

**“Through the Looking Glass: An examination of governance issues  
in the WTO through the mirror of WTO institutions and  
jurisprudence affecting trade in livestock products”**

**or**

**“Overload at the WTO: Coping with Success”**

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**Introduction**

Yes, we admit it – perhaps we are frauds and con artists. We’re not really here to talk about the symposium’s theme “International Trade in Livestock Products” but rather about “Challenges to the Governance of the World Trade Organization”. Yet maybe there is a link and we are more than charlatans selling snake oil. We propose to use the international trade in livestock products as a point of departure, a sort of looking glass or microcosm, for an examination of current governance challenges facing the WTO and suggest how states might respond to these challenges. We believe that if these challenges are not addressed, trade in all products, including livestock products, will be greatly and negatively affected.

From the 23 members of the General Agreement on Tariffs and Trade<sup>1</sup> in 1948 to a current WTO<sup>2</sup> membership of 140 states, the international organization charged with regulating trade is not the sleek machine it once was. With new areas of concern like services and intellectual property, and with agriculture fully within the WTO’s mandate, tariff reduction talks at the centre of the old GATT are not the only items leading to disagreements. More parties, more issues, more at stake and more linkages—to environment, to human rights, and to consumer choice—make the task of governance at WTO a formidable one.

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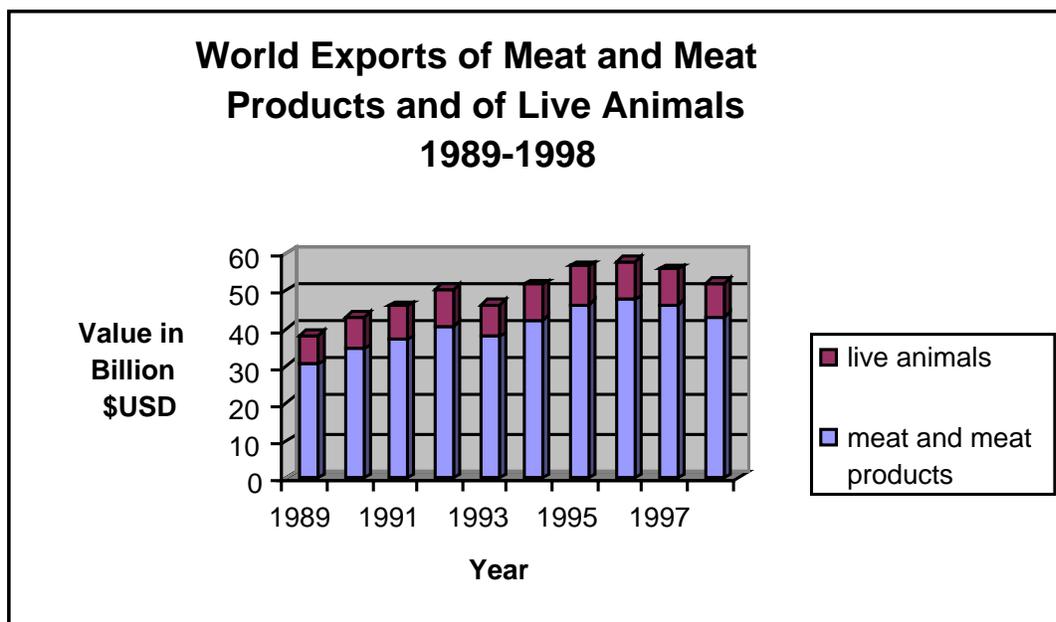
Cracks are starting to appear in the WTO fabric. There was Seattle — with problems both inside the “Green Room” and out in the streets. There is increasing reliance on and non-compliance with dispute resolution decisions – take beef hormones or aircraft or bananas as examples. There is more assistance from the WTO for retaliatory measures. There is also significant disagreement on the timetable and scope of the next round of negotiations characterized by a deep divide between developed and developing countries.

While recent events may have accentuated a governance crisis within the WTO, international rules to discipline agriculture have frequently brought the WTO, and the GATT that preceded it, to crises and this continues to be the case. Just last month, the Korean Beef case was decided by the Appellate Body and the US Lamb case by a WTO Panel. These decisions touched on several substantive aspects of WTO rules and delved deeply into the national policies of Korea and the United States respectively. There was the EU Hormones case before that in 1999. While strictly about the interpretation of the WTO’s SPS Agreement, the case has come to represent much more—like the WTO’s role as arbiter of science, law and national agricultural policy. So let us take a short tour of world trade in meat and the WTO’s treatment of trade issues affecting meat to permit some broader conclusions about WTO governance to be drawn. We conclude with some suggestions for reform that we think should be considered to rescue the WTO from its own success.

### 1. World Trade and Trade in Meat and Meat Products

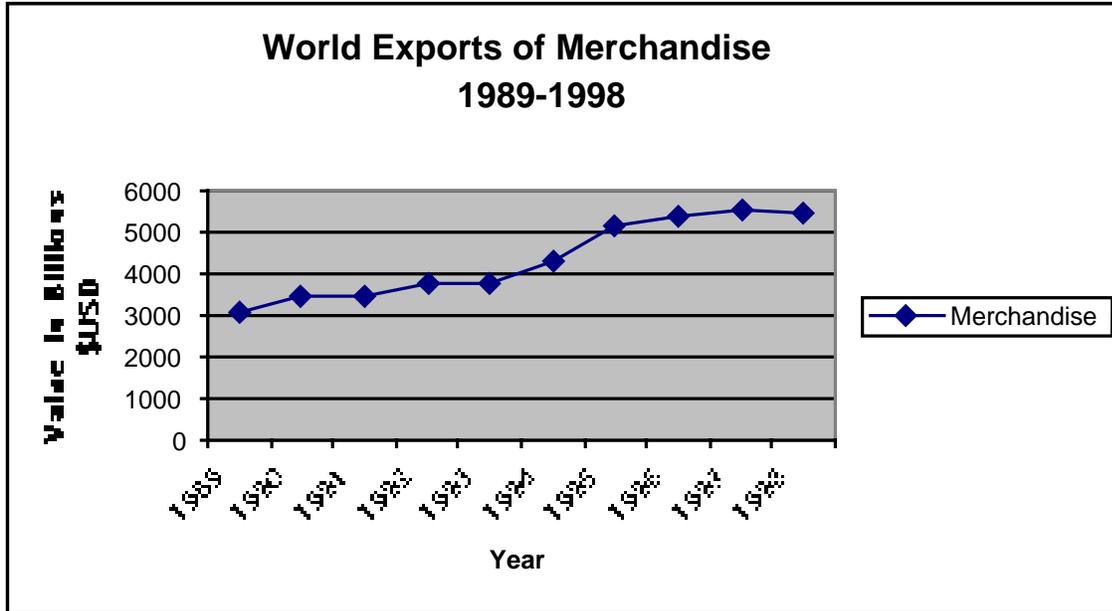
World trade in meat and meat products and live animals has risen about 35% over the past decade but as the Figures 1 and 2 below indicate, this increase has not kept pace with the overall increase in the general merchandise trade which has almost doubled over the same period. In the meat sector, there have been two significant growth spurts in exports over the past ten years, one prior to the conclusion of the Uruguay Round of multilateral trade negotiations in 1991-92 and one in 1995-97, just after the coming into force of the new World Trade Organization.

