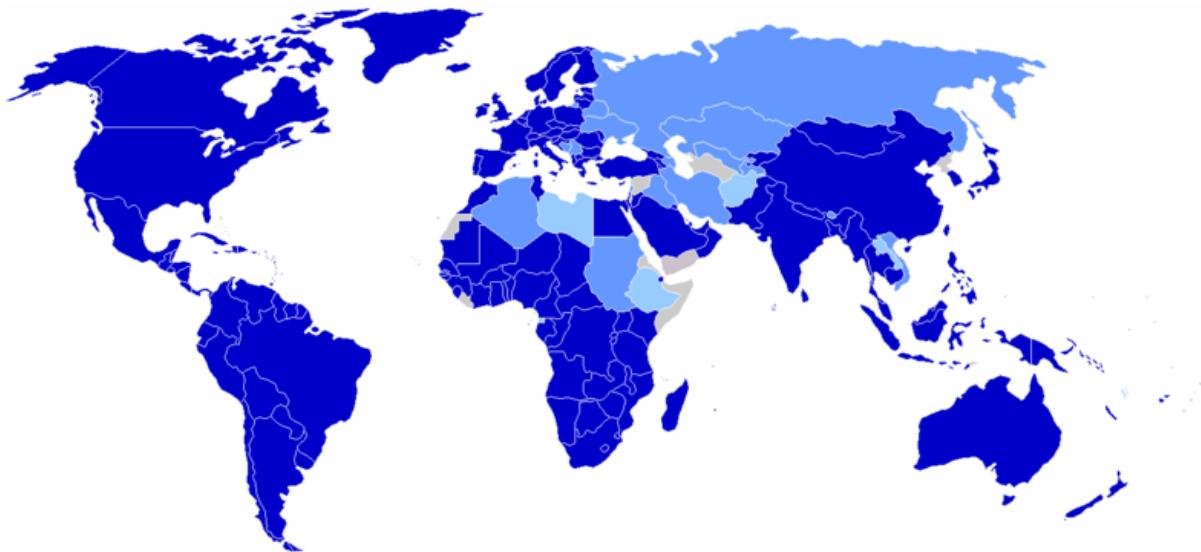




WTO at the Crossroads: the Challenges Ahead

**25-26 November 2006
Rama Garden Resort Hotel, Bangkok, Thailand**



Organized by

**The Asian WTO Research Network (Thailand)
Asia – Pacific Economic Cooperation**

Supported by

**Thailand Research Fund
Eastern Asia University
Sukhothai Thammathirat Open University
Asia - Pacific Economic Cooperation (APEC)
International Institute for Trade and Development
Institute for International Studies and Training
Stockholm Environment Institute**



WTO at the Crossroads: the Challenges Ahead

**25-26 November 2006
Rama Garden Resort Hotel, Bangkok, Thailand**

Organized by

**The Asian WTO Research Network (Thailand)
Asia – Pacific Economic Cooperation**

Supported by

**Thailand Research Fund
Eastern Asia University
Sukhothai Thammathirat Open University
Asia - Pacific Economic Cooperation (APEC)
International Institute for Trade and Development
Institute for International Studies and Training
Stockholm Environment Institute**

Acknowledgement

The international conference on **WTO at the Crossroads: Challenges ahead** was organized by The Asian WTO Research Network (Thailand). It was held on 25 – 27 November 2006 at Rama Gardens Resort Hotel, Bangkok, Thailand. The conference was supported by Thailand Research Fund, The International Institute for Trade and Development (ITD), The Institute for International Studies and Training (IIST), Asia - Pacific Economic Cooperation (APEC), Sukhothai Thammathirat Open University, Eastern Asia University and Stockholm Environment Institute.

The publication of this conference report is supported by Thailand Research Fund. The Asian WTO Research Network (Thailand) would like to express our sincere grateful thanks to Thailand Research Fund for the financial support and generosity given to us in publishing this conference report. We also would like to gratefully thank all co-organizers and supporters of this conference.

The Asian WTO Research Network (Thailand)

Table of content

	Page
Acknowledgement	i
Table of content	ii
Conference Agenda	iii
Background	iv
Welcome Remarks	viii
Opening Remarks	xi
Introductory Address	xiii
Keynote Speech	xviii
Papers	
Session 1: WTO at the Crossroads: the Challenges Ahead	
1. Presentation of Prof. Dr. Herbert Kronke	1
2. Presentation of Prof. Dr. Sol Picciotto	10
3. Presentation of Prof. Dr. Wang Guiguo	29
Session 2: WTO in the Future: A Broader Perspective for Negotiation for Sustainable Development	
1. Presentation of Prof. Dr. Somchin Santawaluk	39
2. Presentation of Dr. Sriprapha Petcharameesree	
Session 3: Trade in Services	
1. Presentation of Prof. Gong Baihua	66
2. Presentation of Director Pimchanok Vonkhoporn	84
Session 4: Current Status of Regional Trade Agreements	
1. Presentation of Ambassador Superramaniam	104
2. Presentation of Prof. Dr. Lawan Thanadsilpakul	110
3. Presentation of Dr. Chaw-Hsia Tu	262
4. Presentation of Prof. Duken Ahn	270
5. Presentation of Prof. Sharma	281
Session 5: New International Architecture in Trade and Investment	
1. Report on the Hawaii Workshop by Prof. Henry Gao,	293
2. Presentation of Prof. Naya, Prof. Fukunaga, Prof. Matsushita	305
3. The 14 th APEC Economic Leaders' Meeting – Hanoi Declaration (excerpt)	329
4. The 18 th APEC Ministerial Meeting – Joint Statement (excerpt)	332
Memorandum of Bangkok Meeting	337
Conference Report	339
Bio Data	351
List of Participant	362
Assessment of the Conference	374
The Conference Budget	379



WTO at the Crossroads: the challenges ahead

25-26 November 2006
Rama Garden Resort Hotel, Grand Ball Room 1, Bangkok, Thailand

Organized by

The Asian WTO Research Network (Thailand) Asia-Pacific Economic Cooperation (APEC)

Supported by

Sukhothai Thammathirat Open University Eastern Asia University
International Institute for Trade and Development Institute for International Studies and Training
Asia-Pacific Economic Cooperation (APEC), Thailand Research Fund, and Stockholm Environment Institute

24 November 2006	
	Arrival
25 November 2006	
8.30-9.00 am	Registration
9.00-9.10 am	Welcome Remarks: Prof. Dr. Lawan Thanadsillapakul
9.10-9.20 am	Opening Remarks: Mr. Takashi Iwamoto
9.20-9.40 am	Introductory Address: Dr. Surakiat Sathirathai
9.40-10.00 am	Keynote Speeches: Prof. Dr. William Davey
10.00-10.30 am	Coffee Break and Group Photo
10.30-12.30	Session 1: WTO at the Crossroads: the challenges ahead Presenters: Prof. Dr. Kronke, Prof. Dr. Picciotto, Prof. Dr. Wang Guiguo, Commentators: Prof. Dr. Dukgeun Ahn, Ms. Margaret Liang, Moderator: Ambassador Supperamaniam
12.30-1.30 pm	Lunch (Rama Garden Resort Hotel)
1.30-3.00 pm	Session 2: WTO in the future: A Broader Perspective for Negotiation for Sustainable Development Presenters: Prof. Dr. Somchin Santawaluk, Dr. Srirapha Petchmesri Commentators: Prof. Henry Gao Moderator: Mr. Ken Matsumoto
3.00-3.15	Coffee break
3.15-4.30 pm	Session 3: Trade in Services Presenters: Prof. Gong Baihua, Director Pimchanok Vonkhoporn Commentator: Prof. Rajesh Sharma Moderator: Dr. Da-nien Liu
4.30-5.00 pm	Special Session of the Members of the Asia WTO Research Network Explanation on AWRN website: Dr. Lihchyi Wen Explanation on next meetings: Ambassador Supperamaniam, Prof. Rajesh Sharma Moderator: Mr. Takashi Iwamoto
7.00-9.00 pm	Dinner: Dinner speech by Dr. Somchin Santawaluk
26 November 2006	
9.00-10.30 am	Session 4: Current Status of Regional Trade Agreements Presenters: Ambassador Supperamaniam, Prof. Dr. Lawan Thanadsillapakul, Ms. Chaw-hsia Tu, Prof. Dr. Dukgeun Ahn, Prof. Rajesh Sharma Moderator: Prof. Mitsuo Matsushita
10.30-10.45 am	Coffee break
10.45-12.30 am	Session 5: New International Architecture in Trade and Investment Presenters: Prof. Henry Gao, Prof. Naya, Prof. Fukunaga, Prof. Matsusita Commentators: Dr. Charles Barrett, Prof. Chin Leng Lim Moderator: Mr. Takato Ojimi
7.00-9.00 pm	Dinner: Dinner speech by Prof. Dr. Lawan Thanadsillapakul

International Conference
On
WTO at the Crossroads: Challenges Ahead

Organized by
The Asian WTO Research Network (Thailand)

25 – 27 November 2006

Rama Gardens Resort Hotel
Bangkok

Background, Principles, and Objectives

The Asian WTO Research Network is an independent organization founded by several Asian countries including the Republic of China (including Hong Kong and Taiwan), South Korea, Japan, Indonesia, Malaysia, the Philippines, Singapore, and Thailand as a network for collaboration in the areas of education and research in international trade, especially research on GATT/WTO. The network was established also for each member nation to work together in the development of their laws, societies, economies, industries, and internal procedures that have been agreed upon under the WTO. In addition, the research network aims for full and sustainable development of each nation's potential and maintenance of economic stability and security of the region by taking advantage of the openness and liberalization of trade, investment and finance.

The Asian WTO Research Network was established by a group of scholars from various countries in Asia. They are representatives of their nations with the responsibilities to the WTO. This group foresees the value in working together to develop the nations of this region and is certain of one issue – for their nations to gain further knowledge and true understanding of the laws and mechanism of the WTO. As many do not yet understand the important roles they play, the fundamental principles and ultimate goal is to develop their nations' skills in performing their roles and duties in the WTO until there is full collaboration within each nation. They also aim for each nation to perform fair and free economic progress and to adequately protect themselves from any negative results of free trade under the WTO.

The Asian WTO Research Network has its headquarters in the Japan Fair Trade Center in Tokyo and is headed by Mr. Iwamoto, Executive Director, and Professor Mitsuo Matsushita, President, and a Steering Committee consisting of representatives from various nations. At present there are a total of 50 members, 30 in the Steering Committee and 20 members of high scholastic qualities. Each member is building a network of collaboration within their nation and aims to progress in research as well as continuously develop their understanding of the workings of the WTO and to present their resulting ideas at the bi-annual seminars.

WTO seminars are organized to take place around the February – March and November – December with each session taking 2 to 3 days depending on the host country. Since its conception in 2004, the Asian WTO Research Network has held 5 seminars as follows:

1. Seminar 1 in Tokyo, Japan on 25 – 26 November 2004
2. Seminar 2 in Shanghai, China on 30 November – 2 December 2004.
3. Seminar 3 in Seoul, South Korea on 25 – 26 April 2005.
4. Seminar 4 in Tokyo, Japan on 25 – 27 October 2005, which took place along with the 10th anniversary of the WTO.
5. Seminar 5 in Taipei, Taiwan on 25-27 April 2006

Seminar 6 takes place in Bangkok, Thailand on 25 – 27 November 2006.

Activities of the Asian WTO Research Network

The activities of the Asian WTO Research Network, which was established by researchers and scholars from member nations with concern to the WTO, include a central authority and a network of nations and is summarized as follows:

1. The Office of the Secretary General looks after and coordinates work within the organization, organizes the bi-annual Seminar, announces news and other information, and contacts external organizations among other activities.
2. Each member nation in the network, which comprise of researchers, lecturers, and government officials, is responsible for both WTO-related and non-related research. They publish books and journals, print research results, and organize committee meetings as well as meetings presenting issues important to the WTO. Members also design and maintain a website, send information to fellow member nations, and study and promote government policies concerning the WTO in terms of information on independent organizations, training, and research.

Asian WTO Research Network Funds and Budgets

The funds of each member nation that are used for the organization come in many forms. For example, while the WTO Research Network is an independent organization, it still falls under government's care and therefore receives funds from the government. Education institutions tend to be independent institutions such as business law and international economics schools or law faculties. Budgets also come from research activities, printing of books and journals, and from institutions that focus on research training.

Recommendations from the WTO are usually about individual members and which the Secretary General is always in attendance to these recommendation meetings. Other recommendations concern research work as well.

Topics and Purpose of the 6th Asian WTO Research Network Seminar in Bangkok, Thailand

The topic for the 6th seminar is “WTO at the Crossroads: Challenges Ahead.”

The organizers determined the topic of this seminar when they have realized the changing legal and institutional framework governing the liberalization of trade and investment under the umbrella of WTO. This topic encompasses free trade, finance and investment and does not focus merely on trade in goods but also services, intellectual property and investment. Moreover, important points such as environmental problems, sustainable development, human rights issues, expansion of free trade, and intellectual property issues are discussed. Changes in the points mentioned result in various countries having to change their laws and economic policies as well as expand in free trade, which, in turn, affects industries and persons involved, standards of production and service. Vocational development must then reach international standards to be able to compete globally. Therefore, preparing for the development of each nation’s potential and those who make up their industries is very necessary.

Furthermore, as free trade in products and investments is expanding, problems in society, human rights, and development related to free trade expansion must be considered. The affects of such expansion in free trade must be studied carefully especially in the area of sustainable development and human rights. The WTO has already considered the theoretical affects of deviating from the flow of free trade. However, problems in society, in both the sociological and environmental aspects to education and human rights, have been neglected and are issues that must be discussed. A point to consider is the role the WTO plays in these problems.

Because of these changes, governments must also set policies and change laws accordingly. At present, both the Thai government and foreign governments are in agreement to increase their members and for these members to work together under the agreements made under the WTO – agreements on the expansion of free trade in services and investment. Free trade in this new dimension is controlled by the WTO and is limited by the guidelines set up by the FTA. Nevertheless, the problems with society, education, and human rights must still be carefully considered.

Moreover, Asia is considered to have the potential to develop and grow fast and has continually evolved economically both regionally and sub-regionally. Therefore, economic policies of each country in the region affect development of each individual country as well as the region as a whole.

Business in the private sector in trade management and internal and international investment is the mechanism that pushes the economy towards growth while working under the economic policies of each country as well as international laws and regulations. At the same time, the private sector gains advantages from these economic policies. Therefore, member countries must follow and study the changes in economic laws and policies under the WTO. The topics of the seminar are beneficial to both the government and private sectors especially in education. This seminar is a good opportunity for the private sectors of Thailand and other countries to exchange experiences, knowledge, and get to know each other – all of which will be advantageous in the future.

Nature of the Seminar

The topics of the meeting have to do with opening free trade in business and investment in a new dimension. The role of the WTO is in the changes and the affects in society, culture, and education and expansion in free trade, for example, in import and export, international transportation and logistics, education, health care, tourism and telecommunication. There will be discussions and lectures from experts in the area of law, economic policies, and experiences. Participants will separate and merge into smaller groups for further discussion until solutions and beneficial policies are found, which will then be presented in the seminar once again.

A committee meeting takes place along with the Asian WTO Research Network seminar and is held on the third day.

Objectives of the Session

1. To mobilize knowledge from the experts and scholars in the country and abroad in the field of law, economic, management, and policies.
2. To exchange advice and consult between the government and private sectors about laws, WTO regulations, and policies of the economy in the region as well as various business fields and the problems that are caused from regulations and policies and a way to find solutions for development.
3. For opportunities to meet between researchers, scholars, and experts that have to do with the WTO trade, international investment, and in the private sector. For business persons from other countries in Asia to exchange knowledge and experiences.
4. To encourage cooperation in the policies and development of the economy of Asia.
5. To proceed in the work of the organization, to make resolutions, and to determine the host for future seminars.
6. To determine the limits of cooperation in academics, research, development and the structure of the Asian WTO Research Network.
7. To initiate a permanent Forum for Public, Private, Academia, NGOs, and other interested party sharing ideas, view and opinion to WTO

Welcome Remarks

WTO at the Crossroads: the challenges ahead
Asian WTO Research Network Meeting in Bangkok
25-26 November 2006
Rama Garden Resort Hotel, Grand Ball Room 1, Bangkok, Thailand

By
Lawan Thanadsillapakul
School of Law, Sukhothai Thammathirat Open University
Nonthaburi, Thailand

Honorable Dr. Surakiart Sathirathai

Distinguished professors,
Honorable guests and participants,
Ladies and Gentlemen.

I am greatly honored to have the opportunity to present the welcome remarks, on behalf of the organizers, to the international conference on "WTO at the Crossroads: The Challenges Ahead". I am pleased to welcome the Honorable members of Asian WTO Research Network, distinguished professors, experts, guests, ladies and gentlemen to participate in this meeting.

Let me begin by expressing my appreciation to you, Honorable Dr. Surakiart Sathirathai for agreeing to give the introductory address to this important meeting, Honorable Professor Davey for giving the Keynote Speeches, and Honorable Mr. Iwamoto for making the Opening remarks.

It is a great honor for the Asian WTO Research Network (Thailand) to be the host and joint organizer of this meeting. I would like to sincerely thank our co-organizers, Sukhothai Thammathirat Open University, Eastern Asia University, and Stockholm Environment Institute.

I would like to deeply express my sincere grateful thanks to all sponsors: Thailand Research Fund, The International Institute for Trade and Development, Asia-Pacific Economic Cooperation and Institute for International Studies and Training for their financial support and facilitation of this event.

May I also express my deep appreciation to Professor Matsushita, Mr. Iwamoto, Mr. Matsumoto and Japan Fair Trade Association, Miss Inaba, Miss Shizuka and APEC Committee for their kind help and a great contribution to this meeting.

May I also avail myself of this opportunity to express my appreciation to the staffs of Sukhothai Thammathirat Open University, Eastern Asia University and Stockholm Environment Institute, and everyone concerned for their facilitation in organizing the meeting.

The Asian WTO Research Network is an independent group founded by several Asian countries as a network for collaboration in the areas of education, research and development in international trade, especially research on GATT/WTO. The network was established also for each member nation to work together in the development of their laws, societies, economies, industries, and internal procedures that have been agreed upon under the WTO. In addition, the research network aims for full and lasting development of each nation's potential and maintenance of economic stability and security of the region by taking advantages of the openness and liberalized investment, trade and finance in a fair and wisdom environment.

WTO seminars are organized to take place around the February – March and November – December. Since its conception in 2004, the Asian WTO Research Network has held 5 seminars as follows:

Seminar 1 in Tokyo, Japan on 25 – 26 November 2004

Seminar 2 in ShiangHai, China on 30 November – 2 December 2004.

Seminar 3 in Seoul, South Korea on 25 – 26 April 2005.

Seminar 4 in Tokyo, Japan on 25 – 27 October 2005, which took place along with the 10th anniversary of the WTO.

Seminar 5 in Taipei, Taiwan on 25-27 April 2006

This is the 6th Seminar taking place in Bangkok, Thailand

The topic for the 6th seminar is “WTO at the Crossroads: The Challenges Ahead”

The organizers determined the topic of this seminar when they have realized the changing legal and institutional framework governing the liberalization of trade and investment under the WTO. This topic encompasses trade in goods, services, finance and investment and does not focus merely on trade liberalization. Moreover, important points such as environmental problems, sustainable development, human rights issues, expansion of free trade, and intellectual property issues are discussed. Changes in the points mentioned result in various countries having to change their laws and economic policies as well as expand in free trade, which, in turn, affects industries and persons involved, standards of production and service. Vocational development must then reach international standards to be able to compete globally. Therefore, preparing for the development of each nation's potential and those who make up their industries is very necessary.

Furthermore, as free trade in products and investments is expanding, problems in society, human rights, and development related to free trade expansion must be considered. The affects of such expansion in free trade must be studied carefully especially in the area of sustainable development and human rights. The WTO has already considered the theoretical affects of deviating from the flow of free trade. However, problems in society, in both the sociological and environmental aspects to education and human rights, have been neglected and are issues that must be discussed. A point to consider is the role the WTO plays in these problems.

Your participation in this meeting is recognition of the importance role and function of WTO and the improvement of the free and fair global market for all. Especially, the challenges ahead of WTO to enhance effectiveness and efficiency of WTO in creating a fair and free market beneficial to all countries for improving the living standard and wealth generation of all nation states in the world.

The contribution of all participants' knowledge and expertise as well as the result of the research and development in the field of WTO and related issues is a reaffirmation of our commitment and co-operation in developing the legal and institutional frameworks facilitating the enhancement of the international economy in the global community.

I would like to express my appreciation to all participants for coming here today. And I mostly appreciate your valuable inputs and contributions. I wish you all fruitful, open, and intellectually stimulating discussions in the meeting. We trust you will derive considerable benefit and enjoyment from the meeting.

Thank you for being with us.

Opening Remarks
Asian WTO Research Network Meeting in Bangkok on November 25
and 26, 2006

By
Takashi Iwamoto
Executive Director
Fair Trade Center
Institute for International Trade and Investment, Tokyo, Japan

Good Morning, distinguished guests, ladies and gentlemen.

I am Takashi Iwamoto and I serve as Secretary-General of the Asian WTO Research Network. Professor Mitsuo Matsushita, the Chairman of the Network, will arrive in the afternoon today and he asked me to make an opening remark on his behalf.

It is a great honor for me to speak in the presence of the distinguished professors and experts not only from Asia but also around the world.

First of all, I would like to express my sincere gratitude to the organizers and the supporters of this meeting. As you know, there were various difficulties caused by the recent political situation in Thailand and I was very much worried whether we could hold the meeting as planned. The Thai organizers, Dr. Chotiras, Professor Lawan and their staff, have worked very hard to realize this meeting. I would like to express my utmost appreciation to their great efforts. At the same time I would like to thank Mr. Takato Ojimi, Managing Director of the Institute for International Studies and Training, for his great support to make this meeting possible by accepting to co-sponsor and collaborate as an overseer of the APEC project on “Capacity Building for the New International Architecture in Trade and Investment”.

The Asian WTO Research Network was launched in Tokyo in May 2004 when many professors and experts gathered for the Symposium titled “The Way Forward to Successful Doha Development Agenda. We decided to create a forum for the Asian WTO researchers and meet biannually. We had meetings in Shanghai, Seoul, Tokyo, and Taipei. The Bangkok meeting is the 6th meeting and we plan to have the meetings in Malaysia and Macau next year. We have established excellent fora in Asia. We have had very intellectual and useful discussions among the Asian members together with the

distinguished speakers from around the world.

In the meeting of two days we plan to explore the very important and interesting topics. It is very fortunate that we have excellent speakers, panelists and commentators. Right after my speech we have two distinguished keynote speakers, Professor William Davey and Dr.Surakiart. In Session 1 we have Professor Kronke, Professor Picciotto and Professor Wang as presenters and discuss on the WTO at the crossroads: challenges ahead.

In the afternoon we have two interesting sessions, Session 2 “WTO in the future: A broader perspective for negotiation for Sustainable Development” and Session3 “Trade in Services.

Tomorrow morning we have 2 very important sessions on “Current Status of Regional Trade Agreements” and “New International Architecture in Trade and Investment”.

I am sure we will have very stimulating and interesting discussions. I hope all the participants will have wonderful two days.

Thank you very much.

Introductory Address

WTO at the Crossroads: the challenges ahead
Asian WTO Research Network Meeting in Bangkok
25-26 November 2006
Rama Garden Resort Hotel, Grand Ball Room 1, Bangkok, Thailand

By

Dr. Surakiart Sathirathai

Distinguished Guests,
Ladies and Gentlemen.

I am honoured and delighted to have the opportunity to address this distinguished gathering on the subject that is close to my heart. I have always taken the keen interest in the subject of GATT, international trade and later WTO ever since my student time and I have developed them into the areas of my expertise throughout my academic career for more than 25 years now. My research works and teachings at various institutions have been GATT and WTO related. The keen interests in these subjects followed me through my time in politics both as Foreign Minister and Deputy Prime Minister. When I met Director-General Pascal Lamy at the time when he was still the EU Trade Commissioner, our lengthy discussion was no doubt concentrating on the issues of international trade and the future direction of EU-ASEAN economic partnership.

I could not help feeling that the issues were even more of global significance as I ran my 2-year campaign for the position of United Nations Secretary-General. Visiting all developing regions and learning more of their development concerns and priorities, I felt the urgent need of forging partnerships with developed and developing nations as well as a need for international institutions to address the development challenges.

Both the question of the WTO and the Doha Round drew attention of Leaders of both developed and developing countries. Trade is recognized as a driving engine for economic development and holds great potential to bridge the widening gap in the world economy. Indeed, the Doha Round or Development Round is unprecedented in terms of the scale of opening trade in scope and the number of countries involved.

Director-General Pascal Lamy estimated that cutting trade barriers by a third would boost the global economy by 600 billion US dollars. But the question remains, how can we guarantee the developing world's share in such trade increases? Take Africa for instance. By some estimates, a one percent increase in Africa's share of world trade would benefit Africa by over 70 billion US dollars. But how exactly can we increase Africa's share of world trade by one percent?

There needs to be guaranteed market access for the goods of developing countries. For many, that involves agricultural products and commodities. Elimination of agricultural subsidies would go a long way towards increasing the relative price

competitiveness of agricultural commodities of many developing countries. Indeed, the Uruguay Round had succeeded in creating the first comprehensive set of multilateral trade rules in agriculture. Today, the world expects the Doha Round to be able to do much more. It is regarded as a “once-in-a-generation opportunity” for all WTO members.

Since the launching of the Doha Round, trade negotiations have struggled to reach an on-time conclusion. Unfortunately the timetable continues to be delayed. Why has agriculture been a core issue of the impasses? Though agriculture represents less than 8 percent of world trade, food production remains a sensitive sector for both the rich and the poor nations. Contention has yet to be resolved over the issue of effective reduction in farm subsidies and reduction of agricultural tariffs for improved market access on the part of developed countries. Reduction in subsidies continues to be perceived by developing nations as not going far enough whilst insistence on flexibility which could negate the principle of market access was unacceptable to some developed and developing nations.

For the developed economies, the impasse means a delay of negotiations. For the developing economies, it means an erosion of development efforts with a devastating impact on the livelihood of the people. The deadlock of the WTO negotiations has clearly distorted trade and undermined the principles of free and fair trade and non-discrimination. It has diminished the hopes and expectations of people of the developing nations for a better livelihood. The hope for job opportunities and income generation is hampered by the barriers to the free flow of trade. The efforts of many developing countries in attaining the Millennium Development Goals for poverty eradication are being undermined.

However, the current impasse and its implications to the global trading system must not detract our efforts to address the imbalances of the global economy. Developing countries cannot afford to remain complacent. They must continue with their development strategies by adopting innovative approaches that best fits their needs and concerns. This is the challenge, which I believe are of priority to developing nations in pursuing effective development strategies.

First is the exchange of experiences in development strategies. There is no “one-size-fits-all” approach to development. But effective development strategies can be drawn from the successes failures of others attempting to integrate into the global economy.

Take Thailand for instance. Guided by the principles of self-help and partnership, Thailand’s development strategy builds upon the inner strengths of our culture and society to benefit from globalization while minimizing its negative effects. Inspired by and based upon His Majesty the King’s philosophy of “Sufficiency Economy”, sustainability is the ultimate goal of Thailand’s economic progress. The philosophy applies moderation, reasonableness and self-immunity as the key functioning factors. Through this philosophy, the economy learns to avoid excessiveness and to strike a balance to achieve sustainability. At the same time, the economy learns to increase productivity and international competitiveness without going beyond its reasonable means. This two-prong direction, namely avoiding excessiveness and increasing productivity, aims at reducing poverty on the one hand

creating growth on the other. Without learning to strike the right balance between these two major economic policies, no development will ever sustain.

