

From GATT to the WTO: Implications for Developing & Developed Countries

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Introduction

This paper describes the changes that occurred to the international trading system brought about by the establishment of the *World Trade Organisation* (WTO) with particular focus on the impact that these changes had on developing and developed countries¹ that operate within that system. This is no easy task since commentators present widely differing descriptions based on the different views they hold concerning questions such as sovereignty,² globalization,³ governance, equity, welfare obligations⁴ and development. Part 1 compares and contrasts the international trading systems as influenced by the GATT and the WTO. Part 2 describes the impact that the differences brought about by the WTO system had on developing and

¹ This paper assumes two basic sets of countries namely "developing countries" and "developed countries" even though a third set, "least developed countries" (LDC's), is sometimes described in the literature. A degree of arbitrariness in these categories should be recognized.

² See Giunea, J. (2003) "International Trade Theory" in *International Trade and Investment: An Asia-Pacific Perspective*, McGraw-Hill, Australia for an excellent introduction and then MacEwan, A (1999) "International Commerce and Economic Development" in *Neo-liberalism or Democracy*, Zed Books, New York for a more critical discussion of, amongst other things, "neo-liberal myths".

³ The differences between Jagdish Bhagwati's *In Defense of Globalization* (Oxford University Press, 2004) and Philippe Legrain's *Open World: The Truth About Globalisation* (Abacus, 2002) of globalization on the one hand and Dani Rodrik's "The global governance of trade - as if development really mattered" (United Nations Development Programme, 2001) descriptions on the other are hard to reconcile.

⁴ Hudec, Robert, *Developing Countries in the GATT Legal System*, Thames Essays, 1987, p. 187.

developed countries. I conclude with a few observations that follow from this discussion. I argue that the best, or most balanced, way to describe the international trading system is as a *regime* thereby emphasizing the fact that the WTO, as a non-state actor, produces “soft law” only.⁵ Such an approach recognizes the asymmetrical nature of power in the international trading system whilst also recognizing the important legitimizing role that normative values and concerns relating to fairness still play within that system. Seeing the international trading system in *regime* terms may make Steinberg’s⁶ conclusion that the multilateral trading system is “organized hypocrisy”⁷ unavoidable. Yet this conclusion, far from leading to despair, may well be a cause for optimism.

1. Differences between the GATT & the WTO

Some commentators maintain that while there is much different between the GATT regime and the WTO regime that nothing has *really* changed.⁸ In one sense this is undoubtedly true. It can be argued that at the end of the day nothing really changed with the establishment of the WTO regime because what matters most, and what has always mattered most, in the international trading system is the “continued willingness of ... members to

⁵ See Hoekman, B.M. and Kostecki, M.M.(2001), "The trading system in perspective", in B.M. Hoekman and M.M. Kostecki *The political economy of the world trading system : the WTO and beyond*, Oxford University Press, New York where the concept of regime is discussed at p. 25.

⁶ Steinberg, Richard H., "In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO" *International Organization*, 2003, Vol. 56, No. 2, p. 339.

⁷ See also Krasner, S. D., *Sovereignty: Organized Hypocrisy*, Princeton, NJ: Princeton University Press, 1999.

⁸ Hoekman, B.M. & Kostecki, M.M.(2001), "The trading system in perspective", in B.M. Hoekman & M.M. Kostecki *The political economy of the world trading system : the WTO and beyond*, Oxford University Press, New York

abide by the negotiated rules of the game...”⁹ In another sense, however, it can be argued that the changes that occurred as a result of the Uruguay Round and as a result of the establishment of the WTO system did fundamentally change the nature of the system.¹⁰ I take the view that on one level considerable change did occur but that on another level it remains true that nothing *really* changed.

The agreement that establishes the World Trade Organisation – the *Agreement Establishing the World Trade Organization* – establishes principles that are included and defined in several “annexes.” The most important of these annexes are the *Multilateral Agreement on Trade in Goods*, the *General Agreement on Trade in Services*, the *Agreement on Trade Related Aspects of Intellectual Property Rights*, the *Agreement on Agriculture* (AoA) and the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

(i) Expanded democratized and legalized’ system showcasing a dispute resolution procedure (DSP)

The combined effect of the WTO agreements is the creation of a WTO that differs from the GATT, on one level, in a number of ways.¹¹ The rounds of trade negotiations that took place under GATT between 1948 and 1994 concerned reductions in tariffs, anti-dumping measures and other non-tariff barriers to trade and were negotiated between “contracting parties”. The

⁹ Hoekman, & Kostecki, p. 45.