**Figure 1 – World Exports of Meat and Meat Products and of Live Animals. Source: FAO.**



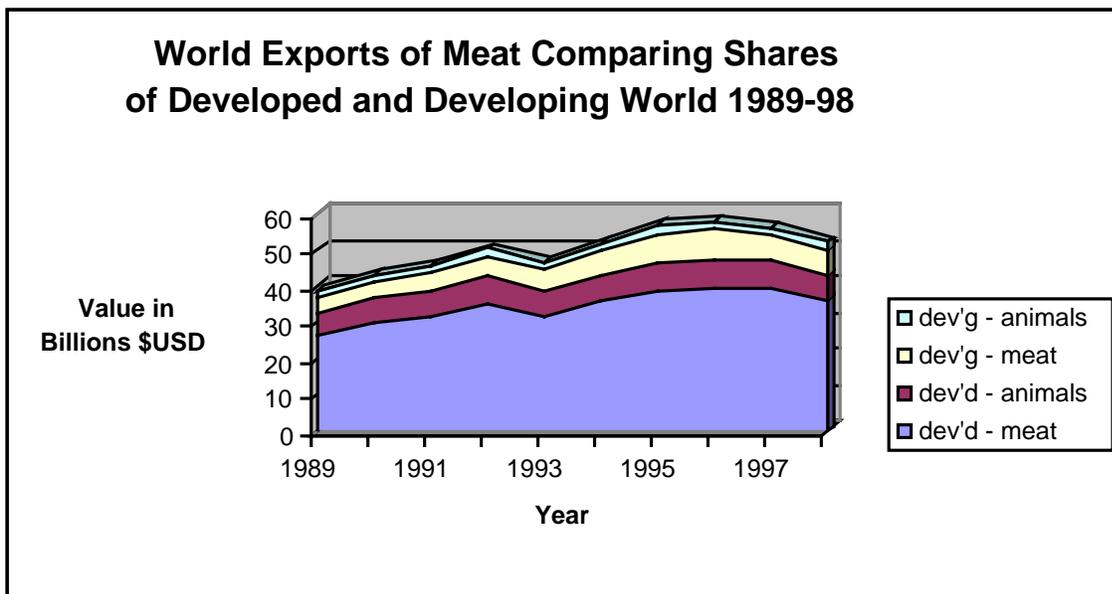
The trend in merchandise trade shows similar trends but the growth was earlier and more dramatic in the second stage of 1994-1997 leading to significantly higher growth for merchandise as a whole than for meat, meat products and live animals.

**Figure 2 – World Exports of All Merchandise. Source: FAO.**



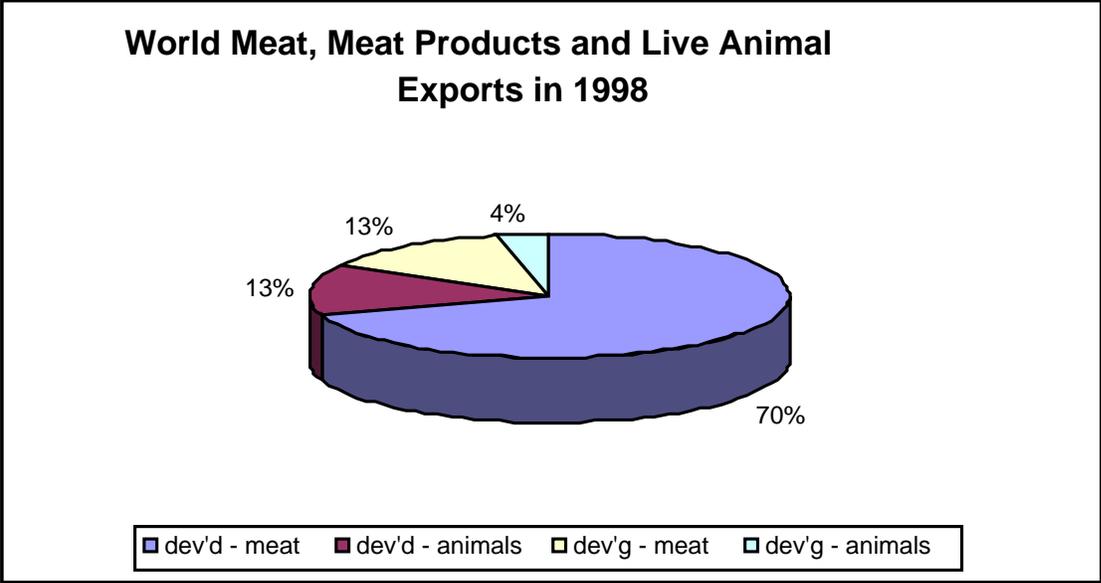
World trade in meat, meat products and live animals is primarily an activity of developed countries, both as exporters and importers. Over the past decade, for example, exports originating in developing countries has consistently been under 15% of total world exports as Figure 3 demonstrates.

**Figure 3 – Exports of Meat -Developed and Developing World 1989-98. Source: FAO.**



Imports by developing countries have accounted for just under 20% of total world imports. Thus in 1998 for example, there is a net flow of meat and live animals into developing countries from developed countries in the order of about \$1.6 billion USD . On an annual basis, taking exports in 1998 as the base year, the world export market in meat, meat products and live animals is split between developed and developing countries as shown in Figure 4.