That is Thailand's story. But many developing countries may have gone through successful self-help schemes, effective partnerships and jobs and income creation programmes that are worth consideration. Some countries have built partnership to share local knowledge necessary to turn financial resources into shared prosperity.

I am glad to say that by working together through South-South cooperation, developing nations in many regions have been able to unleash their productive potential. Yet, many more countries and their hundred of millions of impoverished citizens have not been so successful. Based on the success and failure stories, the United Nations, the WTO and other international institutions can serve as a pool of initiatives and expertise to spur different tailor-made development schemes for sustainability in these countries.

Apart from looking at individual country, each region has to be looked at for the different factors that may retard economic growth and development. Some regions, such as Central Asia face geographic isolation. The construction of roads and telecommunication help these distant regions create productive ties with the rest of the world. In sub-Saharan Africa, by contrast, the first challenges are disease control, soil fertility, and expanded educational opportunities. In the Pacific Islands, their survival is increasingly determined by natural disasters and climatic change.

When we look at Asia, we are addressing the diverse development challenges. Asia contains some of the most advanced economies as well as sixty percent of the world's poor. As neighbours with common borders, common problems, and shared goals for prosperity and security, Asia is making progress in effectively linking our markets and industries, pool resources, share know-how, and assist each other in times of need.

In Southeast Asia, we uphold the principle of "prosper thy neighbour". Sustainable development does begin at home, but it does not stay at home. To prosper, we must be open to one another and to the world. We must ensure that our neighbours must also prosper, and that our neighbourhood remains peaceful. By forging strategic economic cooperation in our neighbourhood, we hope to find better ways to use our natural resources, share responsibility for infrastructure, develop our products, link our markets, and strengthen our joint participation in the international economy.

WTO can play an important role in the exchange of development experiences both between countries and between regions.

My second observation is on the significance if the productive sector. Trade negotiations are necessary but in themselves do not guarantee a fair share of the development pie, particularly in enhancing the domestic productivity and international competitiveness of the developing countries. Any regional and bilateral trade agreements cannot bear fruit if the relevant country is without a vibrant productive sector.

Attention is needed in linking the objectives of trade negotiations with the capacity of the productive sector. This is a key area in which the interests of developing countries can be served. Trade negotiations must benefit the potential productivity of the grassroots economy. Trade negotiations must aim at having their potential nurtured and developed, and provide the people at the grassroots level with opportunities to pursue the right to development. That conviction is all we need to build our capacity for genuine sustainable development.

As it stands, much of the potential of the developing countries are hampered by weak economic and technological infrastructure and supply side limitations. The WTO and other development institutions such as the UNDP and UNCTAD can help build up the real productive sectors of member countries. They can provide technical assistance in the formulation of economic policies and the necessary legislative adjustments needed to attract foreign investment. They can draw up effective training programmes to enhance the ability to produce. And they can help turning a non-productive into a more productive unit of the society.

My third observation is on the special needs of and the special given to the economies of the Least Developed Countries (LDCs). Special and differential treatment still needs to be applied. An enhanced Integrated Framework for LDCs, enabling them to more effectively make better use of the “Aid-for-Trade” approach, should continue to receive global support. The delay in negotiating the Doha round means a delay in the implementation of duty free/quota free for LDC products.

Fourthly, is the proliferation of free trade arrangements. As the WTO is perceived as being in a struggle, many countries are strengthening bilateral and regional partnerships with key partners. There are fears in some quarters that this trend might lead to a weakening of the multilateral system. But I believe it need not be so. I believe that bilateral free trade agreements which are WTO consistent and regional economic integration can serve as building blocks for promoting the multilateral trading system.

Fifth is the issue of IPRs which also lies at the heart of the Doha Round. Protecting innovative and creativity serves, in principle, to stimulate the development of new products for consumer benefits. However, we must remain vigilant to the use of IPR as well. There is a need to strike the right balance between IPR protection as the rewards for the creator on the one hand, against the dire need for the right framework to ensure that knowledge and technology under IPR protection would be properly and timely disseminated. This is particularly pertinent to TRIPS and Public Health. Accessibility and affordability of life-saving medicines such as those for HIV/AIDS, malaria, and avian flu are beneficial to all. Hence, we must continue to work together in order to ensure the right balance for mankind.

Lastly, is capacity building for trade negotiators of developing nations. Multilateral rules and standard setting will not provide a balanced global trading system and would only accentuate global inequality if developing countries are not brought on board. I therefore take pride to have personally taken a direct hand in the establishment of the International Institute for Trade and Development (IITD) in Bangkok in 2002.

As Foreign Minister, I recalled taking up the idea of establishing this institute with UNCTAD Secretary-General Ricupero that led to the opening of the IITD in Bangkok in 2002. The Institute has been most supportive for developing countries to better prepare themselves for the growing complexities of economic globalization, including further liberalization in trade, financial and investment. As I attach my personal sentiment to this institute, I must congratulate the institute in selecting its capable director. Unfortunately, he was so capable that he had to prematurely relinquish his term to become the present Minister of Commerce, Excellency Minister Krirkrai Jirapat.

Distinguished participants,

This pace of further liberalization should be pursued progressively and consistently with the developmental levels and objectives of individual members. A trade round is to be completely successful only when all members are able to fully implement their agreed rights and obligations and gain benefits in so doing. Attempts to link social issues with trade such as labour standards must not be protectionism in disguise.

The Doha Round needs to resume in good faith. The major players need to show extra flexibility in their negotiation positions. Compromise needs to be reached amongst the developed and developing nations. We need more meaningful offers to open markets and eliminate non-tariff barriers. It is the responsibility of all to ensure that confidence in the multilateral system is stored and that the WTO is relevant to all economies.

Given the current impasse, I am hopeful that faith in the multilateral system will be restored. There have been indications from Geneva of resumption of takes at the technical level. Building upon that, just last weekend, the Leaders of APEC expressed their political commitment to the strengthening of the multilateral trading system and to the resumption of trade talks as a matter of absolute priority towards achieving a balanced and more ambitious outcome. APEC represents a vibrant region accounting for 60 percent of GDP and 50 percent of world trade. Their voice carries much weight as APEC comprises many of the major players as the US and Japan in pushing the Doha Round forward.

I am hopeful that the WTO, as a member-driven organization, will be able to mobilize concerted efforts and cooperative spirit of all WTO members to help guide our multilateral trading system towards attaining a more balanced and sustainable growth and development. Challenges ahead are for all of us to overcome if the WTO and its members choose the right direction at the crossroads.

Thank you.

The WTO at the Crossroads: What Does the Future Hold?

William J. Davey
Guy Raymond Jones Chair in Law
University of Illinois College of Law

Thank you very much for that kind introduction. It is a great pleasure for me to be here in Bangkok – for the first time in about 30 years – so I am very grateful to the organizers for inviting me. Much has changed since 1976; and much of that change has been the product of Thailand’s decision to embrace the multilateral trading system. Thus, Bangkok is a particularly appropriate venue for this meeting, and I am looking forward to very interesting discussions over the course of the next two days. It is, after all, a critically important time in the short history of the World Trade Organization. Indeed, more generally it is a critical time in the history of the rules-based multilateral trading system that has enriched many of the countries of the globe and their populations in the post World War II era. As I have noted, and it bears emphasizing, Thailand, as well as other East and South-east Asian countries, have been major beneficiaries of the WTO and the multilateral trading system.

So, what issues are raised by the topic of this conference: The WTO at the Crossroads: The Challenges Ahead? There are three that I would discuss. First, what are the prospects for re-launching the Doha negotiations? And what are the prospects for the WTO if a successful resumption of the negotiations is not likely to occur in the near future? Second, and of particular relevance to Asia these days, what are the prospects for and consequences of a proliferation of free trade areas – FTAs – as a response to the suspension of the Doha negotiations? Third, what would be the consequences of the Doha suspension and FTA proliferation on the one major WTO success to date – its dispute settlement system.

I. Prospects for Re-Launching Doha and the WTO in the Near-Term

As you all know, Director-General Pascal Lamy suspended the Doha negotiations last summer. The reason was a lack of progress on the major issues, and, in particular, on agriculture. While I do not have first-hand knowledge of the negotiations, it appeared that the major developing countries, by which I mean Brazil and India, and the EU wanted the US to offer deeper cuts in US domestic farm subsidies. The US was unwilling to make such an offer because it did not believe that it would receive in return adequate further offers by the EU on agricultural market access and by the major developing countries on market access in the goods and services sectors. Since the negotiations were suspended, there have been efforts to try to bridge some of the differences such that the negotiations could be re-launched. It is my impression – again, the impression of one not participating in the negotiations – that not much real progress has been made, although there certainly are frequent discussions in multiple fora of various WTO members and upbeat reports often come from those meetings. [including

those from the APEC meeting in Hanoi last week?] To put it bluntly, (i) I am not sure that the EU can offer enough under its current negotiating mandate that the US would find it acceptable and (ii) I am not really convinced that some of the major developing countries are all that interested in making significant market access offers if they can avoid it, as they have done so far. In any event, even if the negotiations are re-launched early next year, as some have speculated, I doubt that much will be accomplished. Why? Because the US administration will probably not have trade negotiating authority, which will make it difficult for the US to negotiate and will remove pressure on other countries to reach an agreement within any defined time frame.

Is it possible, though, that the US Congress will extend President Bush's negotiating authority, which expires next summer? Indeed, such an extension is already needed because the mechanics of using the so-called trade promotion authority or fast track effectively required an agreement to be reached by the end of this year, which is clearly not in the realm of possibility. Personally I think that there is little likelihood of an extension of the President's negotiating authority. It is difficult to be sure or definitive about that because of the change in control of Congress that will take place in January – as you all know the Democrats captured control of both the House of Representatives and the Senate in the US national elections two weeks ago. However, it seems to me that it is not likely that a Democratic Congress is going to grant President Bush negotiating authority. In the House of Representatives, the carry-over Democratic members of the Trade Subcommittee of the Ways and Means Committee tend to be more "Fair Traders" rather than "Free Traders". For years, the elite consensus on the subcommittee and the committee as a whole has been in favor of freer trade. While that consensus may have been fraying in recent years, there were notable achievements recently. After all, the Republican leadership managed to change the Foreign Sales Corporation export tax subsidy to the satisfaction of the EU and to repeal prospectively the 1916 Anti-Dumping Act and the Byrd Amendment by putting the repeal provisions in legislation at the conference stage, which legislation had not passed either house of Congress initially. The new chair of the Ways and Means Committee – Congressman Rangel of New York – has spoken of increasing transparency in the Committee's work – making such actions less likely in the future. Indeed, a number of strong pro-trade Republicans – including Congressman Clay Shaw of Florida – the republic chair of the Trade Subcommittee – were defeated in the election. The situation is not better on the Senate side, where the Democrats have a majority of one. One of the newly elected Democratic senators is Sharrod Brown of Ohio, who ran on and emphasized an anti-trade platform. Thus, the personnel changes suggest that trade legislation will be more difficult to pass in Congress in the next two years.

Now, it is possible that, in the spirit of bi-partisanship, some sort of agreement on trade negotiating authority might be reached. After all, many Democrats still support the WTO and the Doha negotiations – for example, the incoming Democratic chair of the Senate Agricultural Committee – Senator Harkin of Iowa – is in favor of a Doha deal – with the necessary cuts in US domestic support – but if and only if sufficient market access opportunities are offered to the US by the EU and others. But overall, the Democratic concern with recent free trade agreements – remember the controversy

surrounding CAFTA – suggests to me that they will probably not place much priority on giving this – or any other sort of – power to President Bush. In the absence of US negotiating authority, I fear that the Doha Round will proceed at best only at a very slow pace, even if talks are resumed. After all, without deadlines not much happens at the WTO and without negotiating authority for the US there will be no real deadlines.

With the Doha talks suspended, what should the WTO be doing in the meantime? Certainly the efforts to find a basis for re-starting negotiations should continue. The single most powerful argument that could be made in the US for renewing negotiating authority is that a deal acceptable to the US can be reached. There is obviously a chicken and egg problem here. Who moves first? Will anyone make such a gesture if the US is viewed as unable to commit in the absence of negotiating authority? Will negotiating authority ever be approved in no such gestures are made? While continuing informal contacts are useful and may eventually lead to some break-throughs, I don't see much hope for near-term progress in the Doha Round. Consequently, one can expect renewed – or continued – interest in FTAs and more frequent use of dispute settlement to attempt to achieve there what is not achievable in negotiations. I next turn to the issue of the WTO and FTAs next, but first a couple of thoughts on decision-making.

Has the WTO become dysfunctional? Should it embark on a fundamental restructuring of its decision-making systems? I don't think so. Significant agreements have been reached since the end of the Uruguay Round (on information technology; in services; on TRIPS and public health). After the complaints about transparency in Seattle, it is my sense that the decision-making process is working. The problem is that the issues are complex and there is effectively no alternative to consensus. Sovereign states are not going to accept the imposition of such obligations without their agreement. Moreover, the new negotiating activity and strategies of developing countries complicate achieving consensus, especially the use of groups that make it difficult to isolate the most obstructionist countries. But some of those groupings will prove to be unstable. After all, ultimately trade agreements are in the interest of developing countries, as well as the developed world. That will ultimately provide a strong impetus for successful negotiations that can be achieved under the current negotiating structures. Thus, restructuring decision-making is not, in my mind, an immediate priority.

II. FTAs and the WTO

In the past, I have not viewed FTAs as a major threat to the WTO. For the most part, they have led to trade liberalization overall and the studies I reviewed several years ago suggested that their economic impact was not all that great and, with the exception perhaps of Mercosur, they had not had a significant trade diversion effect. Nor did the negotiations of FTAs seem to slow down multilateral progress, as the Uruguay Round was concluded even after some major players such as the US started expanding their use of FTAs. That was in part because the US in particular made use of FTAs, not as long term alternatives to the multilateral system, but rather more as encouragement of – and stepping stones to – broader multilateral trade liberalization. Now frankly I worry more about the proliferation of FTAs.

There are several reasons for my concerns. First, most of FTA activity seems to exclude whole regions, such as Africa. To the extent that the advanced developing countries and the developed countries mainly conclude such agreements with each other, the future of the **multilateral** trading system is undermined, especially for the least developed countries in Africa and Asia. Indeed, some worry that the current pattern of FTA activity could lead to the creation of hostile trading blocs centered in Europe, East Asia and the Western Hemisphere. I doubt that will happen. There is too much cross-bloc trade now and already there are many cross-bloc FTAs being negotiated. For example, Chile has FTAs with North America, the EU and Korea. Nonetheless, the focus that is occurring on developing regional agreements does raise concerns for the multilateral system and its weakest members. In fact, as worrisome as being left out of FTA negotiating activity may be, if the poorest countries are faced with negotiating FTAs with more developed countries, they may end up even worse off as the results of such negotiations may be less balanced than they would have been in a multilateral negotiation.

Second, while I have not reviewed many of the recent FTAs, the fact that economists tend to find that they do not have major economic effects on the trading partners involved suggests to me that they are actually liberalizing only limited sectors. FTAs have long tended to exclude agriculture; their rules of origin often effectively exclude certain other products as well. To the extent that this is occurring, some FTAs may in reality be nothing more than agreements for preferential treatment of certain sectors. That is troubling, and clearly not in line with the intent of the WTO rules on FTAs.

Third, to the extent that specific sectors with significant trade interests are achieving what they want – either through effective preferential access or effective exclusion from the FTA's coverage – they will be come less interested in multilateral negotiations (in the case of those achieving their goals through FTAs) and more able to prevent progress multilaterally (for those seeking to avoid market access commitments generally). For the US, it is clear that achieving an improved agreement on agriculture is a fundamental negotiating goal. That goal is only achievable in the multilateral context so this problem would seem less of an issue for the US, although a past strong supporter of the multilateral system – the US intellectual property lobby – has recently seemed quite enamored of the so-called TRIPs Plus commitments it has been able to obtain in FTA negotiations. An example of where this problem might be more serious is Japan, where a trade official was recently cited as preferring FTAs since they allowed the achievement of access for certain sectors of interest for Japan, but did not require difficult market access commitments in agriculture. However, some of Japan's goals in the rules area and in dispute settlement may not be achievable outside of the multilateral context, so Japan too has reasons not to abandon the multilateral system, but it may still face more difficulties in implementing a multilateral agreement if overall support therefore is undermined as some Japanese industries decide that they are satisfied with what they have achieved bilaterally or regionally. In any event, it seem inevitable, that, as FTAs proliferate, they will create constituencies that will oppose multilateral negotiations so as to maintain their preferences. Developing countries have long made arguments along these lines as general tariff levels have fallen, thereby reducing their benefits under GSP.

But others – I was once told that Mexico may fall into this category – have seemed less interested in multilateral initiatives as they have concluded FTAs with all of their major trading partners. In this connection, I do not worry that the emphasis on FTAs hurts multilateral negotiations because smaller countries do not have sufficient resources in their governments to pursue both. I do worry that it is undermining general support for the multilateral system on the part of those who used to be its strong supporters (e.g., export industries) and creating new constituencies that oppose liberalization because of its effect on their preferences.

Fourth, FTAs are making international trade more complicated through their complex rules of origin, which are designed in part to make FTAs less trade promoting than would otherwise be the case. These complexities mean that it is not unusual for a significant amount of trade that could benefit from an FTA does not because businesses decide that compliance with the record-keeping requirements needed to prove that one is entitled to a preference is too costly or otherwise too burdensome. In the long run, the desire for simplification and trade facilitation may either make FTAs unattractive compared to the multilateral system or force FTAs to standardize and simplify rules of origin. But in the short to medium term, it seems likely that FTAs will make trade more complex – to the detriment of individual traders and the world at large. Moreover, to the extent that the complexity becomes entrenched in approaches to, for example, standards, it could complicate multilateral negotiations by presenting negotiators with too many models to harmonize.

What can the WTO do about these threats presented by FTAs? Unfortunately, not a great deal, in my view. The WTO rules on FTAs – largely taken over without change from GATT – have not been enforced over the years. While FTAs are always examined – initially by working parties and now by the WTO Committee on Regional Agreements – typically no conclusions are reached because of a failure to achieve consensus. The examinations and discussions are useful, however, because they do reveal that there are many open issues as to how to interpret the WTO rules on FTAs. The prospect for more detailed substantive rules – as opposed to improved reporting and transparency requirements – seems bleak. However, the WTO is not powerless in the face of the proliferation of FTAs. It can and should continue to push WTO members to be more diligent in ensuring compliance with WTO rules. In practical terms, that means encouraging countries to make sure that their FTAs have the broadest possible product coverage and the least complex rules of origin. Moreover, in the final analysis, the WTO dispute settlement system can ensure that the rules are not ignored too cavalierly. There has only been one case during the existence of the WTO that turned on the interpretation of the WTO rules on regional agreements – and that was a case involving the creation of the EU-Turkey Customs Union. The issue in the case is not directly relevant to FTAs, but it is interesting to note that the Appellate Body took a strict view of the WTO/GATT rules on regional agreements generally and made it clear that those rules can be invoked in dispute settlement, where it will be for the respondent to establish the bona fides of the FTA. Personally, I hope that the dispute settlement system does not often have to play this role as ultimate monitor of the legitimacy of FTAs, as it will be a controversial one.

But in the final analysis, dispute settlement is the ultimate guarantor that the proliferation of FTAs does not get out of control.

III

With that, I turn to my final topic – dispute settlement in light of the Doha difficulties. One my ask – since the dispute settlement system has been rather successful to date, why include it as a challenge facing the WTO at this juncture? I agree that the system has been quite successful. It has been used by a wide variety of WTO members. Initially the US and EU were the overwhelmingly dominant users, but in the last six or seven years, developing countries as a group have been the main users. While use declined noticeably in 2005, it seems to have rebounded in 2006. But beyond its frequent use, my studies of the results of cases suggest that complainants typically get their due – either through settlements at the consultations stage or ultimately through the implementation of panel/Appellate Body reports. While delays are a serious problem in that implementation is not always timely, it usually occurs in the end.

The reason I include the WTO dispute settlement system among the current challenges facing the WTO is that WTO members will likely try to obtain through dispute settlement what they are not achieving in the negotiations. The longer that the negotiations are suspended or making only limited progress, the longer the dispute settlement system will be facing such cases. Indeed, in the areas of agriculture and rules, the system has already had to deal with members seeking to achieve in dispute settlement what is contested in negotiations – examples would include the cases against the EU and US on zeroing in antidumping investigations and Brazil's cases against the EU on sugar subsidies and the US on cotton subsidies. Since the WTO cannot control its caseload – if a member wishes to initiate a case, the case will go forward – there is no clear solution to this challenge. The system will probably have to deal with very difficult and controversial cases, particularly in agriculture. I raise the issue here only to note that for the continued credibility of the system, it is essential that panels and the Appellate Body approach these controversial cases carefully and rule on the issues in light of the agreements as they are now worded and not as they might wish them to read. While the panel and Appellate Body reports issued to date have generally been viewed as acceptable, there are some who think that the WTO system engages even now in too much gap-filling and judicial activism. It is essential for the system and the WTO that such charges not be justified.

To conclude, I will concede that I have not been very upbeat about the near term future of the WTO. I do not see much progress occurring in the near term in the Doha negotiations, even if they technically resume. I see increasing use of FTAs in a way that may complicate multilateral negotiations and challenge multilateralism generally in the near to medium term. Finally, I see increasing strains being placed on the dispute settlement system when some WTO members use it as a substitute for negotiations. In the long run, I am optimistic, however. The undeniable benefits of the multilateral trading system will ensure its long run survival.

Thank you for your attention.

The WTO Framework and Transnational Commercial Law: A Constitution for a Global Market Society?



**WTO at Crossroads: the Challenges Ahead
Conference Organised by the Asian WTO Research
Network and the Asia-Pacific Economic Cooperation**

Bangkok, 25-26 November 2006

Herbert Kronke, Secretary-General UNIDROIT, Rome

I. The Domestic Context

- Constituent elements of a market society: private property, party autonomy (freedom of contract), individual freedom of movement, law of succession
- Constitutions as foundations and guarantees
- Beyond positivism: law, philosophy, ideology
- Universal assumption: private-law based transactions based on, protected by, regulated within public-law framework (constitution)

III. The International Context

- Conflict-of-Laws instruments (global – Hague Conference – and regional – e.g. EU & CIDIPI –): mirroring substantive domestic law; examples
- Transnational commercial law
 - TCL defined; examples
 - Underlying principles; examples
- Legitimate analogies?
- "General Principles of Law"
- Types of TCL instruments and the problem of sovereignty
 - The sovereign right to be provincial, illiberal, irrational

III. The WTO Treaty System and Private Law

- Predominant view: no “direct applicability”, i.e. treaties do not create individual rights and duties
- A case for “direct applicability”? “Diplomatic-political approach” v. “constitutional analysis”
- Private law and its claim to be the market societies’ constitution

IV. Custody, Clearing and Settlement of Securities as Case Study

- General principles regarding financial services
 - MFN basis, Article II: 1 GATS
 - National treatment and non-discrimination, Article XVII: 1 GATS
 - Market access, Article XVI: 1,2 GATS
- Annex and Decision on Financial Services, Understanding on Commitments in Financial Services, Schedules of Specific Commitments

IV. Custody, Clearing and Settlement of Securities as Case Study (cont'd)

- Neither framework for transnational law (commercial law) nor harmonisation of regulatory law
- Recognition of regulatory law and standards on reciprocity basis, Articles VI, VII, plus voluntary commitments, Article VIII

IV. Custody, Clearing and Settlement of Securities as Case Study (cont'd)

1. The impact on relevant conflict-of-laws rules
 - General: no undermining of principles and proportionality, Article XIV; formulation, interpretation and application of customary law
 - Hague Securities Convention (all documents at www.hcch.net)
2. Draft UNIDROIT Convention on Substantive Regulated Intermediated Securities (all documents at www.unidroit.org - „work in progress“)

IV. Custody, Clearing and Settlement of Securities as Case Study (cont'd)

2. Draft UNIDROIT Convention on Substantive Rules Regarding Intermediated Securities (cont'd)

- General Approach
- Specific features
- Impact of WTO Treaty System
 - Where are we?
 - Where do we go from here?

V. Other Areas of Transnational Commercial Law and Private International Law

- Other areas of financial-services law
- Company law?
- Secured transactions

VI. Conclusions

- Beware of politicising private law
- Constitutionalising markets
- Competition of regulatory systems
- Techniques of cross-fertilization

WTO: FROM TRADE ORGANISATION TO NODE OF GLOBAL GOVERNANCE

Sol Picciotto
Lancaster University Law School

Paper for the Conference on
WTO at the Crossroads: the Challenges Ahead
organised by the Asian WTO Research Network (Thailand)
Bangkok, 25-27 November 2006

INTRODUCTION

Since its foundation ten years ago, the World Trade Organisation (WTO) has become the focus of debate about governance of the world economy. It has been denounced by its critics and lauded by its supporters as a standard-bearer for free trade. In practice, it has become a central battle-ground over fairness and justice in a wide range of global economic regulation issues. The current suspension, probably abandonment, of the Doha Round is the latest in a series of setbacks for the organisation.

The WTO has been fighting for its future since the collapse of the Seattle Ministerial conference in the closing days of the last century. Since then, progress has only seemed possible by trying to keep talks low-key and reducing the ambitious scope of negotiations. The negotiating agenda agreed at the relatively closed and secretive Doha ministerial ran into trouble at Cancun in 2003, as a new grouping of developing countries led by Brazil, India and South Africa (the G-20) made an effective input which, linked with pleas from the poorest countries for an end to unfair practices by the rich, especially in commodities such as cotton, forced a reformulation. New issues, such as investment rules (seen as an attempt to revive the failed and unlamented Multilateral Agreement on Investment, the MAI), were taken off the table. This helped to refocus the negotiations onto the core trade issues of agriculture and non-agricultural market access (NAMA), although services also remained important. Yet slow progress was made in the preparations for the Hong Kong ministerial in December 2005, and although some further advances were made in Hong Kong, they were clearly insufficient to enable the negotiations to meet the timetable set by the deadlines fixed by the expiry of the US negotiators' trade promotion authority on 30th June 2007. It was no surprise when the Director General Pascal Lamy, who chairs the Trade Negotiating Committee, recommended to the General Council meeting of 27-28 July 2006 that due to lack of progress the negotiations should be suspended 'to enable serious reflection by participants', which was accepted.

In the meantime, the central role of the WTO as a multilateral organisation is being threatened by the rapid growth of preferential agreements, mainly bilateral. These are of dubious validity under WTO rules, which formally only permit 'regional' agreements,

and only under specified conditions, in particular that they should eliminate substantially all barriers among participants.¹ Some 211 such agreements notified to the WTO are currently in force, but taking account of those proposed and under negotiation it has been estimated that almost 400 could be in place by 2010 (Lamy 2006). A substantial proportion of world trade now takes place under such arrangements,² and they increasingly cover many issues other than tariffs, including services, investment, competition, labour mobility and intellectual property (World Bank 2005: 35, 97-118). The traditional regional free trade areas or customs unions between geographically contiguous countries have now been greatly overtaken in number by bilateral agreements, often between distant partners (Crawford and Fiorentino 2005). Although there is some trend to regional clustering, the overall pattern so far is a 'spaghetti bowl' of intersecting arrangements (World Bank 2005, 39). The resulting range of tariff rates has been accompanied by varying provisions on rules of origin, which are inevitably complex in today's world of global supply chains, and bewilder both exporters and customs officials.

