to be the case, for example, that at the Cancún Ministerial Conference, three distinct groupings of developing countries were in evidence.⁴⁶ A lingering suspicion about the WTO’s democratic credentials, nevertheless, remains.

The WTO defends its democratic credentials on the basis that decisions made by the WTO are based on consensus, arrived at through the debate and agreement of the representatives of the national governments of countries that are members of the WTO.⁴⁷ Even at this level, there is something slightly disingenuous about the argument. The WTO admits, in somewhat of an understatement, that “[it] would be wrong to suggest that every country has the same bargaining power”.⁴⁸ However, in this context, it does not seem to take on board the fact that “bargaining power” is not the whole story when it comes to exerting influence over WTO decisions. Being able to attend meetings of the WTO General Council and to wield diplomatic influence at the WTO is also clearly important. Something that particularly militates against the exercise of influence by poorer countries is the cost of maintaining a permanent delegation in Geneva. Perhaps this explains why, in the face of opposition before Cancún by over 60

Woods institutions for greater coherence in global economic policy-making.”

40. WTO (Preparations for the Fourth Session of the Ministerial Conference), “Proposal for a Framework Agreement on Special and Differential Treatment: Communication from Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe” (WT/GC/W/442, 19/9/01).

41. n.39 above, para.44.

42. See, e.g. “Proposal for a Framework Agreement on Special and Differential Treatment”, n.40 above, para.15.

43. See P. Drahos, “BITS and BIPs: Bilateralism in Intellectual Property” (2002) 4 *Journal of World Intellectual Property* 791.

44. See K. van der Borgh and J. Strawson, “Cuba and the Axis of Evil: An Old Outlaw in the New Order” in *Law After Ground Zero* (J. Strawson ed., GlassHouse Press, 2002) p.59, esp. pp.62–64.

45. C. Denny, “WTO relaxes rule on drug patents”, *Guardian*, November 13, 2001.

46. G22, G90 and G33: see CAFOD, n.1 above, pp.7–9.

47. See www.wto.org/english/thewto_e/whatis_e/10mis_e/10m10_e.htm.

48. *ibid.*

developing countries,⁴⁹ the Singapore issues found their way onto the Cancún agenda. Of course, the WTO knows that difficulties in funding a Geneva presence create an influence deficit.⁵⁰ However, even if it were able adequately to address this problem, it would still not be getting to the nub of the allegation that it is not democratic.

When people criticise the WTO for being undemocratic, what they are referring to is what Stiglitz has characterised as “*global governance without global government*”, that is, “one in which a few institutions the World Bank, the IMF, and the WTO and a few players the finance, commerce and trade ministers, closely linked to certain financial and commercial interests dominate the scene, but in which many of those affected by their decisions are left almost voiceless”.⁵¹ Two factors explain how the WTO forms part of this “global governance without global government” and why the involvement of “finance, commerce and trade ministers” has made so little impact on its democratic credentials. These factors are, first, the relationship between the WTO and capital, and secondly, the relationship between nation states and capital.

The WTO may be regarded as representing the interests of capital in the sense that the WTO has a reciprocal relationship with multinational enterprises under which their activities are facilitated through progressive trade liberalisation while at the same time they act as instruments of the WTO’s (rhetorical, at least) goal of free international trade. This has accelerated the process by which the power of multinational enterprise has become global, while the countervailing political power of the democratic entities has remained trapped within the confines of the nation state. Thus, multinational enterprises may be regarded as having transcended what Hardt and Negri refer to as “the constitutional command of the nation states”.⁵² It is important to recognise that not only are nation states politically eclipsed by the power of the international corporate sector, but they have also ceased to resist. They have, in truth, been captured by the ideology of capital. One might even take the argument a step further and say they are controlled by

it.⁵³ Of course, this goes a little further than the observation made above that in Western liberal democracies, the relationship between the state and the “private” sector is very close. On the other hand, it goes some way to explaining the willing co-operation of nation states with a system of international economic law apparently dedicated to a form of trade and financial market liberalisation regardless of its consequences for millions of people and regardless of its insistence on the irrelevance of national borders.⁵⁴ A question that perhaps remains is, if the power of multinational enterprise is no longer constitutionalised within the political entity of the nation state, is it possible or desirable to regard it as being constitutionalised through the mechanisms of this WTO or any successor WTO?⁵⁵

Then what?