¹⁰ See, for example, Demaret, P. (1995), "The Metamorphoses of the GATT: from the Havana Charter to the World Trade Organisation", *Columbia Journal of Transnational Law*, vol. 34

¹¹ See Demaret, P. (1995).

parties to these negotiations were known as contracting parties because the GATT was an agreement only and did not bring into being an organisation. The GATT operated on a provisional basis with no established institutional framework while the WTO agreements led to the establishment of a permanent institutional framework featuring a permanent organization. By virtue of the WTO agreements each member country automatically became a signatory to all those WTO agreements. The introduction of the Uruguay Round's WTO saw the GATT "consensus" or "veto-power" approach to decision-making replaced in the WTO by a principle of "equality of voting" between member states.

The WTO greatly expanded the areas in which trade was to be regulated and "liberalized". Whereas the GATT was mainly concerned with trade in goods (usually excluding agriculture and textiles) the WTO concerned itself with other areas of trade such as trade in services and intellectual property. As Demaret notes:

The scope of the GATT related only to trade in goods. It did not contain rules aimed at the liberalisation of trade in services. Yet, services (telecommunications, the audio-visual sector, tourism, financial services, transport and construction) were of increasing importance to the economy and export trade of many countries. In addition, the exports of developed countries consisted of a growing number of products or services covered by intellectual property rights, the number and the variety of which has grown over 30 years with the development of technology¹²

A new and more binding dispute settlement procedure (DSP) was also

¹² Demaret, P. (1995), "The Metamorphoses of the GATT: from the Havana Charter to the World Trade Organisation", *Columbia Journal of Transnational Law*, vol. 34, p. 3.

established by one of the WTO agreements, namely, the agreement concerned with *Dispute Settlement Understanding*. Whereas the GATT employed a consensus principle which meant that every member country had a veto power (all parties had to agree on an outcome) the WTO jettisoned the veto power and introduced time limits and a more rules based appeals process. It has been said that the WTO became a more "coercive" body although caution needs to be exercised in using the word caution without acknowledging the facts that WTO can only produce un-crystalised "soft" law and that it is only one player in much broader system of international relations. The WTO agreements do, however, produce a single package and an "all or nothing system" where a country that wishes to become a member of the World Trade Organisation must agree to all of the multilateral agreements negotiated and agree to abide by the *Dispute Settlement Understanding*. This increases the role given to the "rule of law" in the multilateral trading system. The WTO agreements contain provisions which are much more precise and detailed than had been the case under the GATT. The WTO multilateral agreements emphasize the need for transparency and legal certainty. National measures that affect international trade were, for the first time, required to be identified and published. In a similar spirit, old barriers to international trade not easily quantifiable were to be replaced by more quantifiable and, therefore, more transparent tariffs.¹³ The WTO

¹³ These changes have given rise to a dispute over the impact that the application of the "rule of law approach" has on developing countries. Whilst some argue that the prominent place given to the rule of law makes it more difficult for the least developed countries and developing countries to comply and to compete, others argue that the rule of law makes it more difficult for countries in positions of power to unfairly exercise that power.

dispute settlement procedure is also strengthened by eliminating the possibility of blocking the establishment of panels or the adoption of panel reports. Time limits for the various stages of panel proceedings were introduced, an appeals process created, implementation of panel reports strengthened, and retaliation in cases of non-compliance with a panel recommendation made automatic.

(ii) Expansion of Trade in Goods Rules to Agriculture & Textiles

The WTO *Agreement on Agriculture* (AoA) and the *Agreement on Textiles and Clothing* (ATC) specifically expand the application of international trading rules to agricultural products and textiles which had been (according to a convention established by developed countries) largely kept outside the scope of the rules relating to trade in goods.