These developments could, optimistically, be viewed as a stage towards a new level of greater multilateral economic integration, or more pessimistically as a fragmentation of the multilateral system.

THE ACHIEVEMENTS AND LIMITS OF MULTILATERALISM

The outcome of the Uruguay Round was by any measure a stupendous achievement, the creation of the WTO as a global economic organisation centring on trade but governing, directly and indirectly, many other aspects of economic regulation. Although widely both lauded and criticised for establishing open markets and free trade, in fact the WTO Agreements erected a complex framework of rules governing many aspects of international economic activity.

The complex and comprehensive set of agreements to which all WTO members must subscribe are almost entirely concerned with setting limits, or in WTO language 'disciplines', on national state regulation. However, they generally leave to other

This paper is partly based on research conducted under a Research Fellowship funded by the Economic and Social Research Council of the UK, on *Regulatory Networks and Global Governance*. I am grateful to the ESRC for the opportunity to conduct this research, and to all those who have helped with this research, especially the various public and private sector professionals and activists who gave their valuable time for interviews and help with documentation.

¹ See GATT art. XXIV and GATS article V; also relevant is the so-called Enabling Clause, the Decision of 28 November 1979, allowing agreements which give special and differential treatment to developing countries. Although GATT art. XXIV requires prior notification, this has generally been disregarded. Combined with the need for a decision on compatibility to be by consensus (which effectively gives the participants in the agreement a veto), it has meant that preferential agreements have been tolerated (Matsushita et al. 2003, 349-50).

² According to World Bank estimates, one-third of world trade now takes place between PTA members, although only 21% is actually preferential trade, and only 15% benefits from an 'economically meaningful tariff preference' (World Bank 2005: 41).

organizations the task of developing substantive international standards and regimes. Thus, as an institution, the WTO is riven by the contradiction between the neo-liberal ideology of liberalization and deregulation which dominated its period of gestation in the 1980s, and the realization that markets depend on regulation. This is partially expressed in the tension between free trade and fair trade, which has been preoccupying economists and lawyers concerned with the future of the trade regime (Bhagwati and Hudec 1996). The free trade perspective rests on the assumption that optimal economic welfare will result from exchange under conditions of equality in competition, and that this is best achieved by a minimal level of government action. Competitive equality is expressed in the principles of non-discrimination which are the foundation of the General Agreement on Tariffs and Trade (GATT), and permeate the many complex provisions of the WTO agreements.

However, the WTO's non-discrimination rules inevitably cut across a wide range of national state regulations. In the abstract, the principle of non-discrimination is neutral, and does not interfere with the national state's 'right to regulate'. In practice, the equal treatment test cannot easily be applied to regulatory requirements or standards without having regard to the purposes or objectives of those requirements. Issues of equal treatment are inseparable from fair treatment, which requires the evaluation of public policies establishing regulatory standards, for the protection of consumers, producers, and the natural environment (Cottier and Mavroidis 2000, Picciotto 2003). The broad non-discrimination rules of the WTO continually raise questions about the validity of many economic regulations which inevitably involve making distinctions between different products or services, including those concerning how and by whom goods and services are produced (in WTO terminology, processes and production methods, or PPMs). Should a tomato which has been genetically modified be treated like other tomatoes (some of which may have been bred by traditional selection techniques)? Is beef or milk from cows which have been fed growth-promoting hormones like the beef or milk from other cows? Are building products made from asbestos fibre like those made from other materials? Is a doctor, a nurse, an accountant, or a software engineer trained in India or China like one who has qualifications from Canada or the UK? Is a pharmaceutical product produced by a patent-holder like one manufactured under a compulsory licence? In practice, rules which are facially neutral may be said to be based on an invidious distinction; while conversely, differences in treatment may be justified by relevant distinctions depending on the purposes of the rules.

This generates inevitable potential conflicts, and therefore linkages, between the free-trade, market-opening obligations of the WTO and a wide variety of regulatory arrangements. These tensions present a dilemma about the nature and future of the WTO which confronts both the advocates and critics of market-driven globalization. If the liberalization of international trade is inevitably entangled with a much wider range of economic regulatory arrangements, does this make the WTO the super-regulator of the world economy? On the other hand, if the WTO confines itself to ensuring that markets are open to 'free trade', it would simply be a scythe cutting down the regulatory standards established by states and even international bodies. The view of regulatory differences as trade barriers implies a need for extensive international harmonization, but whether and how this should take place is very much an open question.

Thus, a central issue for the WTO is how to accommodate its functions and powers to those of other public bodies in the complex system of multi-level governance of the contemporary global economy. Hence, several authors have stressed the importance of ensuring greater sensitivity in the application of WTO obligations to its own proper limits as a trade organization, and to the specific competences and roles of other public bodies, especially national states and international organizations (Howse 2000, Helfer 1998, Picciotto 2003). This institutional question lies behind the conflicting views which portray the WTO either as a tool of the powerful trading blocs or a bulwark for smaller states, a protector of the consumer or of transnational corporations (TNCs).

The Emergence of Linkages

The central dilemma facing the world trading system began to emerge in the 1970s, as the attention of GATT negotiators began to shift from to the 'behind the border' barriers posed by domestic regulations, which were termed 'non-tariff barriers' (NTBs). The GATT's success in making sharp reductions in quotas and tariffs on manufactured goods during the period of economic growth from 1954 to 1974 did not usher in a nirvana of free trade. Instead, exporters became more aware of the ways in which regulatory standards create market barriers. This was especially so in the US, where the tariff reductions and the strong dollar had sucked in imports, leading to a large merchandise trade deficit. At the same time, the increased sophistication and complexity of manufactured goods and their production methods generated increased concerns about potential harms, leading to a growth of regulatory measures to protect consumers and the environment. It is hardly surprising if such measures are shaped by governments and legislatures to suit local conditions and local firms, so that foreign producers may regard the resulting standards as inappropriate and protectionist.

Yet global harmonization of the entire range of regulatory standards affecting goods and services would be an immense task. At the regional level the European Community, with its more developed institutional structure, struggled long and hard to develop a system of regulatory coordination, involving a combination of mutual recognition and harmonization of standards (Dehousse 1989; Bratton et al. 1996: 29-43), and the EU has been described a 'regulatory state' (Majone 1993), or a 'network state' (Castells 1998 vol.III, ch.5).

In contrast, the GATT was a trade organization. It was not equipped to harmonize product standards, let alone standards in areas such as intellectual property, environmental protection, professional and technical services, taxation, investment incentives, or employment conditions. The original GATT provisions resulted from a series of compromises between free trade aims and the need for national autonomy in setting domestic regulations (Goldstein 1993). Hence, the broad obligations of non-discrimination in articles I and III, as well as the prohibition of quantitative restrictions in article XI, are counterbalanced by a series of exclusions and exceptions. In particular, the General Exceptions of article XX left states free to set their own standards (and to exclude goods which did not comply with those standards) in key areas such as the protection of human, animal or plant life or health, and intellectual property rights. The right to set national standards was subject only to the important proviso that such national

regulations should not be applied in an arbitrarily discriminatory manner or constitute a disguised trade restriction.

The balance between international liberalization and the maintenance of national standards of protection (described as 'embedded liberalism' by Ruggie, 1982) became harder to maintain in the era of 'deep integration' of the world market. At the same time, heightened public concern over matters such as product safety and environmental protection led to an exponential growth of regulatory requirements. This greatly sharpened the conflicts between market access obligations and the right of states to set regulatory standards. This was first tackled in relation to technical product standards, and a Code on Technical Barriers to Trade was negotiated in the 1970s,³ a revised version of which was adopted as an Agreement in the Tokyo Round in 1979, but binding only on states accepting it. This obliged the participating GATT states to base their domestic technical standards on those developed by relevant international bodies, although there were significant exclusions especially for health and environmental protection standards.⁴ This gap was filled, in relation to human, animal and plant health standards, by the negotiation of the agreement on Sanitary and Phytosanitary Measures (SPS) during the Uruguay Round.

Thus, in the area of product standards an interesting and novel form of legal and institutional linkage has been created between the GATT/WTO and the work of a number of international standard-setting organisations. The TBT and SPS Agreements in effect convert those standards, which the organisations themselves consider voluntary,⁵ into

³ A draft was ready by 1975 for a proposed GATT Code of Conduct for Preventing Technical Barriers to Trade (see document MTN/NTM/W/5, 21 April 1975, p.9 Annex), which included the following key provisions: 'Art. 2 (b) Where mandatory standards are required and relevant international standards exist or their completion is imminent, adherents shall use them, or the relevant parts of them, as a basis for the mandatory standards, except where such international standards or relevant parts are inappropriate for the adherents concerned. (c) With a view to harmonizing their mandatory standards on as wide a basis as possible, adherents shall play a full part within the limits of their resources in the preparation by appropriate international standards bodies of international standards for products for which they either have adopted, or expect to adopt, mandatory standards.'

⁴ Article 2.2 of the Tokyo Round TBT Agreement reads '2.2 Where technical regulations or standards are required and relevant international standards exist or their completion is imminent, Parties shall use them, or the relevant parts of them, as a basis for the technical regulations or standards except where, as duly explained upon request, such international standards or relevant parts are inappropriate for the Parties concerned, for inter alia such reasons as national security requirements; the prevention of deceptive practices; protection for human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological problems.'

⁵ Standards are defined very broadly: in the TBT Agreement (Annex A) as any 'Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory'; the SPS Agreement refers broadly to 'standards, guidelines and recommendations'. This led the Secretariat of the Codex Alimentarius Commission to write to the SPS Committee for clarification on whether any differentiation would be made regarding the status of Codex standards, guidelines or recommendations. The Committee responded that 'how a Codex text was applied depended on its substantive content rather than the category of that text' and that this content 'might have some bearing on how a Member could show

binding legal obligations on WTO member states. Formally, the obligation is to 'base' national regulations on the international standard, not to apply it as such. However, the leeway allowed by the term 'based on' is not a wide one.⁶ Furthermore, this obligation applies regardless of whether the national regulations are discriminatory or protectionist in intent.⁷ Thus, the addition of the TBT and SPS Agreements in the WTO went considerably beyond the GATT non-discrimination principles.

This has given a greater importance and impetus to the work of the standards organizations, significantly transforming the range and character of their work. For example, the International Plant Protection Convention (IPPC) was extensively revised in 1997 in anticipation of its new role under the SPS Agreement, by creating a Commission under the auspices of the FAO with the power to adopt standards. The work of standard-setting is done in cooperation with the WTO, the staff of the various organisations keep in close touch with those of the WTO, and they are present as observers in the meetings of the relevant WTO committee, while WTO staff attend theirs. However, the standards bodies do not function merely as subsidiaries of the WTO: their participants are generally technical specialists only some of whom also attend the related WTO committee, and they do not always view the need to agree international standards with the same urgency as do the WTO bodies. There is also some overlap in the scope of work of the bodies, and there can be disagreement among member states as to which should take on a particular task.⁸

The problem of how to deal with regulatory differences creating non-tariff barriers was far from confined to product standards, as can be seen by the growth of conflicts from the 1970s onwards. The bulk of GATT complaints concerned NTBs and other 'unfair trade practices', and the proportion increased as the overall number of complaints grew in the 1980s.⁹ These covered a diversity of issues, several of which were again revived under

that its measure is based on an international standard, guideline or recommendation' (Document G/SPS/W/86/Rev.1, 13 March 1998).

⁶ The Appellate Body (AB) in *EC-Hormones* (WT/DS26/AB/R, WT/DS48/AB/R, 13th February 1998) reversed the Panel and decided that 'based on' does not mean 'conform to' (paras. 168-171), so that it allows a state for example to adopt part only of the standard or make appropriate variations for local conditions; in *EC-Sardines* (WT/DS231/AB/R 26 Sept. 2002), the AB said that the similar term 'as a basis for' in the TBT means more than simply the existence of a 'rational relationship' between the two, and certainly the national measures cannot contradict the international standard; also the phrase 'or relevant parts of them' in TBT 2.2 means *all* the relevant parts, a state cannot select only some (paras. 247-250).

⁷ Thus, in *EC - Hormones*, the EU was obliged to justify its ban on hormone-treated beef under the SPS agreement, regardless of whether it could be justified as non-discriminatory under the GATT.

⁸ For example, there has been disagreement in the SPS Committee on whether it should develop procedures for mutual recognition of disease- and pest-free areas, or leave this to the standards bodies (interview information).

⁹ Hudec calculated that of the complaints brought under the GATT, about half concerned NTBs and a further quarter other kinds of 'unfair' trade practices (subsidies and antidumping measures), 75% in total; the combined proportion rose to 86% in the 1980s (Hudec 1993, 338).

the WTO. They included consumer protection and food safety regulation,¹⁰ corporate taxation (the long-running DISC/FSC dispute),¹¹ intellectual property rights, and environmental protection rules (the notorious Tuna-Dolphin cases).

Package Deals and Forum-Shifting

At the same time, other factors were also widening the GATT agenda beyond tariffs. The by now endemic US merchandise trade deficit had highlighted the contribution of 'invisibles' to the balance of payments, while employment in manufacturing production was declining in developed countries, due to mechanization and relocation to lower-wage countries. The transition to a post-Fordist knowledge-based economy, or 'cognitive capitalism' led to the highlighting of the importance of services and of intellectual property.¹² Not only were these activities accounting for a rapidly growing proportion of output and employment, they also came to be seen as key underpinnings of the economy and society as a whole.

These factors led policy-makers and trade negotiators of developed countries to argue for a further broadening of the negotiating agenda of GATT's Uruguay Round. However, neither services nor intellectual property rights (IPRs) could properly be said to be 'trade' issues. Although they affected cross-border transactions, they both raised issues going far beyond that, which were relevant to investment and business regulation more generally. These were well beyond the remit of the GATT, and were dealt with by other organizations, notably UNCTAD.

The provision of services had traditionally been regarded as ancillary to 'real' economic production and even unproductive, but they now came to be considered as value-creating in their own right. International transactions in services had been recognized as 'invisibles', contributing to the balance of payments. The OECD countries had included

¹⁰ Notably, US complaints in 1987 against EC prohibitions of meat imports, in relation to slaughterhouse standards, and then against hormone-treated beef; and in 1989 against Thailand's taxation of cigarettes.

¹¹ In 1972 the EC initiated a GATT complaint against one of the Nixon administration's 1971 measures, the DISC (Domestic International Sales Corporation), a form of tax exemption for export sales, which the EC attacked as an export subsidy. The dispute ran for 12 years, until the Congress replaced the DISC with the Foreign Sales Corporation (FSC) (Hudec 1993, ch.5). This dispute brought the Panel procedure to new legal-diplomatic heights, as the US case was managed by the Treasury Department's General Counsel's office, which brought a counterclaim against three European states, and insisted that the claims be heard by a single Panel, including a tax expert. These tactics partly succeeded, in that the GATT Panel balanced its finding against the US with a rather elliptically-worded ruling against the European measures also. Probably intended to secure adoption of the report by consensus, this backfired, since most governments supported the Europeans, and disagreed with the Panel on this point (Hudec 1993, 82-3). The stalemate was only eventually resolved by a compromise under which the reports were accepted subject to an ambiguous 'understanding' (*ibid.* 91-2), which simply sowed the seed for a subsequent renewal of the dispute under the WTO.

¹² There were both European analyses of post-Fordist and post-industrial society (e.g. Aglietta, Boyer, Touraine) and an influential American work on post-industrial society, with a rather different perspective (Bell 1973)

provisions for liberalization of invisibles in a Code of 1961, and in 1972 an OECD high-level group on the prospects for trade in the run-up to the Tokyo Round coined the concept of 'trade in services' (Drake and Nicolaïdis 1992: 40). In the US in particular, access to foreign markets for services was placed on the trade agenda, leading to the enactment of a procedure encouraging firms to identify 'trade barriers', under s.301 of the 1974 Trade Act. These required the US Trade Representative (USTR) to act on complaints by US firms about 'unreasonable or discriminatory' practices barring their access to foreign markets.¹³

Despite the inappropriateness of the concept of 'trade in services' the issue gained in momentum. This was partly due to US pressures and persistence, but largely because it offered a basis to generate a broad coalition of business interests, both users and suppliers of services. The arguments for international liberalization of services provision as an extension of the trade regime were articulated and developed by an 'epistemic community' of specialists (Drake & Nicolaïdis 1992), and quickly became the dominant discourse (Kelsey 2003). Other OECD countries joined the US in urging inclusion of services in the Uruguay Round agenda, and developing countries' concerns were allayed by adopting a 'twin-track' negotiating procedure, albeit as a 'single undertaking'.

Where services had led, the media and pharmaceuticals industries followed on behind. The 1984 revisions of the US Trade Act extended s.301 to intellectual property rights, which were strengthened by the 'super-301' provisions added in 1988, and these were selectively activated against key countries during the UR negotiations. In this case, however, it was not a case of inventing a new paradigm, as with 'trade in services', but of strategic forum-shifting (Braithwaite & Drahos 2000). A range of mainly US-based high-tech industries (chemical and pharmaceutical, computer software, film and music, electrical and auto) organized and lobbied to secure the inclusion of IPRs in trade negotiations, and were highly influential in the actual drafting of the resulting Agreement on Trade Related Property Rights (TRIPS) (Ryan 1998, Drahos & Braithwaite 2002, 2004). This established for the first time as an international standard a relatively high level of IPR protection. It targeted issues regarded as key by these business lobbies, notably copyright protection for software, patent protection for all technical processes and products, a minimum 20-year period for patents, limitations on exclusions from IPRs and on compulsory licensing, and extensive provisions for enforcement of IPRs. These were all issues on which agreement could not easily be reached in the relevant forum, the World Intellectual Property Organization (WIPO).

Thus, the linkages between the trade regime and related areas of economic regulation were used in a strategic way by powerful firms and states to provide a basis for the grand bargain of the Uruguay Round which created the WTO. The linkages were not artificial,

¹³ The annual Trade Barriers Report later became a powerful weapon, although it was criticized as consisting 'merely of a compilation of self-serving industry claims and anecdotal hearsay' (Barfield, in Bhagwati and Patrick 1990, 105)

but had a real basis.¹⁴ However, the extension of the GATT to these issues took it into areas far beyond its remit. They were unfamiliar and in many ways inappropriate to be dealt with in the language and context of trade bargaining developed under the GATT. The forum-shifting had the effect of side-stepping or side-lining the international organizations with direct responsibility for the issues in question: WIPO for IPRs, and organizations dealing with specific service areas, such as ITU for telecommunications. The UR negotiators succeeded in taking advantage of the possibilities for trade-offs created by these linkages (Ryan 1998).

However, it left a very difficult legacy for the WTO.

Liberalization, De-Regulation and Re-Regulation

Closer international economic integration clearly requires some degree of international coordination and harmonization. However, the forms and extent of such cooperation will inevitably vary according to the specific area of regulation and economic sector.

Approaching these issues from the perspective of liberalization obligations as developed in the GATT introduced an impetus for deregulation. As Drake and Nicolaïdis cogently point out:

'The very act of defining services transactions as "trade" established normative presumptions that "free" trade was the yardstick for good policy against which regulations, redefined as nontariff barriers, should be measured and justified only exceptionally.' (Drake & Nicolaïdis 1992: 40)

This was seen clearly in the UR Services negotiations, where they created inevitable difficulties in crafting an agreement:

'By beginning from the baseline of labeling as potential NTBs anything that restricted competition, the diverse social purposes of existing regulations were obscured. Negotiators thus encountered problems when considering measures that restricted trade but served important purposes. The GATT context channeled the process towards a trade agreement but complicated the search for a balance between trade and regulatory objectives.' (Ibid.: 70)

The recognition of the need for such a balance led to the early rejection of the idea initially proposed by the US that GATT itself could simply be extended by adding the two words 'and services'. Instead, the result was a 'framework agreement', the General Agreement on Trade in Services (GATS), which combines a sweeping potential coverage with a cautious but complex 'bottom-up' system for negotiation of actual commitments.

¹⁴ Under the GATT, IPRs were treated as matters for national regulation and hence exceptions in article XX, but there had been disputes about alleged discriminatory effects of IPRs: a 1987 EC complaint against US procedures for seizing IP infringing goods (renewing a Canadian complaint of 1981), and a 1988 complaint by Brazil against US s.301 trade measures attacking Brazil's local working requirements for patents.

The four 'modes of supply' extend well beyond cross-border exchanges, to foreign direct investment as well as more short-term presence of service providers and access by consumers, so in principle embracing free movement both of capital and labour. However, few general obligations are immediately imposed on states by the GATS. The key 'disciplines' of National Treatment (NT) and Market Access (MA), apply only to the extent that commitments are made. Furthermore, states are permitted to list both NT and MA conditions on their commitments. In principle, therefore, GATS recognizes states' 'right to regulate' by allowing each state to exclude both horizontal and sector-specific regulations in its own Schedule of Commitments. GATS article 6 establishes some very general procedural requirements with which domestic regulations should comply, and it envisages the development of further 'disciplines' on 'measures relating to qualification requirements and procedures, technical standards and licensing requirements'

The importance of the 'right to regulate' became more apparent after the mid-1990s, following the experience in a number of countries of crises in key services sectors following deregulation and privatization. These included dramatic failures of electricity supply, a deterioration of safety, reliability and often frequency of transportation systems, and financial failures and crises. In addition, there have been growing concerns about the inequality of the benefits from liberalization, and even its impact on basic human rights, especially when applied to basic services such as water, healthcare, and education (UNHCHR 2002).

It is difficult, if not impossible, to develop adequate or effective regulation in the many specific areas of services in the context of GATS and the WTO. Although in principle each state can preserve its national regulations by listing the relevant provisions in its Commitments schedules, in practice the complexity of the procedures makes this difficult and hazardous. Even the USA, the most powerful and resourceful single negotiator in the WTO, apparently unexpectedly found that it failed to preserve its right to regulate internet gambling (WTO-AB 2005). In any case, national regulations may themselves be inadequate or inappropriate, especially if a country wishes to attract foreign services suppliers. This has been recognised in the negotiations on Basic Telecommunications Services, which it is widely accepted require a positive regulatory framework. This is dealt with in the so-called Reference Paper, which is annexed to national commitments, and lays down basic principles of regulation for this sector, including prevention of anti-competitive practices, interconnection and universal service obligations, and the establishment of an independent regulator. The GATS Council adopted in 1998 some Disciplines on Domestic Regulation in the Accountancy Sector.¹⁵ Aside from a very widely worded general obligation that regulatory measures should not be more trade-restrictive than necessary to fulfil a legitimate objective, it essentially established procedural standards (transparency, fairness in licensing procedures). Interestingly, it did include a linkage similar to those in the TBT/SPS to 'internationally recognized standards of relevant international organizations', but only as a factor which should be 'taken into account' when deciding on conformity of national measures. Instead of continuing a

¹⁵ S/L/63 14 December 1998.

sectoral approach, this work has shifted to considering professional services in general, while the Working Party on Domestic Regulation has adopted an even more generic approach.

Legalization

Hence, the WTO Agreements now establish general global standards or 'disciplines' to ensure that national regulations do not act as barriers to market access. These are essentially negative obligations, with the significant exception of the TRIPS Agreement. However, even TRIPS operates restrictively, in limiting the freedom of states to establish what they may regard as the most appropriate balance between private rights and the public interest in relation to IPRs (Drahos and Mayne 2002, Picciotto 2003). The WTO rules therefore act as a type of disciplinary meta-regulation which could potentially apply to almost any aspect of economic activity.

The management of the interaction between WTO liberalization obligations and national or international regulation has entailed a legalization of the trade regime (Reich 1996-7). The aspect which attracts the most attention is the judicialization of the Dispute Settlement (DS) system. However, this is in many ways the tip of the iceberg of the wider system of procedures and rules. For example, as already outlined above, the TBT and SPS Committees maintain a continuing supervisory role in relation to the development of product standards, in conjunction with standards setting bodies. States are required to notify any national measures which are not based on international standards (either because such standards do not exist, or in the cases of SPS standards if the state wishes to adopt a higher standard following a risk evaluation). This gives other members the opportunity to comment, and to seek modification where appropriate, with the ultimate right of recourse to the complaints procedure. The TRIPS Agreement has an even broader requirement of notification of all laws, regulations, final judicial decisions and administrative rulings, and the TRIPS Council conducts reviews in which states are expected to explain and defend their national IPR systems.

For some, it is indeed the merit of the WTO Agreements that they constrain national policy choices. Thus, defenders of the WTO argue that national state regulation tends to be protectionist because it is the product of the 'capture' of states by special interests. For example:

'Free trade and democratic government face a common obstacle - the influence of concentrated interest groups. ... The WTO and the trade agreements it administers act to restrain protectionist interest groups, thereby promoting free trade and democracy.' (McGinnis and Movesian 2000: 515).

State power must be confined, in this view, in order to safeguard the rights and liberties of individuals.

However, this view conveniently ignores the converse process: the deployment of the economic power of some sections of big business to secure the capture of the WTO by sectional interests, and thus to restrict the regulatory powers of states. As pointed out

above, it was the capture of US trade policy by lobbies representing the services and IP-intensive sectors and the deployment of s.301 that enabled these special interests to capture the trade policy arena and secure favourable provisions in the WTO Agreements. In response, the EU introduced its Trade Barriers Regulation, which similarly encourages firms to bring complaints and hence to set the trade negotiation agenda (Shaffer 2003).

Against this, it is emphasized that the WTO stands for the rule of law in the world economy, as a constraint against the unilateral use of power. After the organization was shaken by the debacle of the Seattle Ministerial meeting, a speech by the then Director-General Mike Moore concluded as follows:

'People do not want a world government, and we do not aspire to be one. At the WTO, governments decide, not us. ...But people do want global rules. If the WTO did not exist, people would be crying out for a forum where governments could negotiate rules, ratified by national parliaments, that promote freer trade and provide a transparent and predictable framework for business. And they would be crying out for a mechanism that helps governments avoid coming to blows over trade disputes. That is what the WTO is. We do not lay down the law. We uphold the rule of law. The alternative is the law of the jungle, where might makes right and the little guy doesn't get a look in.'

The centrepiece of the WTO legal system was the transformation of the DS procedure into a fully-fledged adjudication system. The key elements of this were the creation as a standing appeals tribunal of the Appellate Body (AB), and the automatic adoption of reports.¹⁶

The legitimacy of such system rests on the assumption that the rules are adopted by an accountable political process, leaving to independent adjudicators the task of applying them. In this perspective, the WTO Agreements entailed political decisions by states to make 'credible commitments', the application of which they delegate to adjudicators operating within a formalist rationality (Abbott and Snidal 2000: 426-7). However, the Agreements have been described as 'trip-wire texts' which reflect diplomatic fudges by negotiators, so that cases referred for adjudication under them are likely to be politically charged (Alter, 793).

Although the WTO agreements are extensive and detailed, their provisions often remain indeterminate, for two main reasons. Firstly, the agreements retain many ambiguities reflecting policy disagreements between the negotiators which remain to be resolved. It is significant that a substantial number of the early cases taken to the AB have involved issues dating back to the GATT and which were well-known during the Uruguay Round

¹⁶ The Dispute Settlement Body must adopt the Reports unless there is a consensus against, which ended the veto which a losing state could wield against a decision it did not wish to accept. These two aspects related, since governments were reluctant to agree automatic adoption without some form of appeal, due to the difficulties caused by some of the GATT Panel reports which were generally considered misjudged (Steger, 483).

negotiations. These include the US corporate tax treatment of exports, and the EC ban on hormone-treated beef,¹⁷ as well as its bananas regime. Trade negotiators had every opportunity to resolve these long-running concerns in an unambiguous manner, and conspicuously did not do so.