**Figure 4 – World Market Share for Meat and Meat Products Between Developing and Developed Countries in 1998. Source: FAO.**



While developing countries have only about 17% of world market share in both meat and live animals, they have, relative to developed countries a far less significant market share in processed meat and meat products than in exports in live animals.

Many of the other speakers at this conference will provide a more detailed presentation of the trade aspects of meat and meat products and may offer suggestions as to the causal connections for such statistics. We, however, present this broad statistical sweep only as a backdrop to the issues of governance and reform that the WTO must address if it is to continue to facilitate international trade generally and trade in meat, meat products and live animals in particular.

**2. Meat and the WTO**

**2.1 The Rules**

While none of the comprehensive multilateral agreements falling under the World Trade Organization Agreement (WTOA) have specific detailed provisions regulating the international trade in meat and meat products, the WTO’s impact on meat trade is felt in two distinct ways. The first way is the specific application of the general rules of the WTOA to trade in meat while the second is the use of the WTO’s dispute settlement mechanism to resolve disputes involving measures affecting trade in meat, meat products or live animals.

With respect to market access, the WTOA produced new tariff bindings and eliminated several existing non-tariff bindings affecting trade in meat. Under WTO's Marrakesh Protocol to the GATT 1994, countries agreed that their schedules annexed to the Protocol would contain exact commitments and that all tariffs would be reduced by at least 15%. The schedule also contained state obligations to open up a minimum market access opportunity, generally equivalent to 5% of domestic base period consumption by this year.<sup>3</sup>

With respect to subsidization, the WTO's Agreement on Agriculture required countries to agree in their schedules annexed to the Protocol to limit export and domestic subsidization of agricultural products, including meat.

In spite of commonly agreed rules, countries had some latitude as to how to define their quantitative commitments (e.g. by engaging in "dirty tariffication"), and they also have some flexibility regarding the actual implementation of some of the commitments. However, it appears that in the sector of meat and meat products such flexibility was not generally used to a large extent, or in a more detrimental way, than in any other agricultural sector. However, some individual cases of startling ingenuity or perverse implementation became known in the meat sector. For example, the way the European Union calculated its minimum access commitments for meat was not exactly what a plain interpretation of the rules would have suggested; the tariff set for pork and poultry in the EU, though well in line with the rules, nevertheless resulted in a significant increase of the duty actually charged when implementation of the Uruguay Round commitments started.<sup>4</sup> However, such things happened in all agricultural product sectors, and not only in the area of meat.

Finally, with respect to national measures that might affect trade in meat, countries agreed to a number of new commitments which seek to standardize rules affecting how national measures may be instituted such as those affecting animal health and food safety (Agreement on Sanitary and Phytosanitary), labeling and packaging (Agreement on Technical Barriers to Trade), dumping (Agreement on Implementation of Article VI of GATT 1994), subsidies (Agreement on Subsidies and Countervailing Measures and the Agreement on Agriculture) and the use of safeguards and emergency measures (Agreement on Safeguards).

## **2. The Cases**

The WTOA sets out in its Annex 2, the new rules for dispute resolution under the WTO. Fortifying the practices of the GATT 1947's Article XXIII, the dispute resolution mechanism of the WTOA envisaged a decidedly more judicial process for dispute settlement with tighter timelines, obligatory dispute resolution, the option for appeal and the reversal of GATT's "unanimity-for-approval" rule. Now WTO panel decisions are, for all intents and purposes, binding and final on parties to the dispute.

Already three important cases involving trade in meat products have come before WTO panels. By far the most controversial has been the EU/United States & Canada dispute over the use and safety of Beef Hormones<sup>5</sup> (panel, 18 August 1997; appeal 16 January 1998; arbitration 29 May 1998) under the WTO's SPS Agreement. A second case, Korea/Australia & United States (panel,

31 July 2000, appeal, 11 December 2000) imported beef dispute<sup>6</sup> examined several general issues of market access. The most recent case--the United States/ New Zealand & Australia lamb case<sup>7</sup> (panel report released 21 December 2000)--involved the WTO's scrutiny of a US government agency decision to impose a safeguard measure to block increasing imports of lamb meat. Below is a short synopsis of each case.

***EU Hormones case.*** Both the United States and Canada complained to the WTO that the EC prohibition of the importation and sale of beef in Europe treated with growth hormones violated the EC's obligations under the SPS Agreement. The EC directives that implemented the importation and sale ban singled out six separate growth hormones--three natural occurring ones (oestradiol-17 $\beta$ , progesterone, and testosterone) and three synthetic ones (trenbolone acetate, zeranol and melengestrol acetate ("MGA")) and applied a zero-tolerance policy. Thus a major part of North American beef, most of which is produced with hormones, was effectively prohibited from EC markets.

The Appellate Body of the WTO ultimately held that the EC directives did violate the SPS Agreement because the measures were not based on an appropriate risk assessment. With respect to MGA, no risk assessment had been done. With respect to the other five growth hormones, scientific evidence suggested that the hormones were safe if properly administered. The only evidence presented concerning the carcinogenic potential of increased hormone ingestion was not related directly to the six hormones in question. Thus the risk assessment demonstrated no rational connection with the SPS measures adopted, the outright ban on meat products coming from animals that had been treated with any of the six growth hormones. Finally, the panel found that no evidence was presented to substantiate a claim that any of the six hormones were being improperly administered on a widespread basis. Therefore the EC measures could not be sustained on the basis of protecting human health. The Appellate Body recommended to the WTO that the EC end the ban so as to bring its measures into conformity with its SPS obligations.

The Appellate Body's recommendation has however been subject to interpretation by the parties to the dispute. First, the EU told the WTO that it would take four years to bring its measures into conformity, but after the United States and Canada argued that it could be done in 10 months, an arbitrator ordered that the EU comply within 15 months, that was on 18 May 1999. However, the EU has still not lifted the ban on hormone treated beef, nor provided scientific evidence of the risk involved. The United States, therefore, charges punitive tariffs on imports of several products from the EU. Negotiations on compensation (through opening a larger quota for tariff-reduced import of hormone-free beef into the EU) are in progress, but have not yet come to a conclusion.