Absent global catastrophe, whether this WTO exists tomorrow or not, it is most unlikely that international trade will cease, that developing countries will rectify their position of historical inequality or that multinational enterprise will abandon the powerful global position that it has carved out for itself. This WTO may have been responsible for exacerbating all these problems. However, for all its faults, not only will the abolition of this WTO without any successor, except the free market, fail to improve the present situation, it may well make it worse. We do, indeed, need trade rules. The real question is whether we can do a better job with them. The criticisms of this WTO from the pro- and anti-liberalisation perspective might be regarded as largely addressing questions of how any new or revised trade rules might strike the balance between free trade and protectionism in order to serve certain countervailing values. The politico-structural criticisms, especially when viewed cumulatively with the anti-liberalisation arguments, starkly raise two particular problems that need to be addressed as a matter of urgency. One is the position of the developing world, and the other is the apparently unregulated power of the multinational sector.

How, then, do we introduce countervailing values into the system of international economic law as represented by WTO law? Is there a way of constitutionalising power at the international level that reflects the types of values that most people are usually concerned about when they complain of

49. See Christian Aid, n.35 above. It was reported that opposition to starting negotiations on the Singapore issues had increased to more than 70 developing countries by the time of the Cancún Conference: Christian Aid, “Cancun Diary/12.09.03”, www.christian-aid.org.uk/cancun/030912diary.htm (accessed September 12, 2003).

50. See WTO, “Fifth Ministerial Conference, Press Pack: Briefing Notes” (9/9/03), www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief00_e.htm (accessed September 12, 2003), pp.53–54. See also K. Rana (deputy director-general, WTO), “The Multilateral Trading System: Why East Africa Must Remain Engaged” (Keynote Address, Second East Africa Business Summit, September 18–21, 2003), www.wto.org/english/news_e/news03_e/speech_rana_19sep03_e.htm (accessed October 2, 2003), p.6.

51. n.38 above, pp.21–22 (italics as in original).

52. n.12 above, p.308.

53. See A.O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (Princeton University Press, 1977, reprinted 1997), which shows that it was the emerging system of international financial arbitrage that undermined and controlled the power of the European monarchs and despots from the seventeenth century onwards.

54. See Hardt and Negri, n.12 above, pp.150–154.

55. cf. Hardt and Negri, n.12 above, pp.308–309.

democratic deficit: voice, representation, transparency?⁵⁶ Looking around for a source of values with countervailing force to the value of the market as enshrined in WTO law, one is inevitably drawn, as a moth to a flame, to public international law. Might a rapprochement, or even a reconciliation, between the divided systems of international economic law and public international law constitute the beginnings of a solution?

The current international legal order, which has emerged since the end of the Second World War, embraces a kind of schism between international economic law and public international law.⁵⁷ From the beginning, the mandates of these two systems were distinct. The system of international economic law grew up around the Bretton Woods institutions, of which the WTO is a progeny.⁵⁸ These institutions were to manage international economic relations. The Dumbarton Oaks institutions were to manage the international political order. As part of this mandate, the Dumbarton Oaks institutions and the system of public international law that has been built up around them have purported to establish international standards in areas such as human rights and the protection of the environment. Legally, there was, and remains, little in the way of linkage between the two systems. Despite this legal separation, their institutions and activities have a clear, if changing, interrelationship. That is, there is a wide range of matters within the purview of the international legal system that have an impact in both the system of international economic law and the system of public international law.⁵⁹ Institutionally, Finger and Tamiotti have noted a "rearrangement, which makes international public institutions regroup around three key issues ... security, sustainable development and trade regulation".⁶⁰ The Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries, which is a joint venture between the IMF, the World Bank, the WTO, UNCTAD, UNDP and the International Trade Centre,⁶¹ provides a useful example of this. Nevertheless, there are no legal connections between the two systems. Rather than speaking to each other, it is often suggested that the two systems are in some

sort of regulatory competition in which international economic law, especially WTO law, is ascendant "with economics replacing politics as law's sidekick and nemesis".⁶²