The second reason flows from the particular characteristic of liberalization obligations which are characteristic of the GATT/WTO, and rely on abstract general principles which must be applied to particular cases. Even as basic a matter as the allocation of a product to a tariff group may be debatable, as seen from an early decision in which the AB overturned a Panel's view that the EC was wrong to reclassify some types of computer equipment from 'automatic data processing' to 'telecommunications' equipment.¹⁸ The general structure of the WTO agreements also entails the evaluation of interacting general rules. Thus, a central principle in the GATT, which also runs through the WTO agreements, is non-discrimination, which prohibits less favourable treatment of 'like products'. This broad obligation is subject in the texts to various conditions and exceptions, so that the evaluation of the legality of a particular measure must consider whether it entails differential treatment of 'like products', and if so whether it may be justified under one of the exceptions.

As Trachtman points out, 'Each step in this analysis has involved a good deal of creativity on the part of the dispute resolution panels and now the AB; in none of these cases is the language of the treaty regarded as determinate' (Trachtman 1999, 346). Further complexity and uncertainty is created by the interaction of WTO rules with those of other regimes, such as food safety or technical regulations established by international standards organizations. Hence, for example, the sharp conflict over the legality under trade law of regulation of GM foods has been said to be 'submerged in considerable ambiguity and ... uncertainty' not only in the WTO agreements but also in the 'bewildering labyrinth of rules' which regulators must negotiate (Covelli & Hohots, 774, 776). It is hardly surprising that the outcome of the highly politically-charged complaints by the US and Canada against some aspects of the EU's regulation of GM foods was a mammoth Panel Report of over 1000 pages, which nevertheless equivocated over the issue (WTO-Panel, 2006).

The WTO's reliance on the rule of law for its legitimacy places an enormous burden on the AB, which it is ill-equipped to carry. The AB is expected to carry out a technical function of applying the agreed texts in an independent manner. In doing so, it is expressly prohibited from 'interpreting' the texts, since this task is reserved to the

¹⁷ . Although the beef-hormones dispute was very live during the UR negotiations on the SPS, the issue was not raised in any of the formal meetings during the entire Round. Another issue of concern was the prohibition of beef imports to protect importing countries from foot and mouth disease, and on this point the US requested that the OIE be formally asked by the WTO's Working Group on Agriculture to develop guidelines, which received a favourable response (GATT Document WGSP/W/13, 19 March 1990).

¹⁸ *European Communities - Customs Classification of Certain Computer Equipment*, AB 1998-2; the AB's decision and its reasoning were in turn criticized by Trachtman (1998).

General Council.¹⁹ The AB has been obliged to tread very carefully in this labyrinth, to avoid being accused of creative interpretation of the rules. Consequently, it has adopted a formalist approach, stressing a literal approach to interpretation (Picciotto 2005). The importance to the WTO as a whole that the decisions of the DS system should be widely accepted as legitimate suggests further moves towards its juridification. Certainly, commentators have suggested reforms which would turn it into a full-blown judicial body, with standing Panels acting essentially as courts of first instance, hearings in public, and open acceptance of submissions by non-governmental organizations.²⁰ Significantly, however, the proposals put forward by governments have been much more modest.²¹

A shift towards greater procedural juridification would extend the accountability of the DS system beyond governments, and could encourage the AB to address its decisions more overtly to a broader public. This would entail a much more explicit articulation of the values underlying the WTO, and in particular the interaction of its market-opening liberalization principles with regulations embodying socially-constructed preferences such as health and environmental protection. This has certainly been advocated by some (Bronckers 2001, Alter 2003). Others have taken a different tack, and have advocated the 'constitutionalization' of the WTO based on individual human rights (Petersmann 2002, 2003). This view has been criticized, both as involving a very narrow concept of human rights and its 'takeover' by trade law (Alston 2002), and as providing only a limited basis for balancing the aims of market liberalization against other social preferences embodied in regulation (Picciotto 2006).²²

Thus, the AB is caught on the horns of an institutional dilemma. It feels restrained from expressing in more open terms the policy considerations which underpin its interpretations, for fear of usurping the political legitimacy of the governments to which

¹⁹ Art. 3.2 of the DSU firmly states that 'rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements', while the WTO Agreement itself (art. IX.2) specifies that 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations ... of the ... Agreements', which requires a 75% majority of states; art.X provides for the adoption of amendments.

²⁰ See e.g. Weiler 2001; Davey 2002, 2003. The AB has taken a cautious step towards this last, by stating that such *amicus curiae* briefs may be accepted if they are 'pertinent and useful' (*EC – Trade Description of Sardines* AB-2002-3, para. 160). This met with hostility from many governments, and it was stressed in the DSB that the AB should not adopt any changes to its working procedures without consulting the DSB (DSB Minutes of 24 July 2000, WT/DSB/M/84, para. 86). The AB has diplomatically said in most cases that it has not taken such briefs into account as they have not been helpful.

²¹ See Report by the DSB Chairman to the Trade Negotiations Committee, TN/DS/9, 6 June 2003.

²² However, it has also been pointed out that a form of constitutionalization is already taking place through the AB's 'judicial norm-generation', using devices such as rational relationship testing, proportionality, and less restrictive means, to delineate both the legitimate scope of national state regulatory powers impinging on trade, as well as the relationship of the trade régime to related international regulatory regimes (Cass 2001, 2005)

it is primarily accountable. They in turn are motivated by a reluctance not so much to concede power as to admit to their domestic constituencies how much power has already been transferred to supranational instances such as the AB. Until the political system faces up to this, it will be difficult for global governance institutions such as the AB to develop in ways that are more directly accountable to a global public, and hence to contribute to new forms of democratic deliberation appropriate for multi-level governance (Picciotto 2001; Joerges and Neyer 2003).

CONCLUSIONS: THE DILEMMAS OF DOHA

This analysis should help to explain the uncertain progress of what became termed the Doha Development Round (DDR). For some, the only way for the WTO to fulfil its task was to continue in the same way, by stitching together a package deal involving trade-offs. This would confirm the trajectory on which the organization was launched in the Uruguay Round, prioritising liberalization.

This approach unravelled, leading to the present impasse, for two main and related reasons. One was that many, especially from the developing countries, considered that the UR bargain was an unequal one. In exchange for the enormous concessions involved in transforming the GATT into the WTO and the inclusion of services and IPRs, developing countries obtained only meagre concessions on agriculture, many of which have not been realised yet (and may never be). This led to their very firm rejection of further 'new issues', and insistence that the negotiations should focus on the core issues of trade, especially agriculture. They have, justifiably, targeted the enormous subsidies paid out by the main developed country blocs, which are indefensible from the perspective of trade liberalization.

Secondly, however, it is perhaps now becoming clear that the management of the global economy must involve far more than the simple mantra of liberalization, the removal of barriers. In this era of governance by regulation, economic integration depends on effective management of regulatory interactions.

For example, the focus in the agriculture negotiations on the phasing out of subsidies, which has been so strongly resisted by the US and the EU, is based on a grand illusion. The Agreement on Agriculture only prohibits support which is directly coupled to production and price (the 'amber box'), and seeks reductions in support which is indirectly price-related ('blue box'). The EU is introducing reforms to its Common Agriculture Policy (CAP) which essentially aim to convert these into decoupled support, such as the single farm payment, which the EU treats as permitted 'green box' measures. Similarly, the US is shifting to direct farm payments. It does not require sophisticated economic analysis to understand that these allow farmers to accept prices lower than their direct production costs. Since the negotiations do not at present envisage any serious reconsideration of the green box criteria, much will depend on whether successful challenges can be brought under the WTO's rules. An alternative strategy for agriculture has been put forward by NGOs such as the Coordination Sud alliance, which would aim at food sovereignty. This would require both the ending of all types of subsidies affecting export prices, as well as permitting countries to defend their producers against dumping

of below-cost sales. Beyond this, it proposes global production and supply management, administered by the FAO, rather than the WTO's heedless encouragement of trade, which fosters increasingly intensive agriculture, degrading the environment and sacrificing local and more high-quality food production.

These perspectives are hostile to the WTO's liberalisation ethos. However, in the related area of fisheries, some very similar policies are under development, prompted by the global crisis of fish stocks, which are more likely to be adopted by the WTO. These focus on the elimination of fishing subsidies, and exemptions for artisanal or local fishing. As with agriculture, this would require very careful definitions and stringent monitoring of amber and green support measures. It also entails, as has been stressed in a study done for the World Wildlife Fund (WWF) and the UN Development Programme (UNDP), that the WTO should deal only with trade-related aspects, but in conjunction with fisheries management measures to be operated by regional fisheries organisations (Schorr 2004).

Thus, the real challenge facing the WTO is whether it can develop principles of fair trade, as well as making an appropriate contribution to the development of effective international regulatory arrangements for the global economy.

BIBLIOGRAPHY

- Alston, Philip. 2002. Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann. *European Journal of International Law* 13: 815-844.
- Alter, K. J. 2003. Resolving or exacerbating disputes? The WTO's new dispute resolution system. *International Affairs* 79: 783-800.
- Abbott, K. W. and D. Snidal. 2000. Hard and Soft Law in International Governance. *International Organization* 54: 421-56.
- Bhagwati, J. and H. T. Patrick, Eds. (1990). *Aggressive Unilateralism. America's 301 Trading Policy and the World Trading System*. Ann Arbor, University of Michigan Press.
- Braithwaite, J. and P. Drahos (2000). *Global Business Regulation*. Cambridge, Cambridge University Press.
- Bratton, W., J. McCahery, S. Picciotto and C. Scott (1996) *International Regulatory Competition and Coordination*, Clarendon Press, Oxford.
- Bronckers, M. 2001. More power to the WTO? *Journal of International Economic Law* 4: 41-65.
- Cass, D. Z. 2001. The 'Constitutionalization' of International Trade Law: Judicial Norm-generation as the Engine of Constitutional Development in International Trade. *European Journal of International Law* 12: 239.

- Cass, D. Z. (2005). *The Constitutionalization of the World Trade Organization : legitimacy, democracy, and community in the international trading system.* Oxford, Oxford University Press.
- Castells, M. (1998). *The Information Age: Economy, Society and Culture.* Malden, Mass., Blackwell Publishers.
- Covelli, N. and V. Hohots 2003. The Health Regulation of Biotech Foods under the WTO Agreements. *Journal of International Economic Law* 6: 773-795.
- Crawford, J.-A. and R. V. Fiorentino (2005). The Changing Landscape of Regional Trade Agreements. Geneva, WTO.
- Davey, W. J. 2002. A permanent panel body for WTO dispute settlement: desirable or practical? In D. L. M. Kennedy and J. D. Southwick, eds., *The Political Economy of International Trade Law. Essays in Honor of Robert E. Hudec.* pp.496-527. Cambridge, CUP.
- Davey, W. J. 2003. The Case for a Permanent Panel Body. *Journal of International Economic Law* 6: 177-86.
- Dehoussé, R. (1989) '1992 and Beyond: The Institutional Dimension of the Internal Market Programme.' *Legal Issues of European Integration* 1: 109-136.
- Drahos, P. and J. Braithwaite (2002). *Information Feudalism. Who Owns the Knowledge Economy?* London, Earthscan.
- Drahos, P. and J. Braithwaite (2004). *Who Owns the Knowledge Economy? Political Organising Behind TRIPS*, Corner House Briefing 32.
- Drahos, P. and R. Mayne, Eds. (2002). *Global Intellectual Property Rights. Knowledge, Access and Development*, Oxfam/Macmillan.
- Goldstein, J. (1993) 'Creating the Gatt Rules: Politics, Institutions and American Policy.' In J. G. Ruggie (ed.) *Multilateralism Matters: The Theory and Practice of an Institutional Form.* NY: Columbia UP
- Helper, L. R. (1998) 'Adjudicating Copyright Claims under the TRIPs Agreement. The Case for a European Human Rights Analogy.' *Harvard International Law Journal* 39(2): 357.
- Howse, R. (2000) 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence.' In J. H. H. Weiler (ed.) *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?*. Oxford, OUP: 35-69.
- Hudec, R. 1993. *Enforcing International Trade Law. Evolution of the GATT Dispute-Settlement System.* London, Butterworths.

- Joerges, C. and J. Neyer. 2003. Politics, risk management, World Trade Organization governance and the limits of legalisation. *Science and Public Policy* 30: 219-225.
- Kelsey, J. (2003). "Legal Fetishism and the Contradictions of the GATS." *Globalisation, Societies and Education* 1(3).
- Lamy, P. (2006). Multilateral and bilateral trade agreements: friends or foes? *Annual Memorial Silver Lecture*. Columbia University, New York.
- Matsushita, M., T. J. Schoenbaum, and P. Mavroidis (2003). *The World Trade Organization. Law, Practice, and Policy*. Oxford, OUP.
- McGinnis, J. O. and M. L. Moezian (2000) 'The World Trade Constitution.' *Harvard Law Review* 114: 512-605.
- Petersmann, E.-U. 2002. Constitutionalism and WTO law: from a state-centered approach towards a human rights approach in international economic law. In D. L. M. Kennedy and J. D. Southwick, eds., *The Political Economy of International Trade Law. Essays in Honor of Robert E. Hudec*. pp. 32-67. Cambridge, CUP.
- Petersmann, E.-U. 2003. Human Rights and the Law of the World Trade Organization. *Journal of World Trade* 37: 241-81.
- Picciotto, S. (2003). "Private Rights vs Public Standards in the WTO." *Review of International Political Economy* 10(3): 377-405.
- Picciotto, S. (2005). "The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance." *Governance*, 18: 477-503
- Picciotto, Sol (2006) *The WTO as a Node of Global Governance: Economic Regulation and Human Rights Discourses*. Paper for the Conference on Human Rights and Global Justice, 29-31 March, Warwick, UK. Available at <http://eprints.lancs.ac.uk/152/>
- Schorr, David K. (2004), *Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the WTO* available from <http://assets.panda.org/downloads/healthyfisheriessustainabletradefinal.pdf>
- Shaffer, G. C. (2003). *Defending Interests: Public-Private Partnerships in WTO Litigation*. Washington DC, Brookings Institution Press.
- Steger, D. P. 2002. The Appellate Body and its contribution to WTO dispute settlement. In D. L. M. Kennedy and J. D. Southwick, eds., *The Political Economy of International Trade Law. Essays in Honor of Robert E. Hudec*. pp. 482-95. Cambridge, CUP.
- Trachtman, Joel P. 1998. Case-Note: EC – Customs Classification of Certain Computer Equipment. *European Journal of International Law* 9: 551.

- Trachtman, Joel P. 1999. The Domain of WTO Dispute-Resolution. *Harvard International Law Journal* 40: 333-377.
- UN High Commissioner for Human Rights (2002). Liberalization of trade in services and human rights. E/CN.4/Sub.2/2002/9.
- Weiler, J. H. H. 2001. The rule of lawyers and the ethos of diplomats - Reflections on the internal and external legitimacy of WTO dispute settlement. *Journal of World Trade* 35: 191-207.
- World Bank (2005). Global Economic Prospects 2005: Trade, Regionalism and Development.
- WTO-AB (2005). United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services. WT/DS285/AB/R
- WTO-Panel (2006). European Communities - Measures Affecting the Approval and Marketing of Biotech Products. WT/DS291/R; WT/DS292/R; WT/DS293/R, 29 September 2006.

WTO at Cross-road – From Hong Kong to Cancún

Guiguo Wang*

The Sixth WTO Ministerial Meeting held in Hong Kong in December 2005 resulted in some success in relation to the Doha Development Agenda. Before the Hong Kong Meeting, all the negotiating parties were prepared to do something to prove that the Ministerial Meeting would not be the third consecutive failure. In order to achieve the aim, the Singapore issues were excluded from the negotiations before the start of the Hong Kong Meeting. Yet, each commitment made by the WTO members in Hong Kong depends on the successful negotiation of other issues. According to the Hong Kong Declaration, members are expected to complete all the negotiations by July 2006 and submitting final schedules of commitments by the end of October.

It goes without saying that whatever seemingly achieved at the Hong Kong Ministerial has been wiped out with the suspension of the negotiations. At the same time, nobody knows when the negotiation may resume and that even if it restart, nobody could predict the outcome. The WTO is therefore truly at the cross-road.

One may recall, right after the ending of the Cancún Ministerial, some developed countries immediately announced that they would off-set the aftermath through bilateral free trade agreements.¹ This time however no country has made similar statement, although there are signs that WTO members are more anxious in concluding bilateral and regional free trade agreements (“FTA”). The US proposal on the establishment of an Asia-Pacific Free Trade Area is an example. In any event, the present situation facing the international community and obstacles of the negotiations are almost identical with those before the Cancún Ministerial, as no progress on the Doha Development Agenda has been made.

I. Issues Still Remaining

Both the Hong Kong and Cancún Ministerial Meetings were the follow-up of the Doha Round. Their main task was to carry out the Doha Declaration, especially the implementation of the Uruguay Round Agreements.² The implementation of the Uruguay Round Agreements involves many issues, among which the notable ones include trade in services, agriculture trade, intellectual property protection and dispute settlement. So far as agricultural trade is concerned, the Doha Ministerial Declaration aims at “gradually reducing with a view to phasing out, all forms of

* Professor (Chair) of Chinese and Comparative Law at City University of Hong Kong; Member, the International Institute of Comparative Law (Hague); Chairman, Hong Kong WTO Research Institute and Distinguished Professor of Law, Hunan Normal University, PRC.

¹ Just at the close of the Cancún Conference (in fact the declaration of failure), Robert Zoellick, the trade representative of the United States, announced that the United States would negotiate bilateral trade agreements with other countries. He said that the United States had a long list of potential participants for bi-lateral trade agreements.

² The Fifth Ministerial Conference of the WTO organized a negotiation group on the following six issues: Agriculture, “Singapore” issues, Non-agricultural Market Access (NAMA), Development Issues, Cotton Initiative and Other Issues.

export subsidies and substantial reductions in trade-distorting domestic support".³ In accordance with the aim of the negotiation, the Doha Ministerial Declaration requires participants to submit their comprehensive draft Schedules no later than 31 March 2003, including the provisions for special and differential treatment for the developing countries.⁴

One of the results of the Uruguay Round is that the developed countries have committed to provide technical assistances for the developing countries.⁵ However, since the establishment of the WTO, such commitment has remained mostly on paper, which has disappointed the developing countries greatly. For example, in regard to the laws on technical barriers to trade (TBT) and hygiene standards, the developing countries are in urgent need of the technical assistance from the developed counties. In regard to the formulation and enactment of import standards, apart from the aids on legislation, the developing countries need the developed counties to transfer related technologies as well.

In regard to intellectual property protection, paragraph 6 of the Doha Ministerial Declaration acknowledges that, under the WTO rules no member should be prevented from taking appropriate measures for the protection of human, animal or plant life or health, or of the environment, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries, or a disguised restriction on international trade. But does this provision apply only to the developing country members or all members? To read paragraphs 6 and 1 to 4 together, it is obvious that the right to protect human, animal or plant life or health is established under the background of serious problems the developing counties confront. However, the authorization is applicable to all members. As a result of the authorization, each Member could restrict the patent right in such a way as compulsory licensing and parallel importation etc. for public health reasons. According to paragraph 6 of the Doha Ministerial Declaration, the EU and some non-governmental organizations suggested that members should have the right to grant local producers to export medicines under patent protection to poor countries as an exception of Article 30 of the TRIPs.⁶ It is because that, confronted with diseases that can infect and disseminate fast and widely, such as AIDS and malaria, plague, etc., patients in the developing countries could hardly afford for the medicine produced in and exported from the developed countries. The prices of these medicines would decrease a lot given that the production would not be protected by patent right. A UN study reports, for example, that 150 mg of one HIV drug costs USD55 in India, where the

³ Doha Ministerial Declaration, Para. 13.

⁴ Doha Ministerial Declaration, Para. 14.

⁵ Such provisions can be found in a number of agreements of the WTO such as Article 25 of the General Agreement on Trade in Services ("GATS"), Article 67 of the Agreement on Trade-related Aspects of Intellectual Property Protection ("TRIPs") and Article 11 of the Agreement on Technical Barriers to Trade.

⁶ Amir Attaran, "The Doha Declaration on the TRIPs and Agreement on Public Health, Access to Pharmaceuticals, and Options under WTO Law", *Fordham Intellectual Property, Media and Entertainment Law Journal*, Vol. 12, (2002), P.859.

drug does not enjoy patent protection, as compared to USD697 in Malaysia, USD703 in Indonesia, and USD817 in the Philippines, where the drug is patented.⁷

Except the legal issues, another problem that the developing countries confront is that even though the Doha Ministerial Declaration and the Declaration on TRIPS Agreement and Public Health allow them to grant compulsory licences, these countries have not the capacity to produce such medicines. According to Article 31 of the TRIPs, any such use must be authorized predominantly for the domestic market of the member. The right holder must also be paid an adequate remuneration.⁸ It is generally accepted that the remuneration paid to the right holder should link with the products manufactured. In other words, if relative products are partly or wholly exported, the importing Member should pay for the compulsory license of the patent right.

On December 16, 2002, with a view to addressing the above difficulties of the least-developed countries, the Chairman of the Intellectual Property Council put forward a draft. This draft was passed by the Intellectual Property Council on August 30, 2003 as the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (hereinafter the "Implementation Decision"), which provides for exceptions for those members who are incapable of implementing the provisions concerning compulsory licensing under the TRIPs. On 6 December 2005, members of the WTO agreed to convert the Implementation Decision into permanent amendment to the TRIPs. The significance of the conversion is that the developing members are now entitled to the advantages provided by the Implementation Decision as right rather than exceptions.

The Implementation Decision applies to those members that are totally incapable or lack of effective capacity to make use of the compulsory licensing scheme. These members could import the pharmaceuticals that are manufactured through compulsory licensing to resolve the difficulties due to the lack of manufacturing capacity. They must, however, make a notification to the Council for TRIPs of their intention to invoke the Implementation Decision and to specify the names and expected quantities of the product(s) to be imported.⁹ Those who are eligible to apply the Implementation Decision include the least-developed members and other members lacking or having insufficient manufacturing capacities in the pharmaceutical sector for the product(s) in question.¹⁰ The application of the scheme

⁷ Alan O Sykes, "TRIPS, Pharmaceuticals, Developing Countries, and the Doha "Solution"", *Chicago Journal of International Law*, Vol. 3, (2002), P.47, Taking the seriousness and complexity of intellectual property, a declaration on TRIPs and public health was passed in the Doha Round. It is declared that some epidemics such as AIDS, tuberculosis, PI ague have afflicted the public health of many developing countries and the least-developed countries, therefore, it is necessary to take the TRIPs as national and international initiative to resolve such problems.

⁸ Article 31(6)and(8) of TRIPs.

⁹ The Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health itself has no provision that requires Members who wish to invoke it to get prior approval of the Intellectual Property Council. However, according to the context thereof, such approval seems to be needed.

¹⁰ In spite of the least-developed countries, other Members other than least-developed countries, that

is conditioned on the member's overall situation, national emergency or other circumstances of extreme urgency or public non-commercial use. When the Implementation Decision is applied, Article 31 of the TRIPs which provides that the products that manufactured through compulsory licensing should supply the domestic market of the member authorizing such use, is no longer applicable. In spite of the notification obligation, an eligible importing member should take reasonable measures to prevent improper use and re-exportation of the products that have actually been imported into their territories under this system.¹¹

An exporting member is obligated to produce and export the products only for eligible importing members. The products concerned must be clearly identified as being produced under the system set out in the Implementation Decision through special packaging, coloring/shaping, labeling or marking. Meanwhile, the licensee must post on a website the quantities being supplied to each destination as referred to in indent and the distinguishing features of the relevant pharmaceutical product(s) referred to in indent.

Under the system of the Implementation Decision, an exporting member should be paid an adequate remuneration pursuant to Article 31(h) of the TRIPs for compulsory licensing. Where a compulsory license is granted for the same products in an eligible importing member, that member needs not to pay remuneration for the products imported.¹²

Another effort made by the WTO was that on September 3, 2003, the Council for Trade in Services held a special session and adopted a decision to boost least-developed countries' participation in services negotiations.¹³ Generally speaking, the resolution allows the least-developed countries to make commitments compatible with their economic situations, and require the developed countries to exercise restraint in their negotiation with the least-developed countries. On the whole, the developed countries should neither seek the removal of conditions which the least-developed countries may attach when making their markets accessible to foreign services suppliers, nor expect the national treatment. Meanwhile, the developed countries should strengthen programmes to promote investment in the least-developed countries with a view to building up their domestic services capacity and enhancing their efficiency and export competitiveness.

wish to apply the system of the Implementation Decision should establish before affirm the Intellectual Property Council that they have insufficient or no manufacturing capacity for the relevant pharmaceutical product(s) in order, are incapable or lack of effective capacity to make use of the patent compulsory licensing system. Annex I of the Implementation Decision provides conditions for countries other than the least-developed Members to use the exception system under the Implementation Decision.

¹¹ In this respect, the developed country Members must provide, on request of the importing Member, technical and financial cooperation in order to facilitate the implementation of relative laws.

¹² The Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Paragraph 3

¹³ see WTO Members Agree on Ways to Boost LDC Participation in Services Negotiations, http://www.wto.org/english/news_e/pres03_e/pr351_e.htm

Before the Hong Kong Ministerial, the WTO, like before, tried to create a favourable environment by adopting the July Package in 2005. To be fair, the July Package did contribute to the reaching of the compromise made in Hong Kong especially with regard to the deals on cotton and reduction of domestic support to agriculture. Yet, before people had time to celebrate what achieved in Hong Kong, negotiations for concluding the Doha Round were put on hold due to disagreements on reducing agricultural subsidies by the developed members.¹⁴

II. Why Always Agriculture Trade?

Like the failure of Cancún Ministerial, there can be many reasons for the suspension of negotiations, however, none of them is more important than agriculture trade. It is beyond doubt that any success and failure relating to the Doha Round is related to the negotiations on agriculture trade between the developed and the developing countries.

Under the background of globalization, agricultural subsidies in the developed countries have substantially impaired and threatened the interests of the developing countries. Take Jamaica as an example, its unique natural situation makes itself an ideal place for milk production. Vast amounts of grassland, plenty of water resources and excellent cows, including a breed called “the hope of Jamaica”, have provided this island country, with a population of 2.5 million, good conditions for milk production. In addition, the local people have a habit of consuming milk and milk products. The annual consumption of milk products is around 0.14 million Gallons.¹⁵ However, the EU subsidized milk powder is much cheaper. As a result, the milk products industry of Jamaica began importing milk powder from the EU, which then brought serious loss to the local farmers. In 1999, the Phyllis March's had to pour away more than 1000 Gallons of milk that could not be sold out.¹⁶ Needless to say, it is really a big loss for a small farmer who makes a living by selling milk.

The same situation takes place in other territories and sectors. The misery suffered by Mohammed Ali Indris in Ethiopia is another example. Five years ago, the annual income of Mohammed from selling coffee and corn was USD320, which was enough to cover the living expenses of the whole family. However, because of the competition of subsidized agricultural products, even if the sales volume had increased 4 times, Mohammed could not earn enough money to pay for the family's expenses. As a result, he did not only have no money to send his children to school but also had to sell his farm cattle to repay the loan lest to be sent to prison. Due to the lack of nutrition, the skin of Mohammed's children is very coarse.¹⁷

¹⁴ Agricultural subsidies in the United States and the EU are broad and complicated. Farmers exert great influence upon the domestic politics in those countries. It is therefore rather difficult for them to reach consensus on agriculture trade, especially for the special and differential treatments for the developing countries.