The liberalisation of trade in textiles and clothing was an important objective of many developing countries, whose exports to the United States and the European Community were limited by voluntarily export restraint agreements.... The agreement on textiles and clothing provides for the progressive application of the rules of the GATT 1994 to trade in those products over a ten year period.¹⁴

The AoA contains three pillars: market access, domestic support and export subsidies. The market access provisions require all WTO members to convert non-tariff measures into tariffs through “tariffication” and to reduce all tariffs by a certain amount. This is supposed to increase transparency and accountability. The domestic support pillar refers to the AoA's requirement that all countries aggregate the domestic support provided to their agricultural sector and also reduce that amount over time. Only “trade

¹⁴ Demaret, p. 7.

distorting subsidies”, however, need to be reduced. The export subsidies pillar relates to that part of the AoA that requires export subsidies paid by governments to the agricultural sector, for the purpose of increasing export production, to be reduced by a certain percentage. I return to the AoA again in the second part of this paper when I discuss its impact on developing countries.

(iii) Trade in Services

The WTO system, as just noted, changed the GATT system by providing for the establishment of a system of rules applicable to the liberalisation of trade in services. The *General Agreement on Trade in Services* (GATS) can be understood as an attempt to apply the principles of the GATT to the service sector.¹⁵ Both Chanda¹⁶ and Hibbert¹⁷ provide excellent overviews of the GATS which entered into force on 1 January 1995. The most generally applicable provisions of the GATS apply to trade in services that were not included under the GATT. Most of the GATS provisions are, however, conditional upon the commitments filed by member countries. Countries make commitments on market access and national treatment in specific sectors and also across sectors under schedules of commitments. Countries are free to decide which service sectors they wish to subject to market access

¹⁵ This was always going to be challenging because the barriers to trade in services are different to the barriers for trade in goods. Barriers to services usually do not consist of borders obstacles such as tariffs or import quotas. Nor can trade in services be easily separated from the movement of capital and of natural persons.

¹⁶ Chanda, R. (2003), "Social Services and the GATS: Key Issues and Concerns", *World Development*, vol. 31, no. 12, p.1997.

¹⁷ Hibbert, E. (2003), "The New Framework for Global Trade in Services - all about GATS", *The Service Industries Journal*, vol. 23, no. 2, March, p.67

and to national treatment requirements. Countries can also specify in their schedules the limitations and exceptions they wish to maintain to restrict market access and national treatment for each of the four modes of supply.¹⁸

The GATS covers 160 service activities across twelve classified sectors. The major areas included in the twelve classified sectors are telecommunications, financial services (such as banking), energy, business, education, environmental and distribution (transportation) services. The GATS also defines “services trade” as consisting of four possible modes: cross-border supply, consumption abroad, commercial presence, and movement of natural persons.¹⁹

(iv) Intellectual Property Rights (IPRs)

Protection of intellectual property rights was also included in one of the WTO agreements – the *Agreement on Trade Related Aspects of Intellectual Property* (TRIPS). TRIPS concerns industrial, literary and artistic property. Technology has become a matter of increasing importance for developed countries in international trade and competition with high-end external costs in the production of new technology prompting protection. Another factor motivating developed countries – especially the US and to a lesser extent Europe – was a concern at seeing their supremacy in manufacturing eroded and in seeing their technology imitated.²⁰ The TRIPS Agreement was

¹⁸ Chanda, p. 2000.

¹⁹ Chanda, p. 1998 and Hibbert p. 68.

²⁰ Correa, C. (2000), "General context" in C. Correa, *Intellectual property rights, the WTO & developing countries, the TRIPS agreement & policy options*, Zed Books, Malaysia, p. 3.

just what the doctor ordered:

In the area of copyright and related rights, the TRIPS Agreement enhanced the market position of the software, database and phonogram industries, in which US firms play a dominant role worldwide.²¹

The provisions contained in the TRIPS Agreement define, in great detail, the manner in which WTO members must act in order to ensure respect for intellectual property rights. The agreement establishes minimum standards on copyright and related rights (including computer programs and databases), trademarks, geographical indications,²² industrial designs, patents, integrated circuits, and trade secrets. Consistent with the stricter and more legal approach adopted under the WTO agreements, standards of protection are stated in the TRIPS Agreement as well as enforcement mechanisms. The TRIPS Agreement, for example, stipulates specific obligations related to administrative and judicial procedures including provisions on evidence, injunctions, damages, and penalties. Any controversy as to compliance with minimum standards is subject to a multilateral procedure in accordance with the *Dispute Settlement Understanding* (DSU). Trademark protection was also reinforced by a comprehensive definition of signs that can constitute trademarks, and by putting on equal footing trademarks for goods and services.