The Beef Hormones case is interesting for several reasons. From the perspective of our theme, i.e. governance issues in the WTO, it serves to illustrate that the WTO 'second-guesses' domestic policy. This in turn raises concerns among the defending state's general public and elected officials as to why an international body should be allowed to overrule state policies that find broad support at the domestic level. Europeans can argue that the ban on hormone treated beef in the EU is not (mainly), as in so many other cases, disguised protection of the economic interests of domestic producers, but an unavoidable government response to a wide-spread

feeling among meat consumers in the EU that all sorts of questionable practices in livestock production should simply not be allowed, independent of whether or not there is (already) hard scientific evidence of their detrimental consequences. For EU policy makers it would be extremely difficult to explain to a general public that is scared of mad-cow disease and other unpleasant events in the livestock sector that it allows beef on the market that is treated with unnecessary ingredients, only because the WTO has determined that this should happen.

***Korea Beef case.*** This case reviewed several aspects of Korea's practices affecting imports of fresh, chilled and frozen beef, but on appeal, the Appellate Body specifically examined: (1) domestic support provided to the beef industry and to the Korean agriculture sector generally; and (2) the separate retail distribution channels ("dual retail system") that exist for imported and domestic beef products.

On the issue of whether Korea had exceeded its permissible level of domestic support, there arose a number of difficult interpretation and evidentiary problems. The Panel was ultimately able to conclude Korea's domestic support for beef in 1997 and 1998 exceeded the *de minimis* level contrary to Article 6 of the Agreement on Agriculture and was not included in its protected Total AMS, and was thus contrary to Korea's Agreement on Agriculture commitments on domestic support. On appeal, the Appellate body was asked to reconsider the Panel's conclusions on the legal validity of the Panel's consideration and interpretation of Korea's commitments. The Appellate Body concluded that while the Panel considered the right documents, it misinterpreted the content of those documents. In fact it did not have enough evidence before it to conclude as it did that Korea had exceed its commitments. Thus the Appellate Body overturned the Panel decision on this point stating that there was insufficient evidence to make any such determination.

On the second issue, the Appellate Body upheld the Panel decision that the "dual retail system" did constitute a violation of national treatment. Korean law requires the existence of two distinct retail distribution systems so far as beef is concerned: one system for the retail sale of domestic beef and another system for the retail sale of imported beef. A small retailer must choose between selling only higher priced domestic beef or lower priced imported beef but not both. A large retailer (that is, a supermarket or department store) may sell both imported and domestic beef, as long as the imported beef and domestic beef are sold in separate sales areas. A retailer selling imported beef is required to display a sign reading "Specialized Imported Beef Store".

The Appellate Body held that to determine whether a violation of national treatment had occurred it was necessary not simply to find any difference of treatment, but whether or not the Korean dual retail system for beef modifies the "conditions of competition" in the Korean beef market to the disadvantage of the imported product. The Appellate Body found that in fact the dual retail system did affect the conditions of competition particularly for the reason that since the coming into force of the system in 1990, there had been a considerable decrease in the number of retail outlets where imported meat could be purchased. Finally the Appellate Body concluded that the dual retail system could not be saved by Korea's reliance on Article XX(d) as a measure for the enforcement of consumer protection from fraudulent merchandising practices (i.e. selling cheaper imported beef as domestic beef) as the measure was not necessary within the meaning of Article XX(d). Other food sectors which were subject to the same possibilities for

fraudulent sales did not have dual marketing schemes and with adequate policing and fines the fraudulent practices in the beef sector could have been achieved without WTO-incompatibility.

**US Lamb case.** The most recent case involving the meat trade, the US/New Zealand and Australia Lamb case, produced a Panel Report from the WTO on 21 December 2000. The Panel Report with annexes is over 500 pages long although most of this is a record of written and oral submissions of the parties. However, even the written decision of the Panel is almost 100 pages in length.

This case involved complaints by New Zealand and Australia that the United States' decision to levy a definitive safeguard measure against imports of lamb meat was contrary to Art. XIX of the GATT 1994 and the Agreement on Safeguards, particularly Art. 2 and 4.

The case involved a narrow point of law and administrative action--did the United States International Trade Commission ("USITC") get it right when it levied a safeguard measure against the incoming tide of New Zealand and Australia lamb meat? The Panel decision ultimately found that the USITC did not get it right and in its remedy section asked the WTO's Dispute Settlement Body to "request the United States to bring its safeguard measure on imports of lamb meat into conformity with its obligations under the Agreement on Safeguards and the GATT of 1994" (para. 8.2).

Under the slick veneer of this pronouncement however, is a detailed review of the actions of the USITC. Several contentious points argued by the parties to the dispute point to an increasingly intrusive penetration of WTO Panels into domestic decision-making. As a preliminary issue, there was the standard of review to be applied to administrative action taken by domestic bodies, such as the USITC. The Panel concludes that it must "refrain from a *de novo* review of the evidence reflected in the report published by the competent national authorities". Instead it must limit itself to "a review of the determination made by the USITC and to examining whether the published report provides an adequate explanation of how the facts as a whole support the USITC's threat determination" (para 7.3). The next sixty pages of the report are devoted to this examination and to a very detailed examination of what the USITC had failed to include in its published report. Ultimately, it was on the basis of a lack of evidentiary record that the United States loses the case. Here's how the Panel ruled against the United States:

- (1) The Panel found that the USITC report contained insufficient evidence to demonstrate that increases in lamb meat imports into the US were, as a matter of fact, "unforeseen developments" within the meaning of Art. XIX of GATT 1994.
- (2) The Panel found that the USITC wrongly defined the domestic industry that was being injured by imports as including both producers and packers and that consequently, it had failed to obtain the proper data to show that the safeguard request had come from producers representing a major portion of the total domestic production by the domestic industry in the investigation.
- (3) While the Panel approved of the USITC's analytical approach to determining the existence of a threat of serious injury and of evaluating all the factors which might contribute to that

threat, it found that the USITC had failed to adequately prove the causal link between the increased imports as the substantial cause for the injury or threat of injury to the US lamb meat producers.