¹⁵ See Canadian Council for International Cooperation, “What Direction for Development? Focus on Agriculture”. This document was distributed by the Canadian Council for International Cooperation at the Fifth WTO Ministerial Conference.

¹⁶ *Id.*

¹⁷ *Id.*

The Jamaican and Ethiopian experience is shared by other developing countries that account for 80 per cent of the world's population. It was reported that,¹⁸ before China's joining the WTO, the Chinese government encouraged farmers to grow economic crops by providing the latter with bank loans. Many farmers in Guangxi Autonomous Region hence engaged in growing sugarcane and sugar production. Their living standards grew very fast. Take a farmer for example, at the initial stage, he borrowed money from a bank to plant sugarcane and started to produce sugar. By doing so, he was able to earn RMB2500 annually and was full of hope. The WTO membership of China, however, led to an influx of subsidized imported sugar into the Chinese market which resulted in a sharp decrease in sugar prices thereof. This farmer's income decreased to less than RMB0.8 daily. With this small amount of money, he can hardly cover his child's education expenses, not mentioning his original plan of reconstructing his house. Not only that, he had no money to repay the loan.

Most developing countries deem that farmers' problems have deteriorated due to economic globalization. Globalization and the establishment of the WTO have resulted in the influx of agricultural products with subsidies from the developed countries into the domestic markets of the developing countries, which links the agricultural subsidies in the developed countries with farmers' problems of the developing countries directly. This is so because as a general rule, the poorer a country is, the more it depends on agriculture. For instance, food accounts for about 10% of household expenditure in most developed countries, but more than 30% in the vast majority of the developing countries.¹⁹ That means the effect of the subsidized agricultural products from the developed countries on the income of the farmers of the developing countries has a direct bearing on the living of the latter.

Of course, the developed countries' agricultural subsidies have a long history. At least as early as 1947, when the GATT took effect, subsidies became one of the major issues of agriculture trade.²⁰ According to statistics, the total direct agricultural subsidies in the OECD countries averaged to USD235 billion per year in 2000-2002.²¹ 80 per cent of the grains and oilseeds are protected by subsidies.²² As

¹⁸ This information was disclosed by a survey report of Oxfam Hong Kong published in a local newspaper during the Cancún Ministerial. The report was prepared by surveyors of the Chinese Academy of Social Sciences and Chinese Agricultural Ministry. The author had an opportunity to discussed the issues in detail with the surveyors during the Cancún Ministerial in September 2003.

¹⁹ *Id.*

²⁰ The difference lies in that at that time, the interdependence among countries was limited, especially when there were high tariffs and non-tariff barriers as effective obstacles for market access, the dispute on agricultural subsidies was mainly between the U.S. and EU countries; while at present, it is mainly between the developed and developing countries. One of the reasons is that the developed countries are financially capable of offering subsidies for agricultural products, while the developing countries are incapable of competing with subsidized agricultural products of the developed countries.

²¹ The World Bank, Market Access: Agricultural Policy Reform and Developing Countries, September 10, 2003.

²² However, it does not mean that all the farmers get a large amount of subsidies. It is reported that, generally, only a few large farms benefited from the subsidies. For instance, in U.S., the largest size

indicated in a research conducted by the OECD, those who substantially benefited from the agricultural subsidies are: farm household labor (10.4 per cent), farm household land (12.6 per cent), non-farming landowners (13.2 per cent), other input suppliers (36.7 per cent) and land resource costs (28.2 per cent).²³

Apart from the grain subsidies, the subsidies to sugar and cotton in the developed countries are striking as well. For instance, the OECD countries' support for domestic sugar producers is roughly equal to the total sugar export value of the developing countries.²⁴ Moving to free trade in sugar would raise its price by close to 40 per cent, increase the sugar trade by 20 per cent and generate around USD4.7 billion in welfare gains for the poor in the developing countries.²⁵

In the cotton trade that has raised heated debate, the subsidies in the developed countries are more significant. According to the statistics of the IMF, USD3.7 billion of subsidies are annually provided for cotton products, which is three times as large as the aid provided by the United States to Africa, and nearly one fifth of the total value of the world cotton production.²⁶ Above all, the US subsidies on cotton have been ruled by the WTO as incompliant with the WTO Agreement including the Agriculture Agreement. Taking the EU and other countries' subsidies in cotton into account, it can be easily imagined to what extent the world cotton price has been distorted. In total, the IMF estimates that these subsidies have depressed the world price by 20 per cent.²⁷

The direct effect of agricultural subsidies in the developed countries is that, on the one hand, the products of the developed countries become more competitive to get access to the markets of the developing countries; on the other hand, it is more difficult for the products of the developing countries to have access to the developed country markets. Although an agricultural agreement was reached in the Uruguay Round, the barriers on market access for agricultural products are still substantial in different countries. The current average agricultural bound tariff is 60 per cent, which illustrates the degree of protectionism in agriculture trade. So far as the OECD countries are concerned, about 28 per cent of their domestic agricultural production is protected by import quotas.²⁸ The Uruguay Round brought the agriculture trade into the multilateral discipline of the WTO, although some high

group of farm representing 5 per cent of all farms receiving 20 per cent of the governmental subsidies.

See The World Bank, Domestic Support for Agriculture: Agricultural Policy Reform and Developing Countries, September 10, 2003.

²³ OECD, Agricultural Policies in OECD Countries: A Positive Reform Agenda, June 2003, p. 3.

²⁴ It has been estimated, for instance, that each of the 2,300 jobs saved in the American sugar industry through barriers to imports in the 1990s cost USD800,000 a year. It is not hard to imagine how much such subsidies are. Anne O. Krueger, *supra*, at p. 3.

²⁵ Anne O. Krueger, *supra*, at p. 4. For a general discussion on sugar subsidies of the EU and their effects on developing countries, see also Oxfam International, Dumping on the World – How EU Sugar Policies Hurt Poor Countries, Oxfam Briefing Paper 61.

²⁶ Anne O. Krueger, *supra*, at p. 4.

²⁷ *Id.*

²⁸ The World Bank, Market Access: Agricultural Policy Reform and Developing Countries, September 10, 2003.

levels of support and protection were left untouched. While there is no tariff imposed on most industrial products, the peak tariff on agricultural products is still as high as 200 per cent, which is really an irony for the WTO.²⁹ In addition, the tariff of agricultural products will increase along with the sophistication of the level of manufacturing, which aggravates the importing protection and adversely impacts the developing countries' interests of export.

There are several reasons for the above situation. In the first place, the tariff deduction method for agricultural products reached in the Uruguay Round makes it possible for the developed countries to maintain high tariffs on the sensitive agricultural products imported from developing countries. The Uruguay Round required members to commit to an average cut in tariffs rather than a cut in average tariffs. As a result, the developed countries can choose to reduce agricultural tariffs in the field where tariff levels are already low and then easily meet the WTO's requirements. For example, if the original tariff for some product is 2 per cent, a 1 per cent cut represents a 50 per cent tariff reduction. But these fields are generally not sensitive agricultural products and, therefore, the tariff cuts would not have a substantial impact on the agricultural industry of the importing countries.³⁰

Secondly, the bound tariff system on agricultural products is not reasonable. In theory, both the developed and the developing countries have the same right to bind the importing tariffs. However, in practice, applied tariffs in the developing countries are always lower than the bound tariffs, while the applied tariffs of the developed countries are, as a general rule, higher than the bound tariffs.³¹ This inequality *de facto* does not only have direct adverse impact on the export of agricultural products of the developing countries but also creates a psychological obstacle to the negotiations at the WTO.

Thirdly, there are problems with the method under the WTO to calculate domestic subsidies. According to the Agreement on Agriculture, subsidies in general are grouped and represented by green box, blue box and amber box.³² When calculating the aggregate of domestic support, WTO allows the blue box subsidies to be included, but in ascertaining the subsidy deduction the blue box subsidies would not be taken into account. This will result in an over-estimation of the domestic support and make it easier for the member concerned to satisfy the requirement of reduction in subsidies. Moreover, the aggregate support itself does not require the subsidy reduction in certain field. There is also a tendency that the developed countries try to avoid the important and dwell on the trivial issues to elude the obligation of reducing subsidies. As a result of the above maneuvers, it is possible that a

²⁹ OECD, Agricultural Policies in OECD Countries: A Positive Reform Agenda, June 2003, p. 5.

³⁰ At the moment, there is no international agreement on what constitutes sensitive products. As such, the issue is almost completely left to the discretion of the importing countries.

³¹ A survey of the World Bank indicates that for some developing countries, the tariff overhang is 5 times more than the applied tariff; while the applied tariff of OECD countries is 2 times more than the bound tariff. See The World Bank, Market Access: Agricultural Policy Reform and Developing Countries, September 10, 2003.

³² Green box subsidies are not restricted; blue box subsidies are for special circumstances; and amber box subsidies should be reduced gradually. For details, see Guiguo Wang, *The Law of WTO*, Law Press, Beijing, China (2003), Chapter 7.

member's subsidies in agriculture may increase constantly, while its aggregate domestic support decreases.

Fourthly, agriculture subsidies provided by the developed countries is very complicated in nature. It will take a long time for the developing countries to figure out what subsidy is prohibited and what is not, not mentioning taking such matters to the Dispute Settlement Body of the WTO.³³

Needless to say, agriculture trade is not the only issue facing the WTO members. From the developing members point of view, however, unless substantive commitments are made by the developed countries, they are not prepared to move forward on other issues. This was the case in Cancún and Hong Kong as well as the negotiations taken place thereafter.

As far as agriculture trade is concerned, the similar experience, need and expectations of the developing countries made their negotiating stands close to each other at the Cancún, Hong Kong and thereafter, which brought about a de facto negotiation alliance. This unity of the developing countries has led them to take a strong position toward the agriculture trade. The fundamental problem of agriculture trade is the agricultural subsidies of the developed countries. For the developed countries such as the United States the EU and Japan, agricultural subsidies are the reflections of their domestic politics in the international context which are impossible to be repealed totally and immediately under the present circumstances. As for the developing countries, the reduction by the developed countries of agricultural subsidies is a matter of life or death. Thus the issue could not be resolved easily.

III. The Future of WTO

The suspension of negotiations on the Doha Development Agenda, like the establishment of the WTO, is a reflection of the contemporary process of globalization. It is often argued that globalization is the general and irresistible trend of the world today. Yet, everything has ups and downs; the same is true to globalization. When its development is left behind the needs of the international community, it will speed up the pace. Otherwise, its pace may slow down. At the moment we are perhaps experiencing the down turn of globalization but not the end of it. The temporary down turn is the preparation for another leap forward in the near future. The suspension of the talks is therefore a slow down of the process of globalization and its impact on the WTO will be temporary in nature.

At the APEC meeting last week, leaders of the organization called upon the international community to resume the talks on Doha Round. Although it is difficult to predict when the negotiations will resume and what will be the outcome, apparently WTO members have realized the need to reach compromises.

Having said the above, the suspension of negotiations has not only done a big blow to the WTO but also the process of globalization. Unless remedial measures are taken immediately, both the developed and developing countries will suffer. Like the aftermath of the Cancún Ministerial, whilst facing difficulties of multilateral

³³ Even between the Members that invented and have used such subsidies like the United States and EU, there can hardly any agreement on what is a prohibited subsidy and what is permissible. This illustrates the essential problems for negotiations on reduction of agricultural subsidies.

negotiations, WTO members may divert their attention to bilateral and regional arrangements. Again, the US proposal for the establishment of an Asia-Pacific FTA is an example.

To be fair, even before the suspension of the talks, bilateral and regional FTAs had been fast growing. This is so because in the era of intensified globalization, international trade and international politics connect closely with each other. Out of consideration of geo-politics and economic needs, countries may still pursue the course of bilateral and regional agreements. The FTA between the United States and Singapore and the plan to extend NAFTA to cover the entire America as well as the enlargement of the membership by the EU are all concerned with international politics. In fact, one can hardly believe that it is by coincidence that whilst the United States is engaged in southern expansion, the EU is working hard to move Eastward.

The above discussion notwithstanding, the suspension of the negotiations may change the tactics of FTA negotiations by both the developed and developing countries. It is quite obvious that in negotiating FTAs, the developed countries will try to get what they could not achieve at the Doha Round by offering benefits to some developing countries. The effect of so doing is that the developing countries may split at the multilateral negotiations.

The fast flourishing of bilateral and regional arrangements will exert influence upon the operation of the WTO system, make future multilateral negotiations more complicated and differentiate the basic interests and standpoints of those involved in such bilateral and regional arrangements from others. The negotiating power of the developing countries will then be seriously weakened. The end result may be that the special needs and interests of the developing countries are not fully recognized and dealt with, if not neglected, through multilateral negotiations.

In conclusion, WTO is now at the cross-road. Although the suspension will not totally erase any achievements made through the multilateral mechanism, any further delay of resumption of talks will definitely encourage formation of bilateral and regional FTAs which may not be beneficial to the WTO.



Sustainable Development: A Guide for Ordinary Citizens



Somchin Suntavaruk
International Institute for Trade and Development
(ITD)

Definition

Most accepted definition of SD is from the Brundtland Report:

“Sustainable Development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

Preamble to the Marrakesh Agreement Establishing the WTO

“Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, enduring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserves the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,”

Sustainable development in the WTO context

Paragraph 6 in the Doha Declaration:

“We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement.”

Sustainable Development in Doha Declaration

Para. 31(i): MEA – WTO relationship

Para. 31(iii): Exchange of information with MEA secretariats

Para. 31(iii): Environmental goods

Para. 32: See the desirability of negotiations on certain issues

Para. 51: CTD and CTE act as forum to identify and debate developmental and environmental aspects to help achieve the obj. of having SD appropriately reflected.

Hypothesis and Reality

Members of the WTO seem to believe that:
“The objective of sustainable development is achieved when environment is protected.”

In reality:

“The objective of sustainable development will never be achieved in the context of the WTO, unless trade agreements lead to the alleviation of poverty”

Factors affecting sustainable development objective

1. Equity and Fairness

Ensure that the needs of the poor and the marginalized are taken care of

2. Long term Aspects

Precautionary principles will be achieved only if human development is taken care of

Equity and Fairness Explained:

The needs of the poor as well as the needs of the rich must be satisfied.

If environment is a global concern, why not poverty which cannot be alleviated due to subsidies in agricultural sector by rich countries?

Long-Term Aspects Explained:

Present generation should looks after next generation. If present generation does not know what will happen next, the precautionary measures should be taken.

Human resource development can play an important role. Next generation must be more intelligent than the present generation.

Can poor generation have time to think about human resource development?

Negotiating Issues in the Doha Round that are Related to the Benefit of the Poor

1. Non-Agricultural Market Access (NAMA)

2. Agriculture

3. Intellectual Property Rights Protection

4. Trade in Services

Non-Agricultural Market Access (1)

Market Access Problems faced by small-and-medium size LDCs

- Tariff peaks: Relatively high tariffs on sensitive products
- Tariff escalation: Higher tariffs are applied on semi-processed products than on raw materials, and higher still on finished products

Non-Agricultural Market access (2)

- Preferences offered by developed countries to poor nations:
 - EU's Everything but Arms --EBA
 - US's African Growth and Opportunity Act--AGOA
- Poor countries still suffer from limited coverage and complex eligibility requirements of EBA and AGOA such as rules of origin requirements
- Expiration of the Multi-fibre Arrangement (MFA)
- After the MFA phase-out, small LDCs enter into greater competition with India and China

Agriculture (1)

3 Pillars under Negotiations:

Market Access

Export Subsidies

Domestic Support

Agriculture – Domestic Support:

Negotiating issues involve distortion measures created by developed countries:

- Redefine the Difference between 'Green Box' and 'Amber Box' Measures
- Eliminate the 'Blue Box' Measure (e.g. Compensatory Payments, Land Set-Aside Programmes, Deficiency Payments) which is heavily used by the U.S. and the E.U.
- Substantially Reduce Trade-Distorting Subsidies, by Agricultural Items

Agriculture – Export Subsidies:

- 1. Eliminate Agricultural Export Subsidies: very few developing countries have export subsidies
- 2. Establish Rules on Export Prohibitions and Taxes, both of which have impacts on importing countries' food security and sustainable development

(On the other hand, Export Tax can be a source of revenue for developing countries, and thus should be exempted from the Regulations)
- 3. State Trading Enterprises (STEs): to Ensure Transparency in STEs' Exports
- 4. Special and Differential Treatments: Developing countries should push for SDTs in Subsidies for Marketing and domestic freight fees

Agriculture-Market Access:

1. Allow Developing and Least Developed Countries to Implement Varying Bound-Tariffs: i.e. High Tariff rates on Highly Sensitive products and Lower Rate on Less Sensitive Products
2. Categorise Sensitive Products into Different Groups Based on Various Criteria e.g. Food Security etc.
3. Ensure Harmonisation between Tariffs under the MFN rules and those under the Regional Trade Agreements
4. Emergency and Safeguard Measures

Agricultural Market Access (cont.)

- 5. Increase Poor Nations' Access to Developed Countries' Markets by Increasing TRQs
- 6. Amend Rules on TRQs management for greater transparency and easier use
- 7. Negotiate for Appropriate Tariff Reduction Formula on High-Tariff Rate Products and those with Tariff Peaks
- 8. Collective Bargaining Strategies

Agriculture: Non-Trade Concerns:

- Environmental Protection
- Food Security
- Rural Development

Intellectual Property

IP rules have an important influence on human development and sustainable development

- Barriers for adapting new technologies to raise their living standards. (Fair use principle)
- Barriers for the poor to gain access to inexpensive medicine.—IP drives up the prices of drugs.
- Protection of Biodiversity, Traditional Knowledge, and Cultural Heritage
- Rich countries want ‘TRIPS Plus’ in many regional trade agreements

IPR Protection and Public Health

- Strengthened intellectual property rules which delays or stops the entry of generic drugs and drives up prices.

This limits the opportunity for the poor to gain access to inexpensive medicine.

In poor countries, demand for medicines is highly sensitive to price. Three-quarters of household income goes to medicines.

Defensive Protection of IP on Genetic Resources and Traditional Knowledge:

Proposed 4 Additions to TRIPS Article 27.3 (b) by India, Brazil, the Andean Community etc.:

1. Disclosure of origin of genetic resources used in the invention applied for a patent
2. Identification of the traditional knowledge used in the invention
3. Evidence or prior informed consent by owners of the source of the genetic resource used in the invention
4. Evidence of benefit sharing with the owners of the genetic resource and related traditional knowledge

Trade in Services

- Developed countries concentrate on Mode 3 for the benefits of their insurance and financial services.
- Developed countries have been unwilling to enter substantive negotiations on the temporary movement of labor (Mode 4: Movement of Natural Persons)

Arguments for Liberalisation of Movement of Natural Persons (Mode 4, but including unskilled workers):

- Economist L. Alan Winters' estimated that increased labour mobility across the globe will generate potential gains of over \$300 billion/year.
- 2003 Study by the University of Sussex: Labour mobility equivalent to as little as 3% of the receiving countries' work forces would generate \$156 billion/year in extra economic welfare.
- These gains would accrue directly to workers from developing countries, bypassing reliance on the trickle-down effects.

- Immigrant workers bring technological know-how back to home countries
- Legal labour migration through the liberalisation of labour movement is part of the solutions to the human trafficking problems.
- Legal labour migration grants migrant workers with greater bargaining power, reducing the chances of workers' abuse and violation of workers' human rights.

Problems in Mode 4 Negotiations:

- Most countries continue to leave Mode 4 in most services sectors ‘Unbound’, except as indicated in the horizontal section.
- Focus is still on high skilled categories when developing countries mostly benefit from liberalisation of labour movement in the low- or unskilled category

Conclusion

To achieve sustainable development objective worldwide, final result of the Doha Round must help developing countries in alleviating poverty.

In particular, small-and-medium size LDCs must gain market access in agricultural products and other labor intensive products in the world markets.



Thank you

The Doha Negotiations on Trade in Services: China's Position

Gong Baihua

Prof. at Fudan University Law School
Director of Information Services at Shanghai
WTO Affairs Consultation Center

1 DDA on Trade in Services

- *The Guidelines and Procedures for the Negotiations on Trade in Services (Guidelines, S/L/93)*
- *request-offer approach*
- *initial requests :90*
- *initial offers :69*

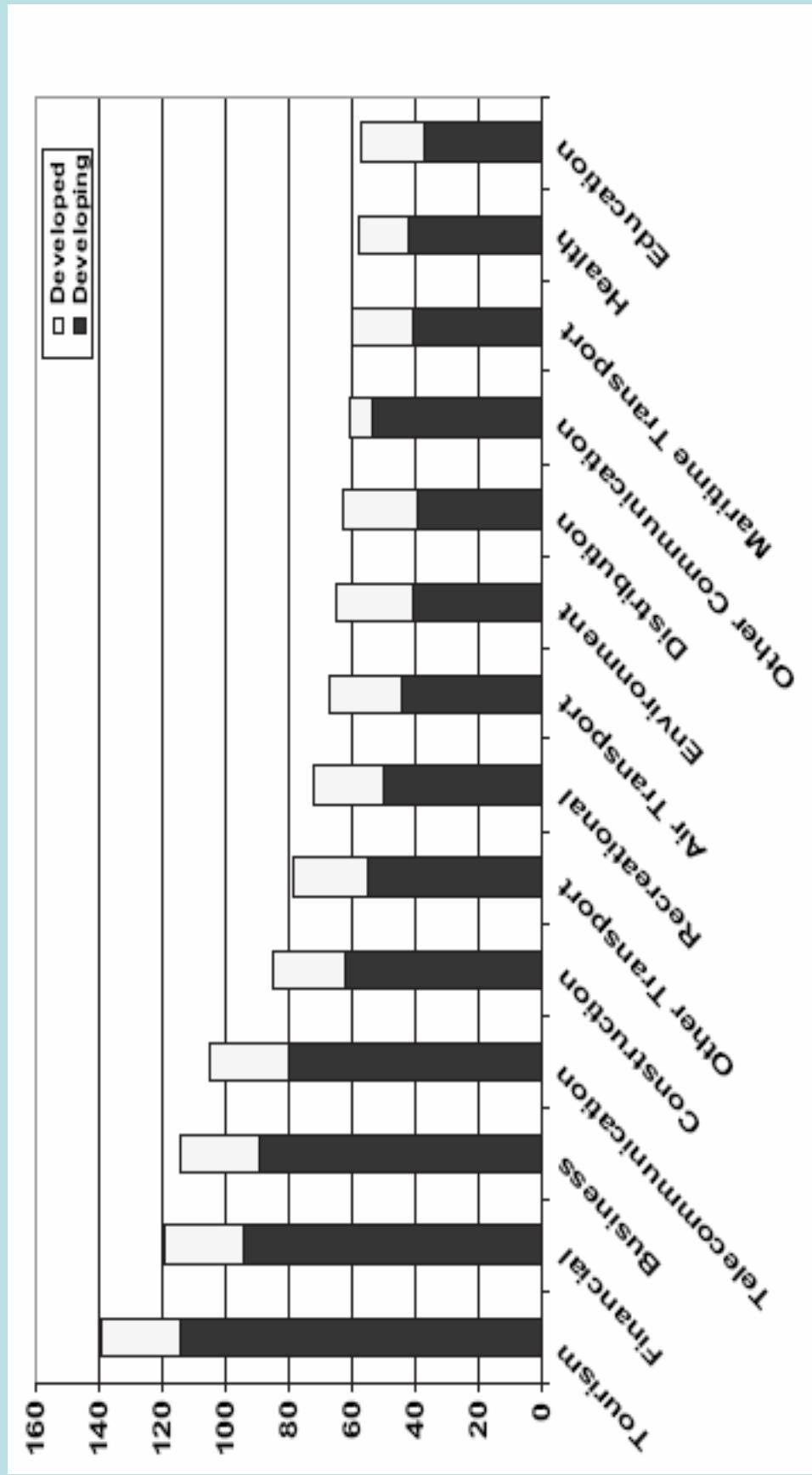
- The Annex C of the Hong Kong Ministerial Declaration
 - bilateral negotiations
 - plurilateral requests

Annex C

- **Recommendations of the Special Session of the Council for Trade in Services**
 - (a) Members who have not yet submitted their initial offers must do so as soon as possible.
 - (b) A date for the submission of a round of revised offers should be established as soon as feasible.
 - (c) With a view to providing effective market access to all Members and in order to ensure a substantive outcome, Members shall strive to ensure a high quality of offers, particularly in sectors and modes of supply of export interest to developing countries, with special attention to be given to least-developed countries.

- (d) Members shall aim to achieve progressively higher levels of liberalization with no a priori exclusion of any service sector or mode of supply and shall give special attention to sectors and modes of supply of export interest to developing countries. Members note the interest of developing countries, as well as other Members, in Mode 4.
- (e) Members must intensify their efforts to conclude the negotiations on rule-making under GATS Articles VI:4, X, XIII and XV in accordance with their respective mandates and deadlines.
- (f) Targeted technical assistance should be provided with a view to enabling developing countries to participate effectively in the negotiations.
- (g) For the purpose of the Sixth Ministerial meeting, the Special Session of the Council for Trade in Services shall review progress in these negotiations and provide a full report to the Trade Negotiations Committee, including possible recommendations.

commitments among service sectors



2. China's Position on Services Liberalization in the Doha Round

- China has made extensive commitments on trade in Services during its negotiations into the World Trade Organization, covering nine out of the 12 large sectors in the GATS lists and liberalized 104 out of the 160 sub-sectors classified by the WTO rules

- On 30 June 2002, China made its initial request on trade in Services to its WTO members, with focuses on six large sectors, namely business services, construction and related engineering services, educational services, environmental services, tourism and travel related services and transport services.

- On sectors like telecommunications, distribution and financial services China only made limited requests. No request was made in health related and social services, recreational, culture and sporting services.

- China has also received requests from other WTO members, mainly concerning on business services, telecommunications, construction and distribution services. Some made requests in sectors where China has made no commitments, say recreational, cultural and sporting services, health related and social services and other business services like R & D and printing. Besides, a few requests referred to some sensitive sectors that China has not yet opened up, e.g. the exclusion of salt and tobacco in distribution and the exclusion of Chinese law practice from legal services.

- China's initial offer was made in late August 2003, suggesting new commitments in business services and transport services and proposing improvements in certain sectors, including the removal of a MFN exemption in marine. Revised offer was made in July 2005.

3. Some Legal Considerations on the Services Negotiations Beyond China's Transitional Period

- A On Emergency Safeguard Measures (ESM)
- Article X of GATS

- The Foreign Trade Law newly revised in 2004 for the first time made provisions of safeguard measures in trade in services. Article 45 of Foreign Trade Law of the People's Republic of China provided that Where services provided by foreign service providers is increased so as to cause or threaten to cause serious injury to domestic service providers of like or directly competitive industries, the state may take necessary safeguard measures to remove or ease such injury or threat of injury.

- B On the Application of Countervailing Measures in Services
- Article XV of GATS

- C On Negotiations Concerning Domestic Regulation
- Article 6.4 of GATS

- As China approaches the year 2007, which is defined as “the year for banking liberalization”
 - Regulations of People's Republic of China on Administration of Foreign funded Banks
- After the transitional period of its WTO accession, China shall pursue shared interests with the foreign equities in competitive cooperation to boost its tertiary industry.

- Thank You!