²¹ Correa, p. 12.

²² The issue of the geographical indications was pushed by European countries particularly in the area of wines and spirits.

2. The impact that differences between the GATT & the WTO have on developing and developed countries

In this part of the paper I consider the impact that the differences between the GATT and the WTO (described above) have on developing and developed countries. The impact on developing countries of the WTO system has been, in a number of respects, negative.

(i) Expanded democratized & legalized system showcasing a dispute resolution procedure (DSP)

The impact on countries of the expansion of trade powers that occurred with the WTO and with the replacement of the GATT veto approach by the principle of equality of voting between member states is difficult to assess. Some argue that the “liberalization” of trade and the introduction of a more “democratic” and “fairer” distribution of power based on a “one country, one vote” system benefits all. The strengthening of the WTO dispute settlement procedures (DSP) as compared with the GATT is also seen by some as a positive development for all countries including developing countries. Hoekman and Kostecki, for example, argue that “... notwithstanding some significant flaws ... the DSU (Dispute Settlement Understanding) works quite well”²³ and that the expectation that small countries would find it easier to bring cases has been born out. “Developing countries,” they claim, are now “more often involved than in the past.”²⁴

²³ Hoekman and Kostecki, p. 79.

²⁴ Hoekman and Kostecki, p. 79.

Others who look behind the façade of the “one country, one vote” principle paint a different picture. WTO decision-making, in fact, continues to be made behind the scenes through the same kind of “consensus building” that existed under the GATT system meaning that developing countries continue to find themselves in a severely disadvantaged position. Indeed, the position in which developing countries now find themselves may be more disadvantageous than before. The more transparent rules-based approach to decision-making requires countries to openly oppose decisions if they go against their interests. Smaller countries find this very difficult to do in the face of larger countries on which they depend for aid.

Power and size are undoubtedly relevant to WTO decision-making. Those who (paradoxically) describe themselves as “realists” are either naïve or intellectually dishonest in denying that this is the case. Developing countries find that they have no real recourse against a non-complying developed country because they cannot credibly threaten trade retaliation.²⁵ Developed countries such as the US and the EU are well equipped with legal talent and possess worldwide networks of commercial and diplomatic representatives. Developing countries, in preparing for panel hearings or for other negotiations, find it impossible to be as legally and technically prepared as the developed countries and also find it impossible to collect the type of information needed for such hearings.²⁶ Asymmetry and power differentials lead to a glossing over of fundamental differences between cultures and

²⁵ Raising import barriers will have little impact on the developed country and is also costly in welfare terms for developing countries.

²⁶ See Hoekman and Kostecki, p. 91.

societies in areas such as the appropriate amount of risk that should be tolerated.²⁷ Whilst this issue may seem to affect all countries alike it is difficult to avoid the conclusion that the developing countries, because of power differentials, suffer most when disputes of this kind regarding standards arise.²⁸

The liberalisation of trade brought about by the WTO in areas such as services, textiles, agriculture and intellectual property rights has resulted in additional demands on developing countries. It needs to be asked whether the representation of developing countries at the WTO is “adequate for the pursuit of their effective participation in the activities of the organisation”.²⁹ Michalopoulos³⁰ has examined the history of trade liberalization during the 1960s and 1970s when developing countries preferred the United Nations to the GATT as the preferred way to promote their interests in international trade. Developing countries, beginning during the Uruguay Round began, according to Michalopoulos, to change tack. Developing countries began to play a greater role in Uruguay Round negotiations and, since the establishment of the WTO, have continued to expand their role. Developing countries, according to Michalopoulos, accounted for 74% of WTO membership in 1992 compared to 66% in 1982. During this same period the proportion of world exports accounted for by developing country members of

²⁷ This is an issue of particular relevance to trade in genetically modified organisms (GMOs).

²⁸ For a general discussion of this point also see Hoekman and Kostecki, p. 96.