### **2.3 Some Hallmarks of WTO Governance Arising From a Look at Trade in Meat**

There are a number of conclusions to be drawn from the microcosm of the WTO's activities in meat and meat products trade which have broader implications for the future of WTO governance and sustainability:

(1) the WTO has become a big institution. Its rules apply to 140 states with each country having its own schedules of detailed commitments, particularly with respect to trade in and support for agricultural products. The impacts of the rules penetrate deep into national policies and decisions that relate to everything from subsidies to safeguards, health and safety standards to distribution and sale practices.

(2) state commitments on disciplines they have agreed to are far from self-evident, from methodological perspectives, philosophical perspectives and interpretative perspectives and thus are open to question by other trading partners through the WTO dispute resolution mechanism

(3) developed states like the United States, the European Union, Canada, Australia and New Zealand are regular users of the dispute resolution mechanism and appear before it with increasing regularity, taking on developed and developing country trade practices

(4) while the development of WTO rules follows, at least in principle, the WTO practice of decision-making by consensus as set out in Article IX of the WTOA, the increasing prominence of dispute resolution displaces the consensus principle for all-or-nothing judicial determination. This in turn, threatens national sovereignty over the regulation of the production, distribution and sale of food whether for health and safety, consumer protection or consumer choice including meat as it falls under more intensive scrutiny of the other states through the WTO dispute resolution mechanism.

(5) Panels and the Appellate Body are exercising little restraint in taking and deciding cases, both in their approach to questions that can be decided by them and in the sufficiency of evidence that national bodies must have relied upon to substantiate their policy or quasi-judicial decisions under WTO review. Checks and balances on the DSB process as a whole appear non-existent.

### **3. The Bigger Picture of WTO Governance and the Challenges Ahead**

Are the above preliminary impressions, gleaned from the microcosm of international trade in meat, indicative of general trends within the WTO or are they simply conclusions from a few isolated cases, anomalies arising from the cases and rules that apply to trade in meat? We think these impressions are indicative of general trends within the WTO and that as general trends they are indicators of "overload" at the WTO. This "overload" needs to be addressed, in the best case scenario to facilitate the continued effectiveness of the WTO and under the worst case scenario, to avert a catastrophic collapse of WTO.

### **3.1 The “Bigness” of the WTO**

As observers of the WTO, it does not take long to realize that the WTO is exploding with development. The WTOA brought new sectors (services and intellectual property) into the purview of the WTO rubric, new disciplines to old sectors like agriculture that had enjoyed little discipline in the past, and new members to the organization. The GATT, which commenced with only 23 states and which operated with a skeleton administration is gone. One of the governance issues with the WTO is simply how to handle the “bigness” of the organization. Negotiations now involve more issues and more parties. Rules are more plentiful. More disputes have been heard and decisions rendered in the first five years of the WTO than in the entire 50 years of the GATT. Day-to-day management of the WTO can hardly be done with a few phone calls.

### **3.2 The Uncertainty of WTO Commitments**

When countries cannot agree on the exact nature and extent of obligations to be assumed, they sometimes prefer to adopt fuzzy language than have no agreement at all. The speed with which international agreements are sometimes concluded, with last minute compromises and the overall complexity of a 25,000-page agreement, leave plenty of room for uncertainty. The WTOA suffers from some of the above symptoms and consequently contains commitments that are vague, open-ended and in some cases even contradictory. This is combined with the vast variety of national measures that may not be WTO-compatible. There is ample room for disagreement among states. This uncertainty feeds into the point concerning the judicialization of the WTO. As the WTO gets bigger, in terms of numbers of parties, sector coverage and types of policies regulated, necessarily disputes will increase.

### **3.3 The Vigour of Developed States Activities and the Sidelineing of Developing Countries**

There is a growing divide in the WTO membership between the Northern, developed countries and the Southern, developing countries on a number of fronts. Developed countries were active in identifying the sectors that needed reform during the Uruguay Round and worked hard to draft rules to bring disciplines to agriculture, services and intellectual property. The economic benefits of increased trade and greater market access were promised to developing countries as the *quid pro quo* for new disciplines.

Many developing countries feel that they have not achieved the development gains promised to them through the greater liberalization of their markets.<sup>8</sup> During the Uruguay Round, market liberalization, was touted as the solution to underdevelopment.<sup>9</sup> Liberalization, it was argued, would correct market distortions allowing for greater efficiency through the operation of comparative advantage. However, in reality, the growth of exports from developing countries has not been able to keep pace with their imports. This has led to a widening trade deficit in most developing countries.<sup>10</sup> Developing countries still struggle to ensure that their exports will be able to enter the markets of developed countries. The problem of ‘end-loading’ by developed countries, whereby benefits of liberalization are accrued only at the end of a significant phase-in period, is of particular concern to many developing countries.<sup>11</sup>

Developing countries, who lack the domestic expertise and resources to fully evaluate the implications of the Uruguay Round, are still struggling to implement the WTO agreements.<sup>12</sup> The delay in implementation is due in part to the lack of resources and infrastructure in developing countries. As well, developed countries are not shy to use the DSB to rout out offensive non-conforming national measures, be they from developed (Hormones case) or developing countries (Korean Beef case). While some countries like Korea might be an example of a cusp country between developed and developing countries, the issue of disparity between the have and have-nots in technical capacity, infrastructure and resources reflects negatively on the overall effectiveness in the long-term operation and governance of the WTO. In the future, the larger the number of sectors, policies and issues included in negotiation rounds, the more difficult it is for developing countries with small delegations in Geneva and a lack of support staff in their capitals to participate successfully in the talks, and to assess and defend their interests in the WTO negotiations.<sup>13</sup> This disparity will likely act as a brake on future negotiations, and any attempt to introduce further liberalizing measures will likely be opposed by the developing world.

### **3.4 The Judicialization of the WTO**

With the creation of the WTO in 1994, the international trade regime organized around the GATT 1947 adopted a more formal and legalistic structure. The prior conciliatory nature of this regime was fundamentally altered. The Dispute Settlement Understanding (DSU) outlines the WTO's dispute settlement framework which has the primary goal of securing "positive solutions to a dispute".<sup>14</sup> This signifies a movement towards a more formal, legalistic process. Originally, the purpose of the dispute settlement mechanism in the General Agreement on Tariffs and Trade<sup>15</sup>, as articulated in GATT Articles XXII and XXIII, was the "mutual resolution of disputes by the parties, through such various means as consultations, conciliation, good offices and mediation."<sup>16</sup> Alternately, Article 3.7 of the DSU merely states that, "a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is to be preferred." The movement away from the previous, conciliatory dispute settlement process was deliberate.