WTO at the Crossroads: the Challenges in Services Negotiations

Bangkok, 25 November 2006

Pimchanok Vonkhorporn

Executive Director

Bureau of Multilateral Trade Negotiations

Department of Trade Negotiations

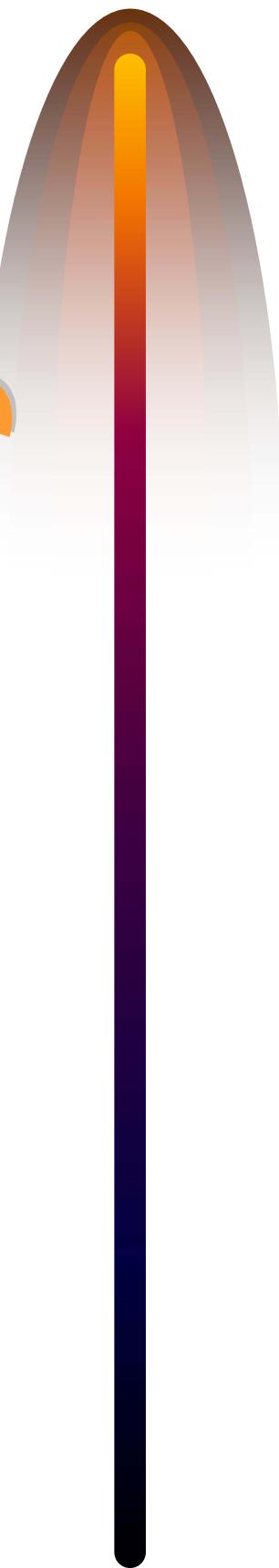
Ministry of Commerce

Thailand

Presentation Outline

- **Background** on Trade in Services and the WTO
- Services Negotiations in the **Doha Round**
- **Thailand** and the WTO Services Negotiations

Background



Economic Significance of Services

- ***Share in GDP and Employment :***

- Roughly two-thirds of global output
 - 69% in high-income, 55% in middle-income, 44% in low-income economies
- Significant share of global employment
 - 70% in high-income, less than 30% in most low-income economies

- ***Share in global trade :***

- In 2002, total export \$1.6 bn., 20% of global trade

- ***Fast growing :***

- Cross-border services grew 8.3% betw. 1980-90 and 6.1% betw. 1990-2002

Source : Marchetti (2002)

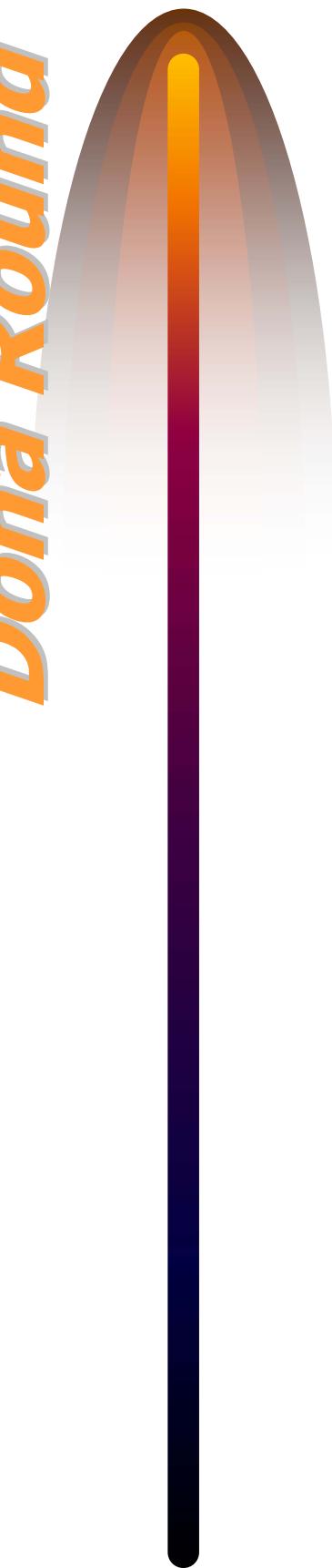
Services and Developing Countries

- Overall, developing countries are not strong in services trade
- But growing fast – in 2002, accounted for 23.5% of global export, up from 19% in 1990
- Some developing countries like India are doing very well on cross-border, grew at 43% between 1995-2000

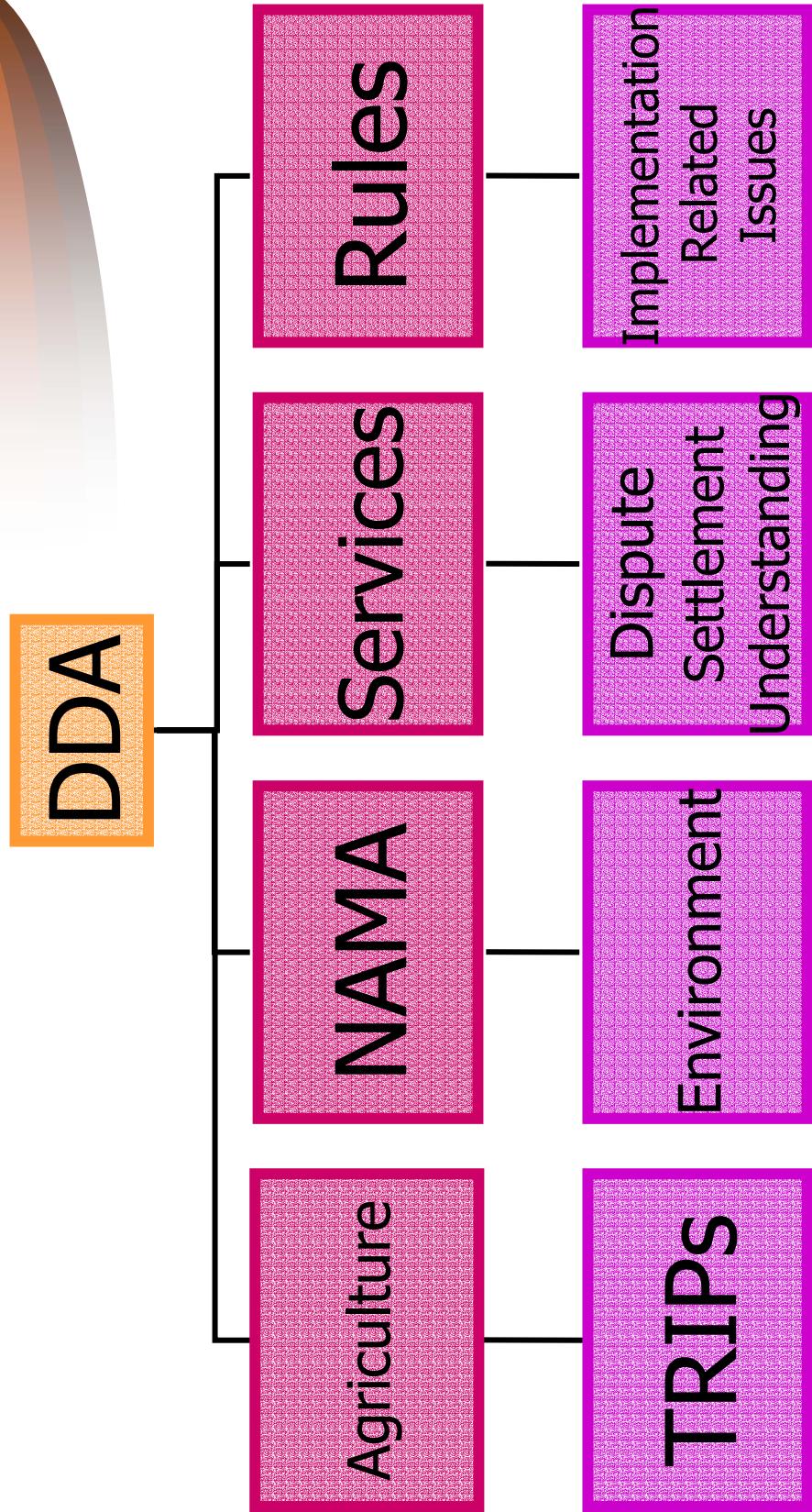
The GATS Agreement

- Is a result of the Uruguay Round Negotiations: effective with the WTO
- One of the “new areas” – only 11 years old
- Key concepts
 - Progressive liberalisation
 - Right to regulate
 - Transparency
 - **Further liberalization through negotiations**

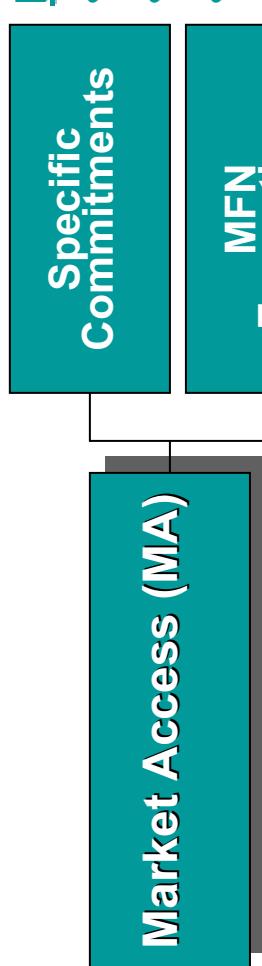
Doha Round



Doha Development Agenda



Negotiate What?



As of Sep, 2005

- 72 initial offers tabled
- 26 revised offers tabled
- **BT overall quality remains unsatisfactory!!**

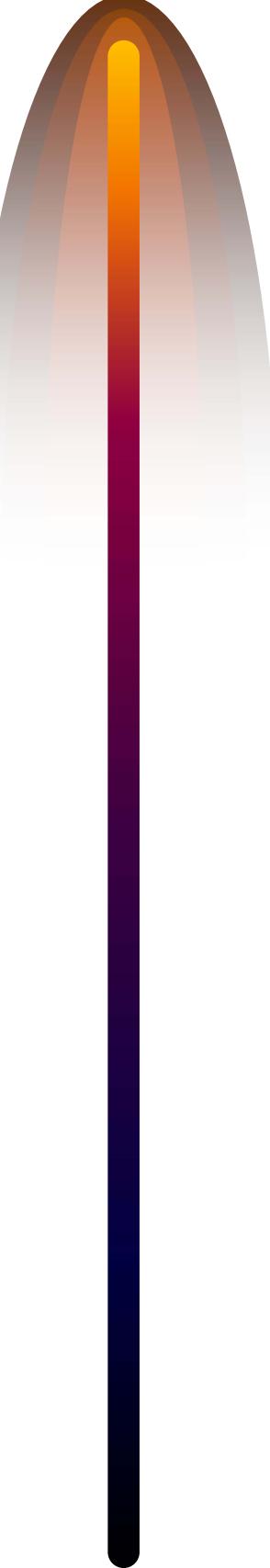
- | <u>Market Access Timeframe</u> | | |
|--------------------------------|------------------------------|-----------------------------|
| • Initial requests: June 2002 | • Initial offers: March 2003 | • Revised offers : May 2005 |

- | <u>Rules Negotiations Timeframe</u> | | |
|---|---|--|
| • DR, GP, Subsidies: prior to conclusion on MA negotiations | • ESM: entry into force not later than results of current round | |

- Deadline for new revised & improved offer
- Level of ambition in market opening negotiations

What has happened?

- Rules negotiation → **progress not satisfactory**
- Market access negotiation
 - Initial request and offer by June 2002 and March 2003-set by 4th MC (Doha) → **result not satisfactory**
 - Revised offer by May 2005-set by 5th MC (Cancun) → **result not satisfactory**
 - Plurilateral request by February 2006, second revised offer by July 2006 → **result not satisfactory**
 - Final draft commitments by October 2006-set by 6th MC (Hong Kong) → **no submission yet**

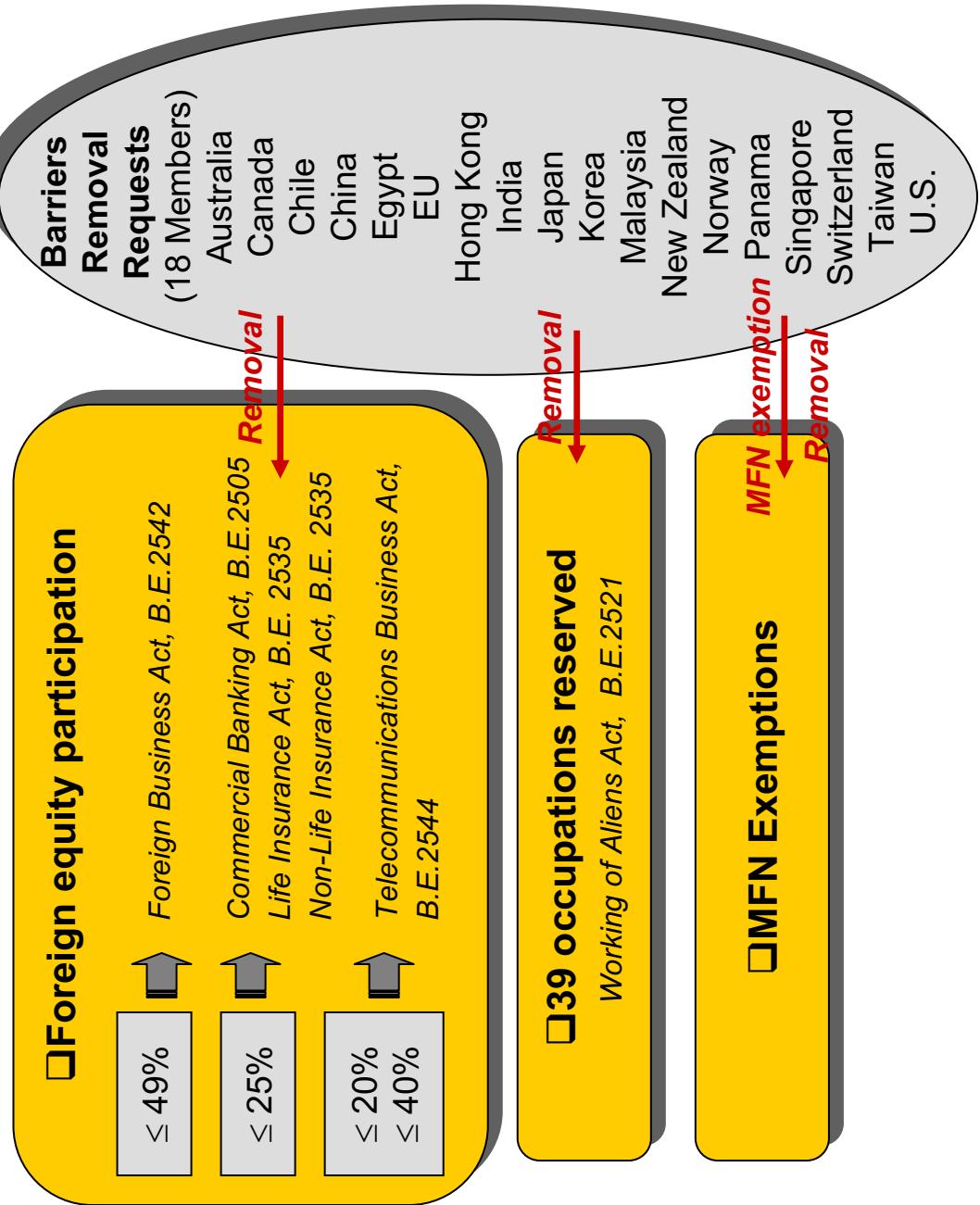


Thailand

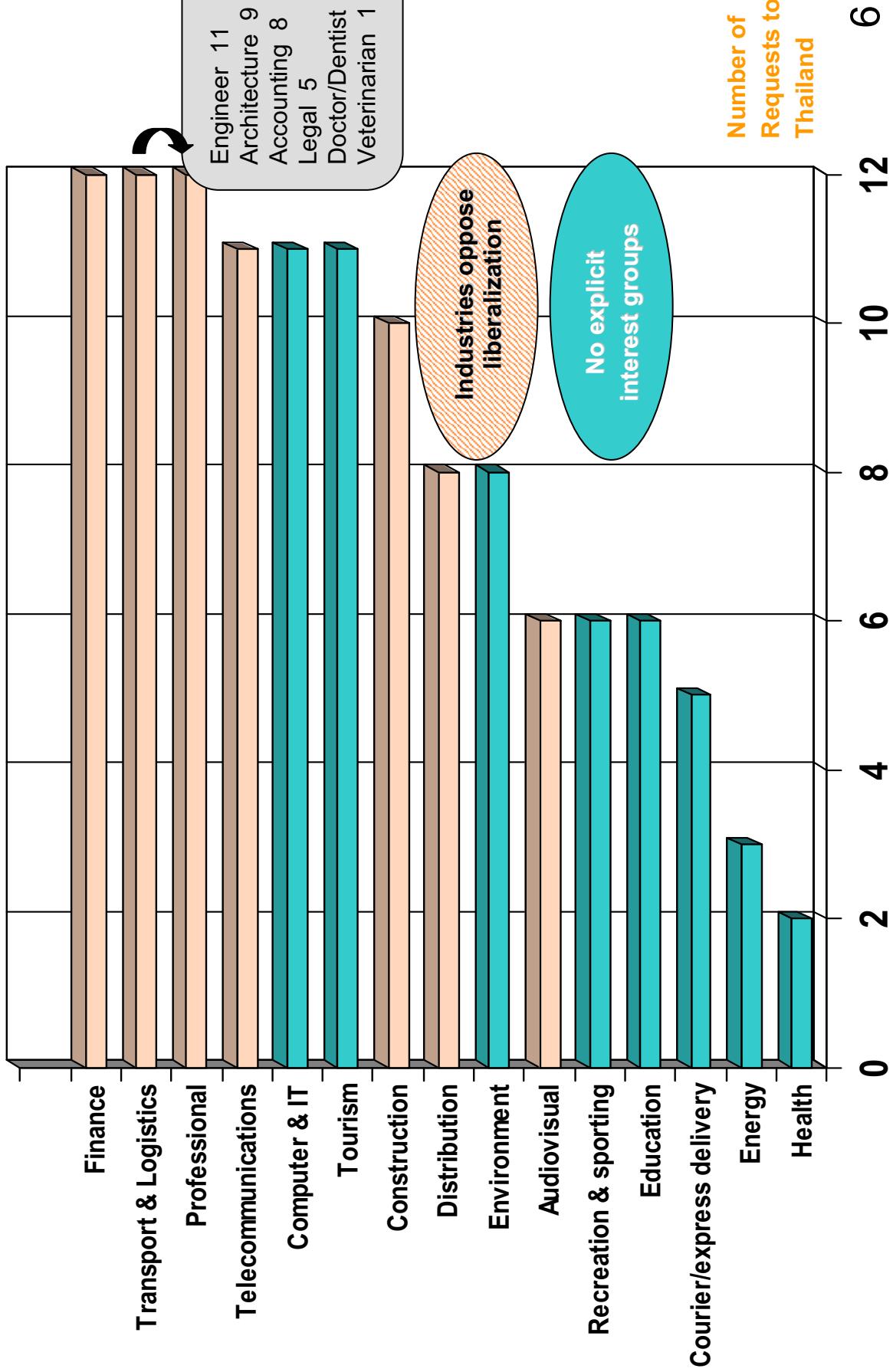
Thailand's services sector

- Services share in GDP about 46.7%, employing more than 12 million people (2004)
- 4.9% growth
- Services export around 600.5 billion Baht

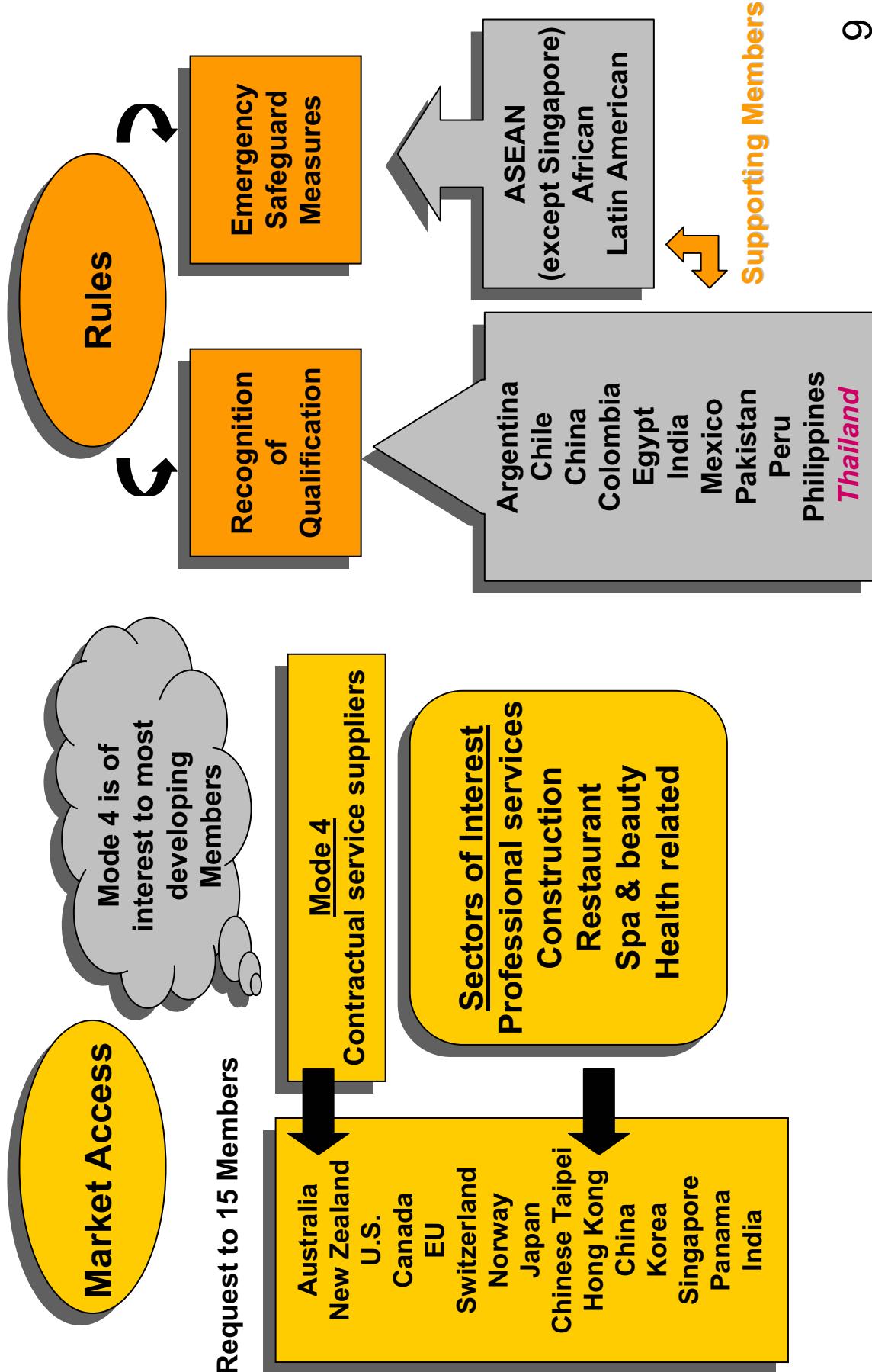
Services Limitation in Thailand



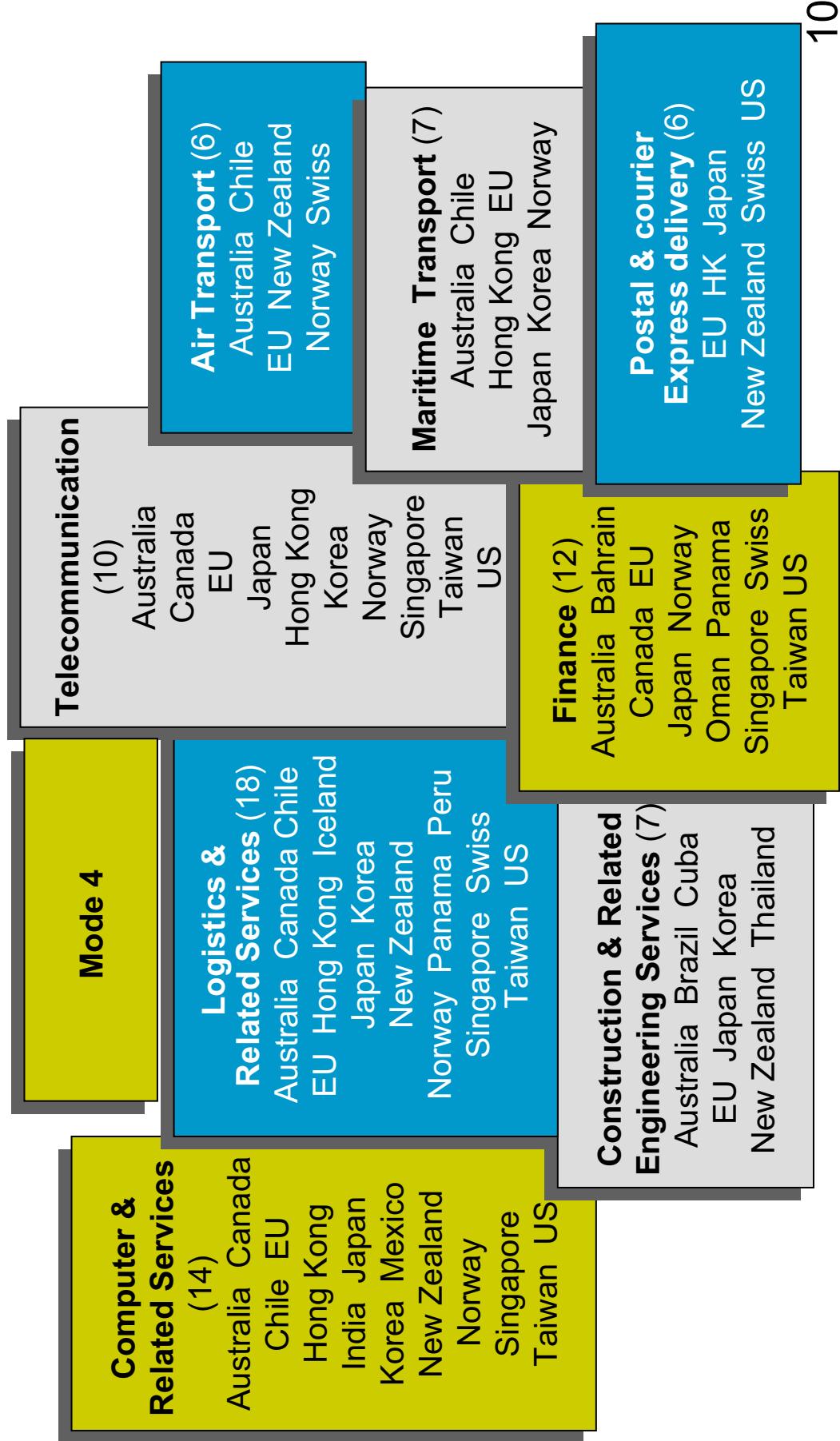
Request for Thailand to liberalize



Thailand's participation



Key services strategic groups



At the Crossroads

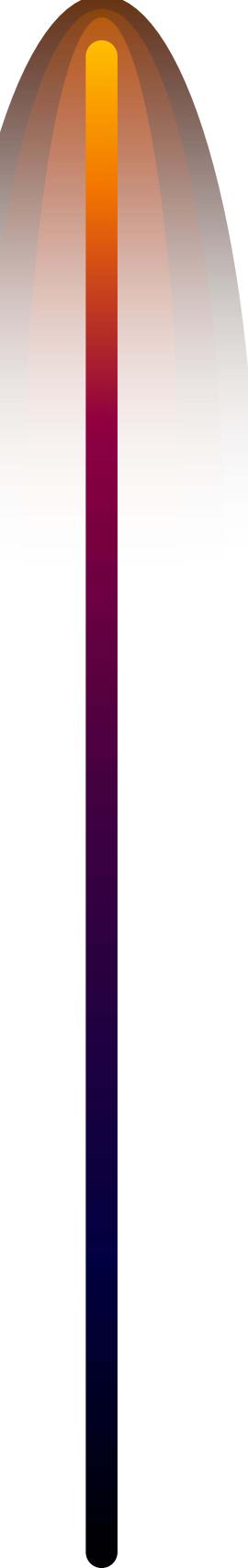
- WTO is temporarily suspended but trade in services continues to evolve. ➔ How should the rules (investment, safeguard, subsidy, etc.) governing services trade look like?
- Can – or should – we do anything on the method of negotiations?
- What should be the role of developing countries in the making of services rules?
- What are the needs of service suppliers in order to upgrade their competitiveness? What domestic regulations should be put in place?
- Which services can yield benefit from liberalization the most?