²⁹ Michalopoulos, p. 118.

³⁰ Michalopoulos, C. (1999), "The developing countries in the WTO", *World Economy*, vol. 22, no.1, p. 117

the WTO increased from 13% in 1982 to 20% in 1997.³¹ Despite these otherwise impressive figures, however, Michalopoulos notes a disturbing fact concerning the relative average size of national missions sent to the WTO:

Based on informal estimates developed in consultation with a number of Missions, just to follow the topics of the various WTO bodies and attend their meetings requires a staff of at least 4-5 people, and the average is increasing. If one uses this yardstick, it is clear that, as of mid-1997, a very large number of developing countries did not meet it.³²

While the institutional weaknesses that developing countries possess have received formal recognition in the WTO agreements³³ the legal issues raised by the WTO's strict and legalistic dispute settlement mechanism (DSM) that require “specialist legal expertise in international law which in most developing countries is absent”³⁴ are too often overlooked or considered unavoidable. Steinberg's description of the international trading system as “organized hypocrisy” is again relevant to our discussion.³⁵ Perceptions of fairness and equality fostered by principles and procedural rules such as the “equality of states” and the “rule of law” are used to legitimize the WTO in the eyes of domestic audiences. But the game may be up. As Steinberg observes:

³¹ Michalopolous, p. 121.

³² Michalopolous, p. 126.

³³ Provisions for special and preferential treatment of developing countries have been included in many areas.

³⁴ Michalopolous, p. 136.

³⁵ Steinberg, Richard H., "In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO" *International Organization*, Vol. 56, No. 2, p. 339 at p. 342 defines organised hypocrisy as "patterns of behaviour or action now largely decoupled from rules, norms, scripts, or rituals that are maintained for external display."

... the use of power that concluded the Uruguay Round may have exposed those fictions, jeopardising the legitimacy of GATT/WTO outcomes and the decision-making rules...

Steinberg's criticisms of the "transatlantic powers" that he sees as having dominated GATT/WTO bargaining outcomes and rules and as having allowed adherence to the instrumental reality of "asymmetrical power" should also be noted:

Instead of generating a pattern of Pareto-improving outcomes deemed equitable by all states, GATT/WTO sovereign equality decision-making rules may be combined with invisible weighting to produce an asymmetric distribution of outcomes of trade rounds.³⁶

The problem here is that powerful countries will always be inclined to protect their own interests by claims relating to legitimacy that allow them to go on and determine agendas and influence decision-making to the detriment of countries lacking such power.

(ii) Expansion of Trade in Goods Rules to Agriculture & Textiles

Although the AoA seems to specifically bring agriculture into the rules-based trading system, it actually does little to reduce agricultural trade protection.³⁷ Despite the AoA, agriculture continues to be one of the most highly protected areas of international trade. In one of those ironies – forcing one to recall yet again Steinberg's description of the international

³⁶ Steinberg, p. 365. A Pareto-improving outcome here would be an outcome or allocation that makes some people better off and nobody worse off.

³⁷ This is largely a result of the fact that agriculture continues to be a highly contentious issue in developed countries for domestic political reasons and because of other "security reasons."

trade system as "organised hypocrisy" – the cost of this protection falls on the developing countries where agriculture typically accounts for a much higher share of economic output and exports than is the case in developed countries.

Unlike most areas of international trade, agriculture is still characterised by complex webs of tariffs, quotas, subsidies, and other forms of government support and protection.³⁸

Matthews³⁹ and Beierle⁴⁰, however, are able to paint a slightly rosier picture. They explain that while lower world market prices, combined with fewer export opportunities available to protectionist developed countries, may have a harmful effect on developing countries, evidence indicates that a slight liberalisation of trading in agriculture is actually providing slight gains for developing countries. It must be said, however, that while the AoA succeeded in bringing agriculture under the system that applies to other traded goods and services for the first time, it has not been successful in liberalising trade in this area. Developed countries are allowed to continue supporting their agricultural sector while developing countries have not seen export markets open up.

The treatment given agriculture as well as problems associated with the rules-based system described earlier raises serious questions concerning WTO legitimacy.