The dispute settlement process is no longer solely a diplomatic process nor is it optional. Admission to the WTO is now conditional on the acceptance of all the various covered agreements administered by the organization. As a result, all members must adhere to the defined rule-based dispute settlement procedure outlined in the DSU. Panels must adhere to the strict timelines contained in the DSU. Also, a standing Appellate Body has been created to review the application of law in panel decisions, on the request of parties to the dispute. This provides some consistency in the dispute settlement process. Last, panel and appellate reports are adopted automatically by the Dispute Settlement Body (DSB) unless there is a consensus decision to the contrary.

The new process has been enthusiastically embraced by some states. In the forty-seven years of the GATT, approximately 200 cases were disputed.<sup>17</sup> Since the Uruguay Round, there has been over 210 disputes<sup>18</sup> with 60 panel reports and over 35 appellate reports issued.<sup>19</sup> This increased use and the binding nature of decisions resulting from the automatic adoption of reports as well

as the strengthened surveillance and enforcement mechanisms make that the dispute settlement process poses some challenges for the WTO.

What are the implications of this move from a consensual model to a quasi-judicial model of dispute resolution? The work of resolving disputes has been transferred from those working in specific government departments and diplomats in Geneva to the trade lawyers in the foreign affairs departments and even private practitioners retained by states to argue their claims. While the past may have seen a similar group of individuals — lawyers, technocrats and diplomats, the cases are won and lost by correctly framing the terms of reference for the dispute resolution panel, by the presentation of sufficient evidence and by persuasive legal argument. The role of the lawyer in trade law has been significantly enhanced by the new WTO binding dispute resolution process. This is even truer at the appellate level where appeals can only be heard where they relate “to issues of law covered in the panel report and legal interpretations developed by the panel”.<sup>20</sup>

One might argue that the judicialization of the WTO process was already apparent in the latter years of the GATT. We would argue that the judicialization of the WTO is more fundamental however. First, under the GATT hearing cases and adopting the decisions of the GATT panels was characterized by consensus. When the panel was created, the case unfolded in private and took on the trappings more of a private arbitration than a full-blown court case. Ultimately the implementation of an unfavourable decision could be blocked by an unhappy state litigant and a political solution to the problem explored. These mechanisms constituted an unofficial and consensual “safety-valve” of the GATT system. Under the WTO, this “safety-valve” is removed for a winner-take-all result characteristic of national judicial proceedings.

### **3.5 The DSB’s lack of judicial restraint and of accountability is an ominous threat to national sovereignty**

As the scope of WTO activities increases, so do threats to national sovereignty. In the quest for more rules which prevent trade distortion, countries are left with less and less room for national policy formation. While the rules themselves are the subject of negotiation during the multilateral rounds, the decisions of the DSB are not. Decisions, which negatively impact upon sectors or sentiments that play key political roles in national economies, are not being implemented. The WTO decisions on EU Bananas, EU Beef Hormones, US FSCs and Brazilian Aircraft are all cases in point. Thus the WTO’s success at tackling the tough sectors of international trade by letting them be resolved through the DSB, pit it against strong sentiments inside national governments and their general electorates that the WTO is becoming too powerful and too intrusive.

Furthermore, the DSB’s decisions are being increasingly perceived by the public as having far-reaching effects on a state’s ability to legislate in the areas of the environment, labour conditions, and economic development. Thus cries from non-governmental organizations (NGOs) and individuals desiring access to the WTO governance structure because governments’ hands are tied are becoming more credible. The most vocal calls for public participation were recently seen in Seattle as the WTO tried to open a new round of negotiations. This is in stark contrast to the previous eight negotiating rounds of the GATT which were conducted with little public outcry or

scrutiny. The success of public protests and disruptions at the last meeting of WTO members in Seattle demonstrates that “public apathy” has been replaced with public frustration, concern and action.

#### **4. Some suggestions for reform**

Is reform of the WTO necessary? In order to avoid the WTO becoming a victim of its own success we argue that member states must seriously consider reform of the WTO. The downside risk of not committing to reform is that the WTO will collapse under the weight of increasing complexity and the overbreadth of its activities, lose its soul to judicialization or be derailed by disgruntled developing countries and increasingly demanding NGOs. At the same time, the WTO is in danger of losing support among the general public, increasing the propensity for state non-compliance with WTO decisions. The stresses at the WTO – over-breadth, over-judicialization and the over-looking of legitimate concerns of developing countries, NGOs and the general public – need to be addressed soon if the WTO is to continue to play its prominent and innovative role in facilitating international trade.

##### **4.1 Reforms to Cope with WTO’s Over-Breadth and Increasing Complexity**

###### **Rationale**

The WTO has now become such a large institution, with such a numerous membership, broad coverage of policies and complexity of issues that it can no longer operate in the traditional GATT mode of taking decisions in meetings where all its members are represented. In practice the WTO – and earlier already the GATT – has anyhow long moved away from that procedure, and adopted a working mode in which a handful of powerful states, above all the United States and the European Union, effectively take decisions among themselves which are then formally ratified by the aggregate of all member countries. However, it is exactly this working mode which has alienated the majority of smaller countries in the WTO, and in particular the developing countries. These countries feel that their interests are not sufficiently taken into account in the WTO, but cannot find a lever to be better heard. In many cases they cannot even follow the negotiating process, in which ‘non-papers’ are discussed to which they may not have had access.

The disaster of the Seattle Ministerial meeting as such – not the public disaster of the riots on the streets – was, to a significant extent, caused by the inability, or unwillingness, of the superpowers to embrace the smaller and developing countries in the making of the actual decisions on the agenda for the next round of negotiations.<sup>21</sup> If the WTO is to remain, or to become, an institution in which all member countries feel equally well represented, and hence where all countries take their commitments equally seriously, it needs to develop a decision making procedure that provides all members with the opportunity to have a say on its dealings. At the same time, though, the WTO needs to find a mode of operation that makes it possible to take decisions, and conduct negotiations, in an effective way, without going through procedures that suffer from the confusion necessarily resulting when 140 or more countries want to speak at the same time.