Given the actual overlap in the impact of international economic law and public international law, it would seem logical for the systems to intersect legally. More than merely having the appeal of logic (a little-regarded value in law), from the point of view of international economic law, many of the abuses that are said to be inherent in the current WTO system might be answered by a form of legal recourse to norms established in public international law. This might be particularly so, for example, in relation to human rights and environmental matters. From the point of view of public international law, its serious problem with enforcement might be addressed through a legal relationship with international economic law.⁶³ Most importantly, however, rapprochement of the two systems would involve a recognition that the international economic order is part of the international political order. It is evident that, despite the strength of the politico-structural criticisms of the WTO, canvassed above, this point is little appreciated. For example, in a speech made just after the Cancún Ministerial Conference, the deputy director-general of the WTO, referring to the plight of the cotton farmers from Benin, Burkina Faso, Chad and Mali,⁶⁴ said the farmers "do not ask for aid, which is the World Bank's remit, nor do they make political appeals that belong to the United Nations".⁶⁵ As discussed above, however, the position of these countries (and their nationals) is a consequence of a structural imbalance in power. Surely, such an imbalance is related to the international political order.

Would a recognition that the international economic order is part of the international political order be the key to a more just and democratic reconstitutionalisation of power at the international level? This raises a thorny problem if that recognition is realised, as suggested above, through the creation of a legal relationship between the systems of international economic law and public international law. This is because the systems share a twofold myopia. First, both systems fail to give any formal or constitutional recognition to so-called "private actors" in the form of multinational

56. See Stiglitz, n.38 above, pp.20–21 and Ch.9.

57. See S. Pahuja, "Trading Spaces: Locating Sites for Challenge within International Trade Law" (2000) 14 *Australian Feminist Law Journal* 38.

58. Having grown out of the 1947 version of the GATT, which was the sole survivor of the attempt at Bretton Woods to establish an International Trade Organisation.

59. e.g. with respect to environmental matters, see Macmillan, n.5 above, esp. pp.266–268; with respect to human rights matters, see Office of the High Commissioner for Human Rights, n.32 above.

60. M. Finger and L. Tamiotti, "New Global Regulatory Mechanisms and the Environment: The Emerging Linkage Between the WTO and the ISO" (1999) 30 *International Development Studies Bulletin* 8 at p.9.

61. Itself a joint venture between UNCTAD and the WTO: see www.intracen.org/default.htm.

62. D. Kennedy, "The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law" (1995) 10 *American University Journal of International Law and Policy* 671 at p.675.

63. e.g. the Office of the High Commissioner for Human Rights, n.32 above, p.15, notes that the TRIPs Agreement is the only legally enforceable international agreement in relation to the intellectual property rights of indigenous peoples. "The other initiatives are only nationally-based, voluntary or treaty-based without sanction-oriented enforcement procedures for violations."

64. See n.6 above.

65. n.50 above.

enterprises. Secondly, neither system appears to be sufficiently concerned about the extent to which power might be exercised outside the cognisance or jurisdiction of the nation state. It is clear that if one were to recast the law of the world trading system so that it directly intersected with, and was constrained by, the values of public international law, many of the criticisms of the current WTO system would be on their way to being addressed. However, one overriding concern would remain. This is the issue of the constitutionalisation of international corporate, or “private”, power. That is, the question of how the power of the multinational corporate sector is to be controlled and regulated within a system of law that both recognises the existence of that power and is not incapable in the face of it.

If it is truly the case that multinational enterprises are outside the constitutional command of the nation state, then given the myopia of

both systems of international law with respect to non-state actors, even laudable initiatives like the United Nations Norms on the Responsibilities of Transnational Corporations⁶⁶ are doomed to rather limited effect. Of course, it might be argued that the very existence of these Norms demonstrates an emerging concern within public international law with respect to the exercise of international corporate power. If so, cross-fertilisation of this concern into international economic law would be desirable. What is clear is that, in order to answer some of the most penetrating criticisms of the system of international economic law embodied in the current WTO, any revised system must concern itself not only with regulating the exercise of power between states, but also with regulating the exercise of corporate power at the international level.

66. n.29 above.