Observations from afar (1)

- Negotiation process should be reviewed
 - Plurilateral efforts should be more transparent to gain developing countries' trust and willingness to participate
 - Sectoral negotiating groups may be the answer – but should be balanced, covering interests of developed and developing countries
 - Developing countries should get together more to exchange information not only on negotiation progress but also domestic regulatory issues

Observations from afar (2)

- Interests on regulatory issues have increased
 - good for members; if “Right to Regulate” is well-understood, more developing countries will be less ambivalent to liberalisation
- Benefits of services liberalisation are not widely appreciated especially by suppliers – need more concrete evidence from academia
- Service liberalisation alone will not do the job
 - for countries – must have regulatory reform and increased competition as well



Thank you

Malaysia's Free Trade Area Initiatives

Mr. M. Supperamaniam
Former Ambassador of Malaysia to WTO

1. Introduction

Malaysia is an open economy, dependent on external trade for its economic growth. Malaysia's global trade is more than 180% of its GDP, reflecting the significance of external trade relations. Currently Malaysia ranks as the 18th largest trading nation in the world.

2. Hence Malaysia's trade policy objectives are aimed to maintain an open and favourable global trading environment to further enhance the country's economic growth and prosperity.

3. Malaysia formulates trade policies not just on a multilateral basis, but also on both regional and bilateral levels. In this context, Malaysia continues to assume a proactive role in the negotiations and work programme of the WTO with the view to contribute to the maintenance of open and strong rules based multilateral trading system. Concurrently, Malaysia is also engaged in efforts to negotiate free trade agreements with important trading partners on a bilateral and Asean basis. Bilateral trade and regional trading deals have emerged as an attractive strategy complementary to multilateralism.

Rationale and Approach to FTA Initiatives

4. Malaysian government's strong interest in FTA's has been spurred by the slow and uncertain progress in global trade negotiations under the WTO as well as to meet the increasing competition posed by her competitors who have already concluded or negotiating bilateral with major trading nations who are also Malaysia important markets. Moreover, such agreements offer scope for wider areas of economic and technical cooperation and prove to be effective conduits for linking trade and development goals of the countries involved.

5. Malaysia's objectives in FTA negotiations are to:

- seek better market access for goods and services;
- facilitate and promote trade, investment and economic development;
- enhance the competitiveness of Malaysian exporters; and
- build capacity in specific targeted areas through technical cooperation and collaboration.

6. In negotiating FTA's Malaysia is committed to the provisions of WTO. Its FTAs therefore cover substantially all trade, elimination of tariffs and do not raise trade barriers against non FTA partners.

7. Bilaterally, Malaysia has concluded an FTA Agreement with Japan and is currently negotiating with Pakistan, Australia, New Zealand and United States.

8. A Joint Study Group was established to undertake a feasibility study on a Malaysia-Chile FTA. On 17 November, on the margins of the APEC Summit in Hanoi, both Malaysia and Chile officially announced their decision to initiate negotiation for a Malaysia / Chile FTA. Chile is the third largest trading partner in Latin America. The courage of the FTA will be comprehensive, involving liberalisation of bilateral trade in goods and services and investment. The FTA if concluded, has the potential to increase trade investment and economic ties between the countries. The Agreement would also make Chile a gateway for Malaysia's exports to South America, which has a population of 550m and imports US\$298 billion worth of goods.

9. In January 2005, Malaysia and India agreed to conduct a joint feasibility study for a Malaysia-India Comprehensive Economic Cooperation Agreement (CECA). The Joint Study Group has completed the study and the report is currently being finalised. Based on the findings of the study, there is merit for both countries to negotiate a CECA.

10. At the regional-level, Malaysia is actively involved in ASEAN's initiatives to establish FTA's with other countries. These includes:

- ASEAN-China FTA;
- ASEAN-Korea FTA;
- ASEAN-India FTA;
- ASEAN-Japan FTA; and
- ASEAN-Australia-New Zealand FTA.

Progress Made on Bilateral FTA Initiatives

11. Malaysia-Japan

- Malaysia concluded its first bilateral FTA with the signing of the Japan-Malaysia Economic Partnership Agreement (JMEPA) in Kuala Lumpur on 13 December 2005. JMEPA is expected to enter into force in July 2006.
- JMEPA is aimed at strengthening economic and industrial cooperation and contribute towards enhancing and strengthening long-term bilateral trade and investment relations between the two countries.
- Under goods, both countries are committed to reduce/eliminate import duties progressively on substantially all agricultural and industrial products over a ten-year period.
- Malaysia to:
 - eliminate import duties on rubber products, food products, plastics, paper and downstream iron products over six to eight years; and

- reduce or eliminate import duty on chemicals and petrochemicals, iron and steel, paper products and automotive and automotive parts and components over a 10 years.
- Japan to:
 - maintain duty free treatment on 6,613 industrial products, tropical fruits and forestry products; and
 - reduce and eliminate duties on fishery products, rubber and leather footwear, and cocoa products over eight years.
- Under trade in services, both countries to accord improved market access compared to commitments under the WTO in selected sectors. The sectors are business and professional services, computer and related services, communication services, education services, tourism and related services and health related services.
- In the area of investment, the agreement provides for the expansion and facilitation of freer cross-border investment between the two countries. These include commitments under liberalisation and protection of investment, and facilitation and promotion of cross border investment flows.
- JMEPA also includes cooperation activities to further enhance Malaysia's capacity in selected sectors. Japan will assist Malaysia in developing the automotive sector, including the automotive parts industry. Projects involving capacity building in the automotive sector include:
 - Automotive Technical Expert Assistance Programme;
 - Mould and Die Center in Malaysia;
 - Vehicle Type Approval;
 - Automotive Skill Training Centre in Malaysia;
 - Automotive Skill Training Programme in Japan;
 - Components and Parts Testing Center in Malaysia;
 - Automotive Business Development Programme;
 - Export Promotion;
 - and
 - Consultation on Joint Venture arrangements.
- Cooperation projects in other areas include:
 - development of Mutual Recognition Arrangements on testing and conformity assessment procedures. This will reduce costs and improve market access for exports from Malaysia subjected to Japanese standards;
 - cooperation, technical assistance and exchange of information on sanitary and phytosanitary measures imposed on agricultural products;
 - education and human resource development;
 - and
 - small and medium industries development;

- The FTA will be implemented over a 10 - year period to enable domestic industries to adjust to gradual increase in competition.

12. Malaysia-Pakistan FTA

- Malaysia and Pakistan began negotiations on a Free Trade Agreement in April 2005.
- An Early Harvest Programme (EHP) was implemented beginning 1 January 2006.
- Under the EHP, Malaysia has offered 114 products (covering yarn, clothing and textile products) and Pakistan has offered 125 products (covering electrical appliances and machinery, plastics products, chemical products, rubber and timber products). Tariffs on these products have been reduced to 0-5 per cent.
- The FTA negotiations with Pakistan are comprehensive and cover liberalisation of goods and services, investment and cooperation activities. The agreement is expected to be concluded for implementation in early 2007.

13. Malaysia-Australia / Malaysia-New Zealand

- Currently Malaysia is negotiating with Australia and New Zealand separately for a comprehensive FTA covering liberalisation of trade in goods, services and investment, and cooperation activities.

14. Malaysia-US

- Malaysia and US jointly announced the commencement of formal FTA negotiations on 8 March 2006 in Capitol Hill, Washington DC.
- Three rounds of negotiations have been held so far. Two more formal sessions have been scheduled to complete negotiations before the expiry of the Trade Promotion Authority on 1 July 2007.
- Several Working groups have been established to handle negotiations covering on a range of issues including trade in goods, services, movement Government procurement, E-commerce, Environment, Competition policy, intellectual region and technical barrier to trade.

Progress Made on ASEAN FTA Initiatives

15. ASEAN-China

- Under the Early Harvest Programme (EHP) implemented since 1 January 2004, all tariffs on EHP products have been fully eliminated on 1 January 2006 for ASEAN-6 and by 2010 for CLMV countries.
- The EHP consists of:
 - unprocessed agriculture products in Chapters 1-8 of the Customs Harmonised System (HS);
 - and
 - specific manufactured products agreed between individual ASEAN countries and China.
- Malaysia's EHP list comprises 590 products, of which:
 - 503 are unprocessed agriculture products;

- and
 - 87 are specific manufactured products.
- Trade in Goods (TIG) Agreement was implemented on 20 July 2005.
- Agreement on Trade in Services and Investment being negotiated and scheduled for completion in 2006.

16. ASEAN-Korea FTA

- The Framework Agreement and the Agreement on Trade in Goods has been signed during the ASEAN Summit in Kuala Lumpur, 12-13 December 2005.
- The modality for trade in goods (ASEAN-6):
- Normal Track:
 - 80% of products by 2009;
 - and
 - 90% by 2012.
- ASEAN and Korea are expected to complete negotiations on investment and services in 2006.

17. ASEAN-India

- The Framework Agreement on Comprehensive Economic Cooperation between ASEAN and India was signed in October 2003.
- The Agreement provides for the:
 - establishment of an FTA in Goods for ASEAN and India by 2011 and 2016 for the Philippines and Cambodia, Laos, Myanmar and Vietnam;
 - and
 - progressive liberalisation for trade in services and investments regimes;
- ASEAN and India are currently negotiating the modalities for tariff reduction/elimination.

18. ASEAN-Japan FTA

- The Framework for Comprehensive Economic Partnership (CEP) between ASEAN and Japan was signed on 8 October 2003 in Bali, Indonesia. The CEP provides for:
 - liberalisation of trade in goods, services and investment by 2012;
 - facilitation and promotion of trade;
 - and
 - implementation of economic cooperation activities.
- ASEAN and Japan are continuing discussion on the elements in the CEP, including scope, structure and linkage between bilateral FTAs and the ASEAN-Japan CEP.

19. ASEAN-Australia and New Zealand

- ASEAN-Australia and New Zealand have initiated discussions towards finalisation of the Agreement on FTA by end-2006.

- Negotiations have commenced in the areas of goods, rules of origin, investment, services, cooperation activities and legal and institutional issues.
20. ASEAN-EU
- ASEAN and EU have established a Vision Group to enhance economic cooperation.
The ASEAN-EU Vision Group has completed its study on the potential benefits of an FTA between the two regions. A formal announcement on the FTA would be made by the end of 2006.

Thailand's Position towards FTAs

Lawan Thanadsillapakul¹

**School of Law, Sukhothai Thammathirat Open University
Thailand**

Introduction

In the past decades, it is clear that the global trading system has become much more liberalized and the world economies have become increasingly integrated. On the one hand, this is due to the successive rounds of trade negotiations under the auspices of the World Trade Organization (WTO), which have resulted in the progressive liberalization of both traditional and new sectors, such as trade in agriculture and services, as well as trade-related investment measures and intellectual property rights protection issues, on the other hand, to the establishment of regional trading arrangements and free trade agreements, or RTAs and FTAs.

The surge of RTAs and FTAs

Since the latter half of the 1990's, due in part to the slow down of the WTO trade liberalization processes, it is evident that there has been an exponential increase in the number of RTAs and FTAs in every part of the world. Especially, after the failure of WTO Meeting at multilateral level in Cancun, Mexico, industrial countries including some developing countries have attempted to initiate free trade agreement to promote international trade and have pushed some items² in the agreement, which cannot be achieved at multilateral level to be able to reach its goal at bilateral and regional level. Thailand is not exception. Thailand is active in negotiation many FTAs with its' economic/trading partners both at regional³ and bilateral⁴ level. Thailand has already signed free trade agreements with China, India, Bahrain, Peru and Australia and is on the process of negotiation with the US, Japan and other countries, especially the EU.

Global Trend of the creation of RTAs and FTAs

The surge of FTAs and RTAs has been seen in various parts of the world. In the Americas, the North America Free Trade Agreement, or NAFTA, was formed in

¹ Professor of Law, Ph.D., LL.M., Director, The Institute for International Economic and Business Law Studies, Sukhothai Thammatirat Open University.

² . This can be clearly seen from the FTA texts proposed by the US, which is a FTA template based on the US FTA model, to its' trading partners, especially the investment chapter, trade in service chapter and IP chapter.

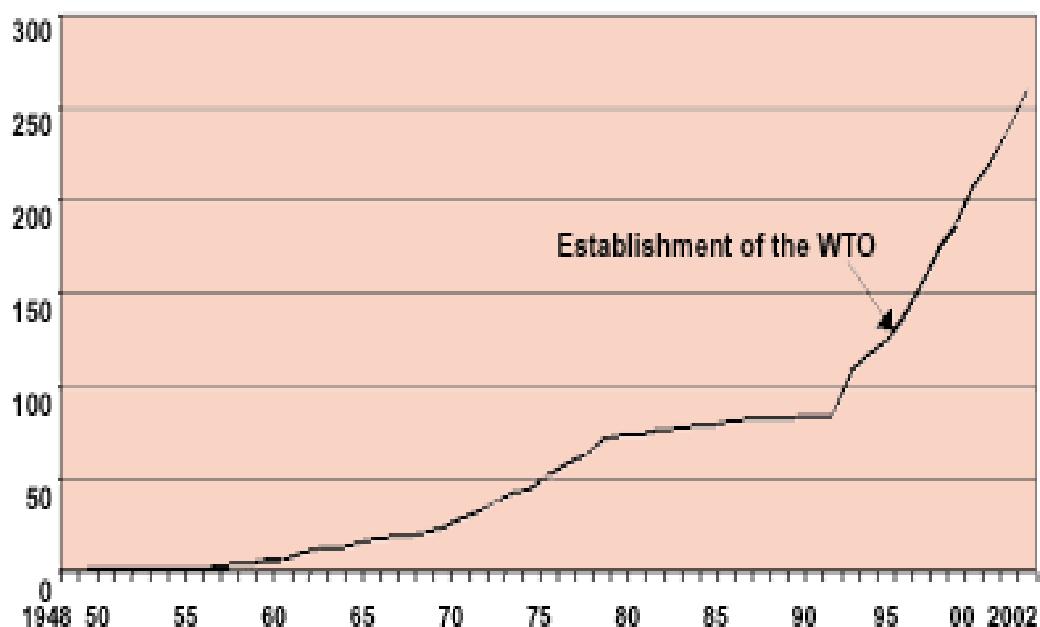
³ . For example, Thailand is a member of ASEAN and APEC. In both regional organizations, there are many economic integration programs launching for attaining the objectives of liberalization, for example the ASEAN Investment Area, the ASEAN Framework Agreement on Trade in Services etc.

⁴ See the current Thai FTAs partners.

1994, and now 34 countries in that region are moving ahead with the creation of the Free Trade Area of the Americas, or FTAA. Likewise, at the beginning of 2004, we all saw the successful enlargement of the European Union from 15 to 25 countries. In the Asian region, China, Japan, Korea, and India have also begun a series of FTA negotiations with their major trading partners. And beside, the ASEAN Free Trade Area, or AFTA has been implemented. Particularly, the launches of ASEAN Investment Area or AIA, the ASEAN Framework Agreement on Trade in Services or AFAS, and the new ASEAN Industrial Cooperation Scheme or AICO have been complementarily implemented along with the AFTA⁵. All the ASEAN countries are now engaging in the process of establishing an FTA with China, India, and Japan. Not only has the initiation of RTAs and FTAs been implemented in Europe, America and Asia but also in Africa Australia and Latin America. As a consequence, the WTO has reported that the numbers of these arrangements have already exceeded 300 by 2005⁶, of which up to 70 per cent are in the form of bilateral FTAs.

. Evolution of Regional Trade Agreements in the world, 1948-2002

Number of RTAs



Source: WTO Secretariat

⁵ ASEAN Secretariat, also see Lawan Thanadsillapakul (2000) Open Regionalism in ASEAN. Washington D.C.: The World Bank.

⁶ WTO Secretariat

Thailand and FTAs

As a strong supporter of free and fair trade, Thailand has been an active participant in the global trade liberalization process through the various regional and international fora, such as ASEAN, the Asia-Europe Meeting (ASEM), the Asia Pacific Economic Cooperation (APEC), the WTO, and is now in the process of developing free trade arrangements and closer economic cooperation with countries across the world.

Thailand has concluded an FTA with Australia at the end of 2004 and began to implement the Agreement on the 1st of January 2005. Thailand also signed an FTA Agreement with New Zealand in April 2005 so that both countries can become an FTA by 2010, the content of which is similar to the agreement with Australia. The Agreement with Peru was also signed so that Thailand and Peru started the implementation process. The first phase of the FTA Agreement with India, or the so called Early Harvest Agreement, in 82 products started on 1 September 2005, and Thailand is currently negotiating the details of the full FTA with India. Thailand and Bahrain are also FTA parties. Thailand is now working with Japan on free trade arrangements: The Japan – Thailand Economic Partnership (JTEP). Thailand has begun the FTA talks with the U.S. in June 2004⁷. Furthermore, Thailand has signed a Framework Agreements with the BIMSTEC countries so as to establish an FTA by 2015/17, and the formal consultations with EFTA has commenced by mid-2005. Most recently, ASEAN and EU have completed the feasibility study on the possibility of FTA negotiation between the two regions. It has been expected that the start of the ASEAN – EU FTA negotiation would begin in March 2007⁸.

Moreover, apart from the establishment of AFTA, Thailand is now working closely with other ASEAN members, at a regional level, to establish a free trade area with its major trading partners, such as India, China, Japan, Korea, and the CER or Australia and New Zealand. The negotiations between ASEAN and each of these countries are expected to be concluded within 2 years in order to become full fledged FTAs by 2015 or at the latest 2020⁹.

The Initiation of FTAs in ASEAN with the US¹⁰

The United States is pursuing regional and bilateral trade initiatives that will reinforce the global efforts in trade and investment liberalization. In 2002, President Bush has announced an important new trade initiative with the Association of Southeast Asian Nations (ASEAN) - the Enterprise for ASEAN Initiative (EAI). The United States believes that a strong U.S.-ASEAN relationship is a force for stability and development in the Southeast Asian region. The EAI will enhance already close U.S. ties with ASEAN.

⁷ Thailand and the US have negotiated the FTA for 6 rounds starting in 2004, which have been taken place in Honolulu, Hawaii, USA for the first and second round, in Bangkok, Thailand, and Chiangmai respectively for the 3-6 rounds. The FTA negotiation was pending due to the Coup D'Etat in Thailand, and the Thai – US FTA negotiation was postponed until the Thai government will have a formal legitimate government.

⁸ Thanisetthakij, 5-7 October 2006.

⁹ Department of Trade Negotiation, the Ministry of Commerce, Thailand.

¹⁰ Based on the US State Secretary's report.

The EAI offers the prospect of bilateral free trade agreements (FTAs) between the United States and ASEAN countries that are committed to economic reforms and openness. The goal is to create a network of bilateral FTAs, which will increase trade and investment, tying more closely together the US - ASEAN economies and futures. The EAI initiative will encourage both bilateral and regional liberalization, and help APEC reach the Bogor goals for achieving free and open trade and investment in the Asia Pacific region.

The Enterprise for ASEAN Initiative (EAI): A Roadmap to FTAs

Under the EAI, the United States and individual ASEAN countries will jointly determine if and when they are ready to launch FTA negotiations. The EAI allows ASEAN countries the flexibility to move at their own speed toward an FTA with the United States. Therefore, the objectives of the creation of the Enterprise for ASEAN Initiative (EAI) are to pave the way for ASEAN member countries to be ready in FTA negotiations with the US. The process of FTA negotiation between the US and ASEAN countries would be based on the following strategies.

- The United States would expect a potential FTA partner to be a member of the World Trade Organization (WTO), and to have concluded a Trade and Investment Framework Agreement (TIFA) with the US -- thus laying the groundwork for future FTA negotiations.*
- The United States will continue to support the efforts of the three ASEAN members (Cambodia, Laos, and Vietnam) that do not yet belong to the WTO to complete their accessions successfully.*
- The United States has TIFAs with Indonesia and the Philippines -- and has signed one with Thailand.*
- FTAs with ASEAN countries will be based on the high standards set in the U.S.-Singapore FTA.*

The Enterprise for ASEAN Initiative

The Enterprise for ASEAN Initiative, which was announced in October 2002, is designed to strengthen the US economic ties with the ASEAN countries, which include Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. With the two-way trade of nearly \$120 billion annually, the 10-members ASEAN group already is the U.S.' fifth largest trading partner collectively. The region represents about 500 million people with a combined gross domestic product of \$737 billion¹¹.

Under the EAI, the United States offered the prospect of bilateral free trade agreements with ASEAN countries that are committed to economic reforms and openness inherent in an FTA with the United States. Any potential FTA partner must be a WTO member and have a TIFA with the United States. The United States now has TIFAs with Indonesia, Philippines, Thailand, Brunei Darussalam and Malaysia. The U.S. goal is to create a network of bilateral FTAs with ASEAN countries.

Trade and Investment Framework Agreements

¹¹ See the US State Secretary's report.

A Trade and Investment Framework Agreement (TIFA) is a consultative mechanism for the United States to discuss issues affecting trade and investment with another country. TIFAs have been negotiated predominantly with countries that are in the beginning stages of opening up their economies to international trade and investment, either because they were traditionally isolated or had closed economies. In recent years, the United States has concluded many TIFA's including with the Central Asian countries: Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan, Thailand, Brunei, Saudi Arabia, Algeria, Bahrain, Malaysia, Qatar, United Arab Emirates, Kuwait, Yemen, Pakistan, Afghanistan, Mongolia, Indonesia, The Philippines, Sri Lanka, Tunisia, Turkey, Nigeria, Ghana, South Africa, West Africa Economic and Monetary Union, Common Market for Eastern and Southern Africa (COMESA), and Oman. Although TIFAs are non-binding, the US hopes that they can yield direct benefits by addressing specific trade problems and by helping trading partners develop the experience, institutions and rules¹² that advance integration into the global economy, creating momentum for liberalization that in some cases can lead to a Free Trade Agreement (FTA).

Free Trade Agreements

The United States pursues comprehensive free trade agreements with like-minded trading partners, to provide broad liberalization of trade relations in goods, services, intellectual property, investment and other areas. These regional and bilateral FTAs are intended to complement U.S. global trade liberalization objectives and add momentum to the global drive for open markets. The agreements are consistent with World Trade Organization (WTO) rules and cover substantially all trade between the parties, so as to avoid distortions to global trade. But they allow like-minded partners to go beyond WTO requirements, the so called "GATT Plus", offering stronger protections for investors and intellectual property rights, for example, and incorporating obligations to uphold internationally recognized core labor standards and to protect the environment. All these mechanism have been facilitated by the passing of the Bipartisan Trade Promotion Authority Act.¹³

¹² . The new US FTA model has been designed to liberalize trade and investment, especially to protect the US investment and investor in a host country without host country's governmental intervention based on the mutual combination of the National Treatment and Most-Favored- Nation Treatment as well as to highly protect IP and environment. The New US FTA model is very similar to the MAI aiming at the establishment of a very high standard of rules and regulations. Also, the FTA texts seek for the investor- state dispute settlement mechanism through arbitration process.

¹³ In passing the 2002 Bipartisan Trade Promotion Authority Act, Congress recognized that stable trading relationships promote security and prosperity and foster world peace by binding nations together through a series of mutual rights and obligations. FTAs also contribute to U.S. economic strength by leveling the playing field for U.S. businesses, spurring productivity and competitiveness, creating well-paying export-related jobs and providing more choices and better value for American consumers.

Since Congress gave the President Trade Promotion Authority (TPA) in 2002, the United States has embarked on an unprecedented program of free trade negotiations with selected trading partners. TPA is scheduled to expire on June 30, 2007 with a possibility of extension. Free Trade Agreements (FTAs) are in force with Israel (1985), Canada and Mexico through the North America Free Trade Agreement (NAFTA - 1993), Jordan (2000), Chile (2004), Singapore (2004), Australia (2005), Morocco (2006) and El Salvador, Honduras, and Nicaragua (2006) through the Central America-Dominican Republic Free Trade Agreement (CAFTA). As of April 2006, FTA negotiations had been concluded but were pending entry into force with Costa Rica, the Dominican Republic, Guatemala, Colombia, Peru, Oman, Bahrain. As of the same date, FTA negotiations were under way or planned with Ecuador, Panama, the United Arab Emirates, the Southern African Customs Union (SACU), Thailand, South Korea, and Malaysia. Talks are also underway to conclude a Free Trade Area of the Americas (FTAA), covering the entire Western Hemisphere.

The foregoing initiatives provide ASEAN countries' opportunity and framework to conclude FTA with the US, and thus oblige ASEAN members to be well prepared of their economies and economic infrastructure as well as legal and institutional framework being ready for negotiating FTA with the US.

FTA Potential Benefits and Costs for Thailand¹⁴

The basic reason that Thailand, like a majority of countries, have been actively engaged these trade liberalization efforts is due to the simple fact that free trade enhances the opportunity for economic growth and development.

For instance, with the removal of tariffs and non-tariff measures and thus the creation of a more open trading environment, FTAs can greatly expand Thailand's trade and exports, and thus growth opportunities. Thai companies, especially those within the manufacturing sector, can also expand and diversify their resource and production base and therefore gain the economies of scale, boost their productivity, and obtain specialization in order to develop its country and economy. In this connection, the increase competitive level from the more open business environment can also help to ensure the better use and allocation of existing resources, as well as encourage the restructuring and reform process both in the private and public sectors so as to create a more favorable business environment. Similarly, an open trade policy can also effectively raise the attractiveness of a country to foreign direct investment, thereby helping to inject greater capital and know-how into the economy which are vital ingredients to improve efficiency and promote growth. Furthermore, with greater exchanges and better understanding through the creation of FTAs, Thailand will not only become better acquainted with partner countries which is the basis for a long-term partnership but also develop joint cooperation to raise international competitiveness and stature with in the international trading fora.

However, this is not to say that there are no costs associated with freer trade. With the more open market, for example, Thailand is likely to be much more vulnerable to outside forces and global instabilities. With freer trade, Thai local companies will also encounter an increasing level of competition, which could result

¹⁴ . Based on the report of the Department of Trade Negotiation, The Ministry of Commerce, Thailand.

in the crowding out of less competitive firms and industries. And the political, social, and cultural repercussions of a more open environment could also be high. Nonetheless, it is clear these negative ramifications can be effectively dealt with through proper preparations, adjustments, reforms, and through joint efforts and intensify cooperation from all sides. More importantly, the lost of opportunities for not participating in this globalization and trade liberalization process can be extremely high - not only will Thailand's trade and market opportunities be severely limited, or even diminish, but the country will also be shutting itself out from an enormous pool of global resources and capitals needed for development.

Thailand's FTA Negotiating Strategy

-FTA should be comprehensive in scope covering trade liberalization in goods, services, and investment, as well as the elimination of non-tariff barriers and cooperation to facilitate trade and development.

-FTA should be based on reciprocity by taking into account the distinct levels of economic development of each country, and flexibility, such as a longer liberalization period, should be granted to accommodate necessary adjustments.

-FTA should be consistent with WTO rules and conditions, which indicate that FTA must cover substantially all the trade in goods and services between the FTA partners.