Moreover, the WTO needs a focal point for developing new approaches to the increasingly complex issues it is faced with. It cannot always wait for full-blown comprehensive negotiating rounds to come up with solutions to new problems, or to difficulties faced with commitments made in the past. It should also take a regular look at the way it operates, and whether it deals with the most important issues in the reality of trading relations. The WTO should review not only the policies of its member countries on a regular basis, but also its own procedures and approaches.

### **Reform # 1 - Creation of an Executive Council**

The current WTO system does not have any form of an “executive” body to steer the organization between the plenary meetings of members held once every two years. If a WTO executive existed, it could be charged with managing the institution, developing policy and making decisions within the guidelines provided by the negotiated texts. The executive would provide valuable leadership in the establishment of the overall direction of the WTO.<sup>22</sup> To ensure that it is accountable, executive members should be chosen on a rotational basis using a regional formula that ensures that it is representative. In the absence of an executive, the “Quad” countries – United States, Japan, European Union, and Canada – have provided that direction to date. Such concentration of influence serves to undermine the legitimacy of the WTO and needs to be reformed.

### **Reform # 2 – Creation of a Negotiating Body**

With a number of member countries soon exceeding 140 states, negotiations in the WTO become increasingly difficult. It is simply logistically impossible to have so many delegations sitting at the negotiating table and to make progress on technically difficult issues. If all 140 or more countries want to make a statement of no more than five minutes on one concrete issue, nearly twelve hours of speaking time are needed. Moreover, the diversity of views expressed in negotiations among so many participants makes it extremely difficult for the chairperson to find the red thread running through the statements, and to see where a possible compromise might be found.

The solution adopted in the past was to have “green room” meetings with a much smaller active participation, usually preceded and paralleled by confidential informal negotiations held among the superpowers. The results of these closed-shop negotiations were then put on the overall negotiating table, and all the other nations that were not included in the inner circle could only accept or disagree, but rarely modify the outcome. This was very much a problem at Seattle, where many smaller countries, in particular developing countries were extremely unhappy with their inability to participate in the real important parts of the negotiations, and with the implicit suggestion that their function was limited to a take-it-or-leave-it role.<sup>23</sup> The criticism of the WTO lacking democratic structure relates not only to the inability of a wider public to participate in the negotiations, or to voting rules in the WTO, but fundamentally also to the way the core of the negotiations is done among a few powerful countries.

The solution to this dimension of the democracy problem in the WTO cannot lie in open negotiations among all WTO member countries, for the simple logistical problems mentioned

above. It can also not come through some refinement of the process of negotiating among the superpowers, because it is exactly this process that has alienated the developing countries. The solution must come through some form of representative democracy which guarantees that all voices are heard in some way, though not at the same time. Groups of countries must be represented at the negotiating table by one spokesperson, with a maximum number of spokespersons at the table at any time. The Executive Council proposed above could be an appropriate model for this purpose, too, where that Council would turn into a Negotiating Body when it comes to negotiations.

Alternatively, the Cairns Group approach could also serve as a model. Under this approach, several countries with similar interests on a given set of issues would form a group on a 'voluntary' basis, and would then speak with one voice at the negotiating table, represented by one spokesperson of their choice.<sup>24</sup> The composition of groups could differ from issue to issue, and a given country might be member of one group in negotiations on services, but member of a different group in negotiations on agriculture. There would, then, be a Negotiating Body for services, consisting of representatives of several groups of countries, and a different Negotiating Body for agriculture, with spokespersons representing different groupings of countries. The big players such as the United States and the European Union could still sit at the negotiating table individually, but the total number of negotiators in any particular forum would always be limited to, say, fifteen or twenty. The results of these negotiations would then still be taken to the WTO Ministerial Conferences where all WTO members are represented, and where final decisions are taken. But the overall assembly of all member countries would then act as a decision making body, and no longer as a negotiating forum.

### **Reform # 3 – Objective (and External?) Review Mechanism**

The WTO currently has a number of review mechanisms to ensure that members are compliant with their trade commitments. These include the Trade Policy Review Mechanism (TPRM) and ultimately the dispute settlement process. However, there is no mechanism that evaluates the effectiveness of the WTO in furthering its mandate overall. The World Bank has established such a mechanism. While this review body would have no power to force policy changes, its usefulness will come from moral persuasion. Moreover, the WTO's mandate will continue to be solely decided by its members, ideally with some input by NGOs. The WTO will be evaluated based on its own criteria established in its mandate. This review mechanism will serve an important legitimizing role, as its regular evaluations will come from an independent body. The review can be used to highlight successes, needed improvements, as well as progress made towards rectifying problems identified in previous reviews. Additionally, the European Commission, Directorate-General for Trade has suggested the formation of an 'Eminent Persons Group' to address and report on institutional issues.<sup>25</sup>

## **4.2 Reforms to Cope with Over-Judicialization**

### **Rationale**

We do not suggest the radical solution of William Shakespeare – First, we kill all lawyers – as the way to reform the over-judicialization of the WTO. And we should not be ones to say that there should be less work for international trade lawyers. Nor are we of the opinion that the DSB process is a flawed one or an illegitimate process.

Rather, we sound a note of caution that the WTO must resist the temptation to rely too heavily on dispute resolution as a substitute for negotiated solutions to the new or gnarly problems of international trade for two reasons. First, the DSB’s judicial “winner-take-all” process is in direct contrast to the WTOA clearly stated preference for proceeding by consensus, failing which it works on the democratic principle of one country, one vote. Second, several issues that states bring before the DSB involve complex issues for which not international consensus has yet developed, risks are unknown and multidisciplinary approaches yield differing answers. Take the cases of beef produced with hormones or GMO foods as examples. These cases will necessarily yield decisions for which there will be no buy-in by both parties to the dispute. This is in contrast to matters of interpreting a vague provision for which substantially agreement has been achieved, as was the case in the Korean meat case.

As the DSB process is now structured, the process requires the automatic establishment of a panel to decide a matter and the production of a decision which will be final. The WTO process was hailed as a significant improvement over the former practice by the GATT which permitted the blocking of panel formation and panel decision adoption. The rigidity and judicialization of the process has perhaps gone too far. Countries must respond to all and every allegation that a measure is WTO-incompatible. This makes the WTO process all pervasive and intrusive, expensive and undemocratic.