³⁸ Beierle, T.C. (2002) "Agricultural Trade Liberalization - Uruguay, Doha and Beyond" *Journal of World Trade*, vol. 36, no. 6, p. 1090

³⁹ Matthews, A. (2002), "Developing countries' position in WTO agricultural trade negotiations" *Development Policy Review*, vol.20, no. 1, p. 75.

⁴⁰ See footnote 38 (above)

It is more important than ever that the WTO demonstrate the legitimacy of the rules-based system governing world trade by being responsive to the demands of developing countries. The membership structure of the WTO means that progress will come only if developing countries reap some of the benefits of globalisation, and nowhere are the stakes higher than agriculture.⁴¹

(iii) Trade in Services

Concerns continue to exist regarding the impact of GATS on developing countries in other areas such as equity, costs, availability of services and the inability of governments in developing countries to define and pursue national objectives. While it can be argued that the liberalisation of trade in services brought about by the *General Agreement on Trade in Services* (the GATS) leads to economic development through increased competition, lower prices, innovation, technology transfer and greater transparency⁴² concerns about the future of developing countries in social service sectors such as health, education and the environment linger. The major concern here, as I have detailed elsewhere,⁴³ is that the GATS fails to properly balance efficiency and equity and fails to balance the desirability of full cross-border integration of service providers with the need for local responsiveness.⁴⁴

While countries, in theory, retain autonomy on policies concerning public services under the GATS due to the so-called “voluntary” nature of the

⁴¹ Beierle, at p. 1108.

⁴² This is the basic position adopted, with some qualifications, by Chanda.

⁴³ For a more detailed account of concerns regarding the impact of GATS in the area of higher education see Mew, Michael J., (2005) "Marketisation & Trade in Higher Education Services: Towards a Balance between Efficiency & Equity", *Seinan Gakuin University Journal of Economics*, vol. 39, no. 3, p. 93.

⁴⁴ Hibbert, p. 71.

commitment structure of the GATS, the reality of the situation is quite different. Countries are seemingly “free” to decide which service sectors they wish to subject to market access and national treatment. But this “freedom” overlooks the political and economic pressures under which developing countries find themselves to make commitments on market access. Arguments mounted by some writers that the adverse implications of liberalisation of health, education and other social services under the GATS are not the result of liberalisation but rather are the fault of “domestic environments” with their “institutional and regulatory deficiencies”⁴⁵ are not only simplistic but are also question begging.

(iv) Intellectual Property Rights (IPRs)

One of the likely major impacts of the *TRIPS Agreement* on developing countries is the way in which it will inhibit the transfer of technology and know-how from developed to developing countries so important to fostering economic development. The developed countries are here “kicking away the ladder” on which they climbed before developing countries are able to step up:

Under the TRIPS Agreement, reverse engineering and other methods of imitative innovation - that industrialised countries extensively used during their own processes of industrialization - shall be increasingly restricted, thereby making technological catching-up more difficult than before.⁴⁶

⁴⁵ Chanda, p. 2007.

⁴⁶ Correa, C.M. (2000), "General Context" in C.M. Correa, *Intellectual Property Rights, the WTO and Developing Countries, the TRIPS Agreement & Policy Options*, Zed Books, Malaysia, p. 19.

The “organised hypocrisy” highlighted by Steinberg that exists in the international trading system, and the problem of achieving an equitable balance between developing and developed countries, are again the major problems. In the area of intellectual property, for example, the balance that needs to be struck is that between the interests of “title holders” in the protection of technology (usually found in developed countries) and the interests of developing countries (and the world at large) in the promotion and sharing of such technology.⁴⁷

Balance and equity is likewise needed in relation to the patenting of life forms and the patenting of drugs as provided for in the TRIPS Agreement. The term “micro–organism” was not explained when the TRIPS negotiations were taking place during the Uruguay Round. This resulted in micro–organisms and abiotic processes used to produce plants and animals becoming patentable (good for those developed countries with advanced bio–technology industries) while plants, animals and “essentially biological” processes that result in plant and animal life remained unpatentable (not good for developing countries and sectors of developed countries wishing to preserve these “traditional” processes). We are again confronted with organized hypocrisy and asymmetries. While the TRIPS Agreement does not recognize traditional knowledge and does not recognize the rights of traditional “owners” of prior genetic resources and knowledge (such as traditional communities and farmers in developing countries) it allows