-FTA should incorporate mechanisms to prevent/annul the negative effects on domestic industries, such as Anti-Dumping (AD) and Counter-vailing Duties (CVD) measures, Safeguards, and Dispute Settlement Mechanism (DSM)

FTA Preparations and Adjustments

In order to ensure that Thailand's national interests are protected and Thai people and businesses will fully benefit from the FTAs, Thailand has undertaken numerous steps and adopted several measures, which include the followings:

-The establishment of FTA Working Groups consisting of the Negotiation Committee, which is made up of FTA Chief Negotiators, the Steering Committee on International Trade Negotiations, which consists of experts from the public and private sector to coordinate and serves as a think-tank on FTA matters, and the FTA Supporting Committee, which oversees the implementation, adjustment, and restructuring processes of the Thai economy.

-The reform and restructuring of the public sector so as to facilitate and lower the costs of trade and businesses, such as the reforms of tax and tariff structures, the simplification of customs procedures, and the expansion of finance and credit facilities.

-The development of infrastructures to facilitate trade, especially in the area of land, sea, and air transportation, as well as information and data to adjust to the new trade and market conditions.

-The strengthen small and medium enterprises (SMEs) and the grassroots economy through research and development, training, and marketing and skill development in order to raise the productivity, efficiency, and international competitiveness of Thai people, products, and economy.

-The promotion of trade and economic relationships between Thailand and FTA counterparts, such as through establishment of joint business councils, working committees, official visits, and trade fairs and exhibitions.

-The promotion of a modern productive and innovative workforce through training and investment in knowledge, skill, and entrepreneurship development, and e-literacy.

-The establishment of social safety nets, such as job training and retraining, alternative skill development, the upgrading of the educational systems and facilities and a social and health care system.

Some concerns on FTAs

The enforced free trade agreements that Thailand has, for example, with China and India at the moment take effect on the decrease of tariff and the start of new markets. But if Thailand follows the FTA framework that the United States of America has with Singapore and Chile, it will not only allow free investment but also further expansion of intellectual property rights to life forms and culture led to its falling into commercial firm hands as evidenced in the US free trade agreements with Singapore and Chile. Concerning this vital matter, free trade agreement would tremendously affect majority people such as agriculturists, consumers, retailers and others. More importantly, it leaves the problem in touching on the state sovereignty issue¹⁵.

As appeared and appeared-to-be in the near future, the procedure of decision-making on free trade agreement has been centralized and proceeded by the government and powerful private interest groups which have close relations with the government. As a consequence, there is the tendency that the agreement would negatively have an impact on the wide-ranged groups of people of the country.

On the grounds of the foregoing, Thai people, academic institutes, NGOs including governmental institutes such as House of Parliament need to play their roles together in a study on the effects of Free Trade Agreement (FTA). In connection with this, it is also essential that the suggestions should be able to push the free trade agreement to genuinely benefit to majority people that the agreement should be inured domestically and should, at the same time, seek for its collaboration and supports internationally.

Current FTAs and RTAs with Thailand

Currently, Thailand has and has negotiated the following FTAs:

Thailand - Australia CER-FTA

Thailand - Peru Free Trade Agreement

Thailand - New Zealand Closer Economic Partnership: CEP

Thailand - Bahrain Free Trade Agreement

Thailand - India Free Trade Agreement

ASEAN - China Free Trade Agreement, which Thailand is a member of ASEAN

BIMST-EC (Bangladesh – India–Myanmar–Sri Lanka–Thailand Economic Cooperation)

European Free Trade Association: EFTA

Japan - Thailand Economic Partnership (JTEP)

¹⁵ . For instance, the negotiation process of FTA with the US and other countries cannot conform with the Thai Constitution due to the fact that all the FTA texts are utmost confidential. Therefore, it cannot be investigated and studied by the public and related sector affected by the FTA.

Conclusion

There is no denying that Thailand, like many other countries, will encounter difficulties and obstacles as the country proceeds with the restructuring and adjustment processes so as to keep pace with the rapid changes of the more open trading environment. But it is also clear that, with appropriate adjustments, there can be considerable gains both in terms of increasing resource base and expanding market opportunities and in terms of acquiring the needed technological know-how and expertise needed to further develop and prosper, provided that the FTA texts are fairly elaborated and mutually agreed based on the equal bargaining power.

This being the case, Thailand will continue to intensify all efforts so as to upgrade domestic resources and industries and prepare for the challenges ahead. Thailand will also remain fully committed to the strengthening of economic cooperation and partnership with all trading partners and actively participate in the international trading fora in order to create a free and fair global trading system. Indeed, it is through this dual track approach that Thailand can assure itself of continual growth and development and succeed in fast-tracking and securing Thailand's position within the global arena. The important concerns for FTAs and RTAs are the fair and equitable legal and institutional framework for implementing such economic agreements, especially the texts of the agreements and the negotiation process that need to be in conformity with the Constitution and other procedure: the legitimacy of RTAs and FTAs negotiation.

Note:

- An Early Harvest (EH) Agreement is a partial FTA on groups of products which the FTA partners have agreed to liberalize first and continue with negotiations on the rest of their products.
- BIMSTEC or the Bay of Bengal Initiative for Multi-sectoral Technical and Economic Cooperation consist of Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka, and Thailand.
- EFTA or European Free Trade Area consists of Norway, Switzerland, Iceland, and Liechtenstein.
- MERCOSUR countries are Brazil, Argentina, Paraguay, Uruguay, and Chile

Notification of the creation of RTAs under GATT/WTO
As of 1st March 2006

<u>NOTIFICATIONS OF RTAs IN FORCE TO GATT/WTO</u>			
	Accessions	New RTAs	Total
GATT Art. XXIV (FTA)	4	120	124
GATT Art. XXIV (CU)	5	6	11
Enabling Clause	1	21	22
GATS Art. V	2	34	36
Total	12	181	193

Source:WTO
 Secretariat

<u>EXAMINATION PROCESS</u>				
Status	WTO provision			Grand Total
	Enabling Clause	GATS Art. V	GATT Art. XXIV	
Examination not requested	19	1	5	25
Factual examination not started	0	10	45	55
Under factual examination	1	11	24	36
Factual examination concluded	0	11	39	50
Consultations on draft report	0	3	4	7
Report adopted	2	0	18	20
Grand Total	22	36	135	193

Current Status of Regional Trade Agreements and bilateral FTAs

Lawan Thanadpillapakul

The motives for international economic integration

- To enhance efficiency in production made possible by increased specialization in accordance with the law of comparative advantages;
- To increase production level due to better exploitation of economies of scale made possible by the increased size of the market;

The motives for international economic integration

- To improve international bargaining position made possible by the larger size leading to better term of trade;
- To enforce changes in economic efficiency brought about by enhanced competition; and changes effecting both the amount and quality of the factors of production due to technological advance;

The motives for international economic integration

- Factor mobility across the borders of member nations;
- The coordination of monetary and fiscal policies;
- The goal of full employment, higher rates of economic growth and better income distribution becoming unified target.

Legal frameworks governing foreign investment

- Domestic Laws and regulations
- International Law
- International Codes of conduct, Guidelines
- Treaty Regime (BITs, Regional Treaty, Multilateral Treaty)
- WTO Rules and Regulations relating to investment
- Special regime for investment liberalisation
- Unilateral liberalization of investment

Legal frameworks governing FDI at the international sphere

- **International Law**
 - traditional recognized absolute State sovereign rights
 - Diplomatic protection
 - State responsibility
 - Minimum international standard of treatment
- **International Codes and Guidelines, soft law**
- **The role of WTO**
 - Multilateral Investment Agreement
 - General Agreement on Trade related-investment measures (TRIMs)
 - The General agreement on trade in services (GATS)
 - General Agreement on Trade-related intellectual property rights (TRIPs)
- **Regional economic integration : EU, NAFTA, ASEAN (regional level)**

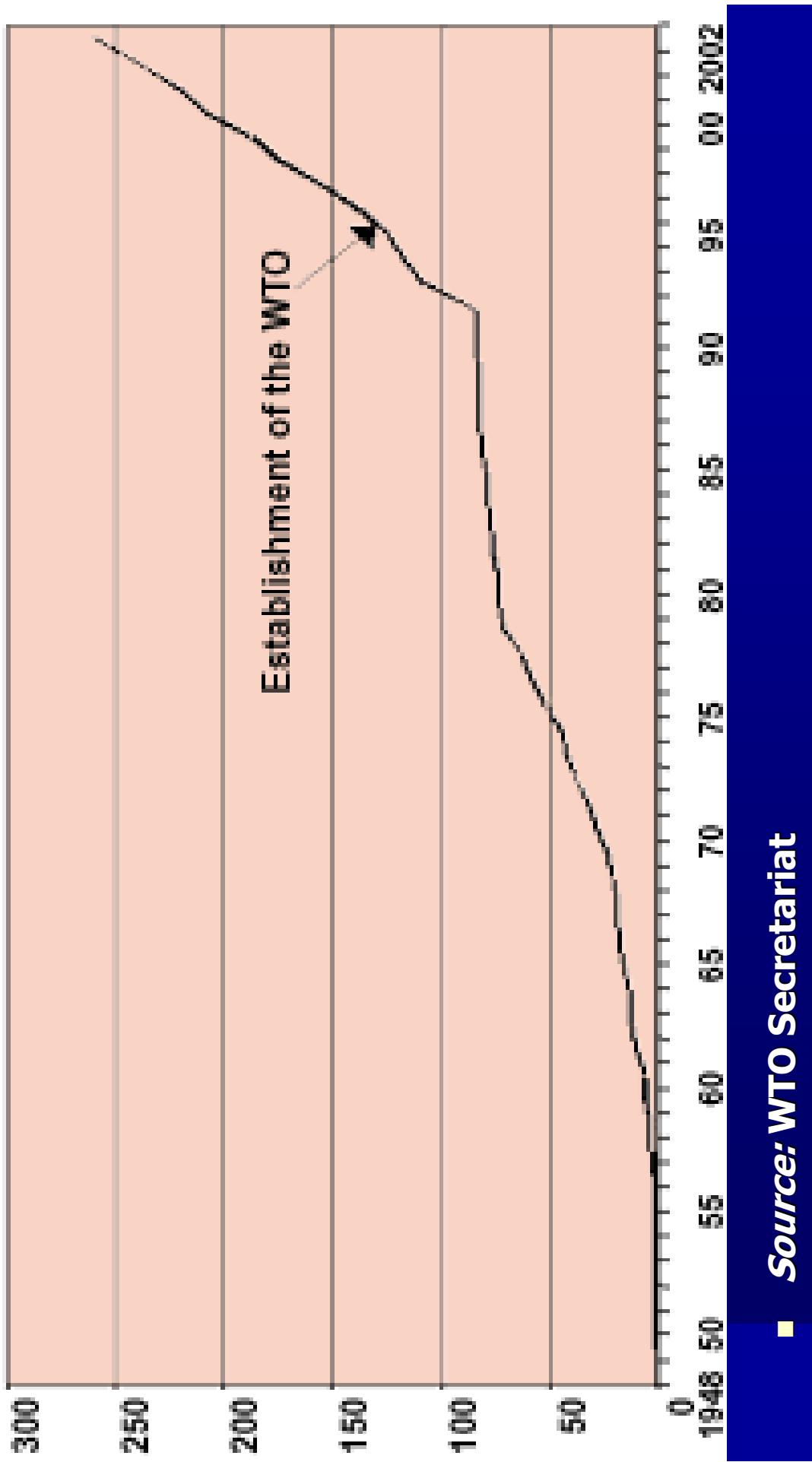
Global Economic Situations

- The global trading system has become more liberalized and increasingly integrated
- Progressive liberalization of both traditional and new sectors : Agriculture, Services, Investment, IP
- The establishment of regional trading arrangements and free trade agreements, or RTAs and FTAs

The surge of RTAs and FTAs

- Since the latter half of the 1990's, due in part to the slow down of the WTO trade liberalization processes, it is evident that there has been an exponential increase in the number of RTAs and FTAs in every part of the world

Evolution of Regional Trade Agreements in the world, 1948-2002



Regional Trade Arrangement

- The North America Free Trade Agreement, or NAFTA, was formed in 1994, and now 34 countries in that region are moving ahead with the creation of the Free Trade Area of the Americas, or FTAA

Regional Economic Integration in Europe

- The successful enlargement of the European Union from 15 to 25 countries

Initiative FTA in Asia

- In the Asian region, China, Japan, Korea, and India have also begun a series of FTA negotiations with their major trading partners

Initiative FTA in Asia

- The establishment of ASEAN Free Trade Area (AFTA)
- The ASEAN countries individually are now engaging in the process of establishing an FTA with China, India, and Japan

Global Trend of RTAs and FTAs

- All these arrangements will exceed 300 by 2005, of which up to 70 per cent will be in the form of bilateral FTAs.

Thailand and FTA

- Thailand is a strong supporter of free and fair trade
- Thailand thus has also been an active participant in the global trade liberalization process through the various regional and international fora

Thailand and regional and international fora

- ASEAN
- The Asia-Europe Meeting (ASEM),
- The Asia Pacific Economic Cooperation (APEC),
- The WTO, and is now in the process of developing free trade arrangements and closer economic cooperation with countries across the world

Thai FTA with Trading Partners

- Thailand - Australia CER-FTA
- Thailand - Peru Free Trade Agreement
- Japan - Thailand Economic Partnership (JTEP)
- Thailand - New Zealand Closer Economic Partnership: CEP
- Thailand - US Free Trade Agreement

Thai FTA with Trading Partners

- Thailand - Bahrain Free Trade Agreement
- Thailand - India Free Trade Agreement
- ASEAN - China Free Trade Agreement
- BIMST-EC (Bangladesh – India –
Myanmar – Sri Lanka – Thailand
Economic Cooperation)
- European Free Trade Association: EFTA

The new US FTA Model

- Australia Free Trade Agreement
- Bahrain Free Trade Agreement
- Chile Free Trade Agreement
- Central American - Dominican Republic Free Trade Agreement
- Israel Free Trade Agreement
- Jordan Free Trade Agreement
- Morocco Free Trade Agreement
- Oman Free Trade Agreement
- Panama Free Trade Agreement
- Singapore Free Trade Agreement
- South African Customs Union Free Trade Agreement

The US FTA under negotiation

- Thailand Free Trade
Agreement

- Republic of Korea Free
Trade Agreement

- Malaysia Free Trade
Agreement

The Impacts of FTA on Sovereignty

- ผลกระทบต่อระบบวินิพัฒน์ (Legislation)
- ผลกระทบต่อระบบตุต្តาการ (Judicial System)
- ผลกระทบต่อการบังคับใช้กฎหมาย (Enforcement of Law and Regulation)
- ผลกระทบต่อระบบการบริหารราชการแผ่นดิน (Administrative System)
- ผลกระทบต่ออำนาจหน้าจัดให้เขตแดนทางด้านที่ดิน (Territorial Jurisdiction)
- ผลกระทบต่ออำนาจศาลอาญาจักรรัฐเห็นอนุคติทางด้าน (Personal Jurisdiction)

The Impacts of FTA on Environment

- ผลกระทบต่อสิ่งแวดล้อมทางเศรษฐกิจ (Impacts on Natural Resources)
- ผลกระทบต่อสิ่งแวดล้อมทางสังคม (Impact on Social Environment)
- ผลกระทบต่อโครงสร้างทางเศรษฐกิจ (Impact on Economic Structure)
- ผลกระทบต่อวัฒนธรรม (Impact on Cultural Diversity, Uniqueness, National Culture)

Inter-linkage of Service Chapter and related Chapters

- General Definition
- Environment Chapter
- Investment Chapter
- Intellectual Property Chapter
- Trade in Goods Chapter (National Treatment and Market Access for Trade in Goods)
- Sanitary and Phyto-sanitary Measure

Inter-linkage of Service Chapter and related Chapters

- Technical Barriers to Trade
- Trade Remedy
- Government Procurement
- Financial Services
- Telecommunication (National Security)
- Labor
- Dispute Settlement
- Rule of Origin and Origin Procedure

Inter-linkage to other International Instruments

- **Basel Protocol**
- **Kyoto Protocol**
- **Draft United Nations Code of Conduct on Transnational Corporations 1983 version**
- **Draft International Code of Conduct on the Transfer of Technology (United Nations Conference on Trade and Development: UNCTAD) 1985**

Inter-linkage to Other International Instruments

- United Nations General Assembly Resolution 39/248: Guidelines for Consumer Protection 1985
- Criteria for Sustainable Development Management: Towards Environmentally Sustainable Development (United Nations Centre on Transnational Corporations) 1990

Inter-linkage to Other International Instruments

- Charter of Trade Union Demands for the Legislative Control of Multinational Companies (International Confederation of Free Trade Union) 1975
- Consumer Charter for Global Business (Consumers International) 19

Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal

- **“...Hazardous waste and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated”**
- **“ของเสียอันตรายและของเสียอัน ควรได้รับการกำจัดภายในรัฐที่ปัจจุบัน แห่งสหประชาชาติ ด้วยวิธีการที่เข้ากันได้กับการจัดการอย่างมีประสิทธิภาพและ คำนึงถึงสิ่งแวดล้อม”**

The Action Program of the United Nations Development Decade II (Guidelines for International Investment)

- ".....Foreign private investment in developing countries should be undertaken in a manner consistent with the development objectives and priorities established in their national plans. Foreign private investors in developing countries should endeavor to provide for an increase in the local share in management and administration, employment and training of local labor including personnel at the managerial and technical levels, participation of local capital and reinvestment of profits. Efforts will be made to foster better understanding of the rights and obligations of both host and capital-exporting countries, as well as of individual investors"

- The Guidelines for International Investment were adopted unanimously by the Council of the International Chamber of Commerce at its 120th Session on 29 November 1972

ASEAN Investment Agreement

- Article XIII (2) This agreement shall thereafter continue in force unless terminated by any Contracting Party giving not less than six months written notice through diplomatic channels. Provided however that in respect of investments made while the Agreement was in force, Its provisions shall continue in effect with respect to such investment for a period of ten years after the date of termination and without prejudice to the application of international law.
 - ແລະ ຖ່ານະເດືອນນອນຮົກໄດ້ຂອງໄທຢູ່ MFN ແກ່ອນຮົກເຫັນວ່າ ນັກຄອງຖ່ານາມສະນືສົມຜາບ້າງຕົນໄດ້ສົກລົງດັ່ງກ່າວທ່າງນັກຄອງທ່າງນອນຮົກໄດ້ສົກທີ່ນີ້ດ້ວຍ

Principles for the Development of International Standards

- The principles for the development of standards, including environmental labeling standards. These are:
 - transparency,
 - openness,
 - impartiality and consensus,
 - effectiveness and relevance,
 - coherence,

Effects of Services Trade Liberalization on the Environment

- Tourism,
- Land freight transport (inter-urban) and
- Environmental services :sewage services; refuse disposal services; sanitation and similar services , cleaning of exhaust gases, noise abatement services, nature and landscape protection services
- Regulatory Adjustment
- Attributing Potential Environmental Effects
- Link to Goods: effects that arise from the supply and consumption of associated goods

Impacts of FTA

- Impact of FTA on Control Measures
- Trading Away the poor's Lives, IP, Medicine
- FTAs undermine benefits of Free and Open Source Software
- Impact on Hazardous waste control
- The environment
- Sustainable development
- The integrity of infrastructure or transportation systems
- The conservation of exhaustible natural resources

Impacts of FTA

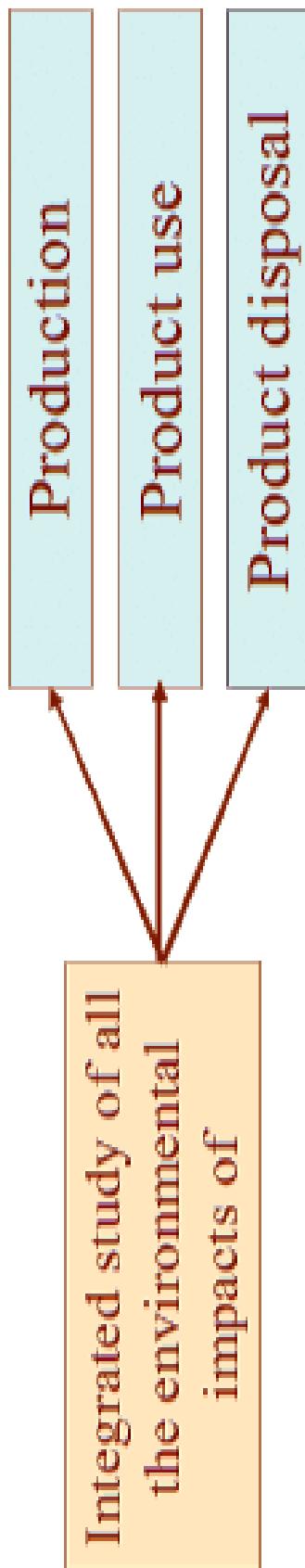
- The Increasing Complexity of Eco-Labels
- Handling requirements (such as requirements for packaging, recycling, reuse, recovery, and disposal).
- The issue of labeling requirements for environmental purposes has become, since the Doha Ministerial Conference an issue of special focus in the work of the CTE Regular.
- The Processes and Production Methods (PPMs).
- Principles for the Development of International Standards

Impacts of FTA

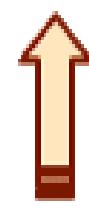
- **Agriculture:** the instability of the international price of agricultural commodities, Lower agriculture returns are linked to poverty, a major cause of environmental degradation
- **Energy:** to mitigate climate change , over-exploitation
- **Fisheries:** over-exploitation and illegal, unreported and unregulated fishing.
- **Forestry:** the mitigation of global warming and the conservation of biological diversity, illegally harvested forest products, the illegal exploitation of forestry resources, illegal logging

Complexity of Eco-Labels

Life-Cycle Analysis



Analyse the full environmental impact of a single product



Objective

From raw material acquisition to production, use and disposal

FTA Cost-benefit Framework

Possible benefits

Possible costs

■ Market access in goods:

- Agriculture
- Industrial

■ Market access services:

- commercial services
- Labor

■ Possible concessions on SPS and TBT?

■ Market access into country:

- industrial goods
- agriculture

■ Market access into country:

- services

■ Labor, environment standards

■ Environmental costs

FTA Cost-benefit Framework

Possible benefits

■ Possible concessions on TBT?

■ Possible aid mechanisms?

■ Possible investment and technology flows

Possible costs

■ Intellectual property

- a) Access to medicines
- (b) Life forms
- (c) Plant varieties
- (d) Biodiversity and disclosure requirements
- (e) Copyright and access to information
- (f) Broadcasting

- Singapore Issues
 - (a) Investment
 - (b) Government procurement
 - (c) Competition policy

Investment Income Payment

- Macro Economic Study
- Micro Economic Study
- The changes of the way of life, moralism, materialism
- The problem of urbanization
- The depletion/over exploitation of natural resources
- The Environment protection

Related concerns for FTA

- Negotiation process
- FTA Template
- Intellectual Property Issue
- Environment Issue
- Labor Movement
- Competitiveness: Competition Law and Policy
- Short term measures for financial control
- Etc.

Legal Aspect of Foreign Direct Investment

Prof. Dr. Lawan Thanadsillapakul

The motives for international economic integration

- To enhance efficiency in production made possible by increased specialization in accordance with the law of comparative advantages;
- To increase production level due to better exploitation of economies of scale made possible by the increased size of the market;

The motives for international economic integration

- To improve international bargaining position made possible by the larger size leading to better term of trade;
- To enforce changes in economic efficiency brought about by enhanced competition; and changes effecting both the amount and quality of the factors of production due to technological advance;

The motives for international economic integration

- Factor mobility across the borders of member nations;
- The coordination of monetary and fiscal policies;
- The goal of full employment, higher rates of economic growth and better income distribution becoming unified target.

Legal frameworks governing foreign investment

- Domestic Laws and regulations
- International Law
- International Codes of conduct, Guidelines
- Treaty Regime (BITs, Regional Treaty, Multilateral Treaty)
- WTO Rules and Regulations relating to investment
- Special regime for investment liberalisation
- Unilateral liberalization of investment

Legal frameworks governing FDI at the international sphere

- **International Law**
 - Traditional recognized absolute State sovereign rights
 - Diplomatic protection
 - State responsibility
 - Minimum international standard of treatment
- **International Codes and Guidelines, soft law**
- **The role of WTO**
 - Multilateral Investment Agreement
 - General Agreement on Trade related-investment measures (TRIMs)
- The General agreement on trade in services (GATS)
- General Agreement on Trade-related intellectual property rights (TRIPs)
- Regional economic integration : EU, NAFTA, ASEAN (regional level)

Investment Treaty Regime

- Bilateral Investment Treaty
- Regional investment treaty
- Multilateral investment treaty

Unilateral Liberalisation

- Unilaterally liberalise foreign investment
- Economic policy
- Attraction of inward capital flow
- Special regime
- Special Economic Zone, Free Zone* (It is different from Free Trade Area, the former is domestic special scheme, the latter is at international level, bilateral or regional/ multilateral)* not be confusing one with the other!

Actors/Players in the field of Foreign Direct Investment

■ The Multinational Corporations

■ States Corporations

■ Home Country

■ Host Country

Sovereign Rights of Host Country to admit and control foreign investment

- Pre entry
 - Pre- entry treatment
 - Total Exclusion
 - Exclusion from negative list, closed sectors
 - Screening
 - Quantitative restriction
 - Conditional entry
 - Restricted allocation
 - Etc.
- Post entry
 - Post- entry Treatment
 - Form of establishment
 - Ownership control
 - Government intervention
 - Special requirements
 - Other Restrictions
 - Control over the operation of MNEs
 - Expropriation / Nationalization
 - Etc.

Admission and Establishment

State's sovereign Rights

- The form of Controls or restrictions over the admission and establishment of foreign investor
- The acquisition of interests in local business
- The limitations on foreign ownership and control
- Registration and report requirements
- The conditional entry of foreign investors:
 - investment measures, incentive regimes, economic policy

Measures relating to admission and establishment

- Control over access to the host country economy
- Conditional entry into the host country economy

Measures relating to ownership and control

- Control over ownership
- Controls based on limitation of shareholder powers
- Control based on governmental intervention in the running of the investment
- Other types of restriction

Control over access to the host country economy

- **Absolute ban on all forms of FDI: Former centrally-planned economies prior to the transitional process.**
- **Closing certain sectors, industries or activities to FDI for economic, strategic or other public policy reasons.**
- **Quantitative restrictions on the number of foreign companies admitted in specific sectors, industries or activities for economic, strategic or other public policy reasons.**
- **Investment must take a certain legal form: incorporation in accordance with local company law requirements.**
- **Compulsory joint ventures either with state participation or with local private investors.**

Control over access to the host country economy

- General screening / authorization of all investment proposals; screening of designated industries or activities, screening based on foreign ownership and control limits in local companies.
- Restrictions on certain forms of entry: mergers and acquisitions may not be allowed, or must meet certain additional requirements.
- Investment not allowed in certain zones or regions within a country.
- Admission to privatization bids restricted, or conditional on additional guarantees, for foreign investors.
- Exchange control requirements.

Conditional entry into host country: General conditions

- Conditional entry upon investment meeting certain development or other criteria (environmental responsibility, benefit to national economy) based on outcome of screening evaluation procedures
- Investors required to comply with requirements related to national security, policy, customs, public morals as conditions of entry.

Condition based on capital requirement

- Minimum capital requirements.
- Subsequent additional investment or reinvestment requirements
- Restrictions on import of capital goods needed to set up investment (e.g. machinery, software) possibly combined with local sourcing requirements.
- Investors required to deposit certain guarantees (e.g. for financial institutions)