⁴⁷ Correa, p. 21.

developed countries, with their superior scientific knowledge, to build on that knowledge and patent (or “pirate”) the micro–organisms and abiotic processes that are fundamental to producing plants and animals.⁴⁸

Another pressing, and much publicized, issue relating to the TRIPS Agreement concerns the inequality between citizens of developing and developed countries in their access to pharmaceuticals especially antiretroviral (ARV) drugs for the treatment of HIV/AIDS.⁴⁹ A small number of developing countries, with the support of NGOs, have been battling for affordable access to essential ARV drugs. It is unfortunate indeed that

... powerful pharmaceutical companies in the North vehemently oppose attempts by developing countries to produce or acquire cheap drugs, especially via methods that would be most likely to result in a sustainable solution.⁵⁰

The fundamental issue at stake here is the failure of the TRIPS Agreement to balance, in an equitable manner, the intellectual property rights of patent holders with basic public health requirements in developing countries. It seems clear that “different levels of development call for different levels of

⁴⁸ Plahe, J. and Nyland, C. (2003), “The WTO and Patenting of Life Forms: Policy Options for Developing Countries” *Third World Quarterly*, vol.24, no. 1, p. 29 at p. 31.

⁴⁹ The TRIPS Agreement sets a minimum period of patent protection for intellectual property protection in the case of pharmaceuticals at a minimum period of 20 years. Under certain circumstances TRIPS allows countries to pursue parallel importing (Article 6) and compulsory licensing (Article 31). Parallel importing is where patented drugs are imported from a third country where they are sold for less. Compulsory licensing allows the manufacture anywhere and the use of generic drugs without the agreement of the patent holder under certain circumstances.

⁵⁰ Thomas, Caroline, (2002) “Trade Policy & the Politics of Access to Drugs”, *Third World Quarterly*, Vol. 23, No. 2, p. 251 at p. 258.

intellectual property protection.”⁵¹ The difficulty that the TRIPS Agreement presents to the availability of vital inexpensive copies of patented medicines in developing countries has been succinctly put:

Finding a balanced intellectual property system that can provide appropriate incentives to motivate private participation in R&D solutions and which also ensures that patients and governments can have access to the results of scientific and technological progress is a global challenge confronting international health policy-makers and WTO negotiators.⁵²

Conclusion – the trading system in perspective

This paper has described the changes brought about by the establishment of the WTO and the impact that those changes have had on developing and developed countries that operate within the multilateral trade system it established. I would argue that the international trading system needs to be recognized for what it is – “organized hypocrisy” – but that this should come as no surprise. It is not surprising that international trading systems reflect the interests of developed countries. It is not surprising that the WTO, one player in an international regime responsible for the exchange of trade policy commitments and for the development of codes of conduct, does not reflect the interests of developing countries that have little influence.⁵³ But what

⁵¹ Sun, Haochen, “The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health, *European Journal of International Law*, Vol 15, No. 1, p. 124.

⁵² Sun, Haochen, p. 150. For another detailed discussion of this problem see Matthews, Duncan, “WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: A Solution to the Access to Essential Medicines Problem?” *Journal of International Law*, Vol. 7, No. 1, p. 73 particularly in the contrast between the TRIPS Agreement “on its face” and the practical affect of the Agreement in preventing the export of generic drugs to countries that do not have a significant pharmaceutical industry themselves pursuant to Article 31 (f) of the Agreement.

⁵³ Hoekman, B.M. and Kostecki, M.M.(2001), “The trading system in perspective”, in B.M.

needs to be stressed is the fact that the WTO is just one piece of a much larger puzzle. The absence of an all powerful central authority in international trade, and in international relations generally, means that the WTO needs to be seen as part of a wider international regime. Seeing the whole system of international trade in regime terms highlights the fact that the continuation of that international trade system is premised on the willingness of WTO members to abide by the rules of the game, and, that this willingness is in turned conditional on there being gains for all members. When this is understood, realist and idealist outlooks meet head on. And when realist and idealist arguments meet head on the realist's finely honed awareness of legitimacy as a requirement for the exercise of power must ultimately acknowledge idealist's insight that both legitimacy and power are ultimately dependent on fairness.

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