#### **Reform # 4 – Ability to Ask for a Justiciability Determination by the Appellate Body before a DSB claim goes to the Panel**

The DSB process is essential to the smooth running of the WTO. Its presence in the organization makes it almost unique among modern intergovernmental organizations. As its workload increases, it continues to make a particular contribution to the clarification of commitments assumed by member states. However, at some point, some questions that member states could put before the DSB must not be. Why? Because the issues may be beyond the proper role or “jurisdiction” of what the DSB was designed to accomplish.

We propose that the DSB be reformed so as to permit defendant states the opportunity to challenge, as a preliminary step in the DSB process, the justiciability of the issue before the DSB and conclude on the propriety of the DSB to hear and decide the case. It is important, of course, that this step not become political football and be subjected to the pressures of general negotiations amongst the WTO members, but rather that like the International Court of Justice in The Hague, the superior judicial body of the DSB, the Appellate Body, decides as to the justiciability of the case. What might be some possible grounds for ruling against the justiciability of a case? We suggest the following three:

1. significant evidence of lack of consensus among member states to agree during the most recent negotiations on the issue before the DSB;

2. pending determination of acceptable standards in the area of the proposed case by another international body, or

3. the taking of a decision in the case would be clearly prejudicial to one or more of the parties involved.

We argue that the primary role of the DSB is to clarify the interpretation of the agreements to which member states have agreed to be bound. It is not the role of the DSB to decide cases that are outside the agreed commitments. These are for future negotiations. Thus under the first heading for declining jurisdiction, one might include export credits. Agreement on the treatment of export credits was not part of the final WTO package and if a state were to try to bring them in under another rubric, it would be improper for the WTO to deal with the issue. With respect to GMOs, the issue could be raised as a SPS or TBT issue, but would it be proper for the DSB to address such an issue when it is so clearly without a resolution in the international community and not part of the WTO package. This issue also leads into the second ground for declining jurisdiction. No less than 7 international organizations<sup>26</sup> are attempting in one way or another to regulate GMOs. Why should the WTO preempt these attempts at arriving at an international consensus on the issue of production and trade in GMOs?

A third ground that might be available for the DSB to address a dispute put before it would be because the taking of a decision in the case would be clearly prejudicial to one or more of the parties involved. One example of where this might be the case would be where a country demonstrated overwhelming hardship at mounting a proper defence to the case brought against it.

The “preliminary determination” process, of course, runs the risks of complicating and lengthening the dispute resolution process at the WTO, something that member states wished to avoid in making the changes they did in 1995. But the concern that the WTO is becoming over-judicialized is a legitimate one and requires a response. The preliminary determination process, if properly framed, provides the DSB with the opportunity to develop a policy and practice of deference to the WTO’s consensus approach, and it prevents everything from devolving into the situation of “dragging anyone to a DSB panel to find who has the best lawyers”.

### **4.3 Reforms to Cope with Legitimate Concerns of Developing Countries**

#### **Rationale**

Many developing countries are still struggling with the commitments of the Uruguay Round<sup>27</sup> despite the fact that they account for approximately one quarter of all world trade.<sup>28</sup> It is now clear that the link between increased liberalization and development is weak.<sup>29</sup>

The North-South divide in the WTO is complicated by an imbalance of power in the WTO. While over two-thirds of WTO members are from developing countries, the developed world controls the balance of power. Moreover, the informal nature of WTO negotiations places developing countries at a disadvantage. The negotiating of agreements is done in “green room”

discussions, which can easily exclude developing countries that do not have the resources or expertise to search out and keep on top of all these informal negotiations. It is feared that developing countries will have little choice, but to accept what has been negotiated without them. To refuse may have repercussions outside the trade realm as most rely on aid from developed countries.

Instead, development depends on the initial economic and political conditions of the country prior to liberalization. These include the existence of: (1) a civil society where issues are debated openly and critically; (2) indigenous analytical capacities to assess policy alternatives; and (3) the financial, technical and human resources to adapt to change brought on by the international trade relations agenda.<sup>30</sup> The WTO and its developed members have a very important role to play in fostering these conditions by providing technical and financial support for the indigenous improvement of these pre-conditions.

Developing countries are also calling for more effective remedies.<sup>31</sup> Violations of WTO commitments are often more burdensome for developing countries who tend to have a less diversified economy than developed countries. However, enforcement of trade rulings is often more difficult as their economies, individually, do not represent an important market for many developed countries. Their retaliation efforts are insignificant. As a result, when cost is considered, many developing countries may choose not to initiate a dispute. Cross-retaliation, involving action under WTO agreements other than the ones which were originally violated, may be part of the answer. Thus, allowing Ecuador to impose sanctions in the area of intellectual property rights in response to the EU violating its commitments in banana trade, may have been a step in the right direction. Moreover, if the WTO were to adopt collective retaliation whereby defined groups of member countries would initiate retaliatory measures against another member in violation of a WTO commitment, developing countries would have a more effective incentive to enforce their rights. This would challenge the perception that the WTO is biased towards the developed world.

#### **Reform # 5 – Rapid Operationalization of Technical Assistance to Developing Countries including Legal Representation at the DSB through the office of the newly formed Advisory Centre on WTO Law**

Inequality among WTO members in terms of resources and ability to research and analyze key issues affecting the international trading system severely undermines the effectiveness of the WTO. To rectify this, the WTO must be able to expand its research capacity and make its resources available to state members and the interested public. To be fair, the WTO has taken some important steps in this direction within the last year with increasing numbers of training seminars for developing country trade officials, an official plan for increased internal transparency for all member states, and initiatives to improve capacity building in areas such as health and safety and technical barriers standards.

What has been missing up to this point has been resources for developing countries for the dispute resolution side of the WTO equation. With respect to dispute resolution, developing countries are often at a disadvantage when it comes to initiating or defending a dispute. The cost of the process, in part attributable to the lack of domestic legal resources, presents a significant

barrier to effective participation in the dispute settlement process. To remedy this, it has been suggested that the WTO establish an Advisory Centre on WTO law to provide technical assistance to developing countries.<sup>32</sup> The idea of a WTO ‘public defender’ has also been suggested. The public defender’s role would be to initiate dispute proceedings on behalf of countries that do not have the resources to act on their own.<sup>33</sup> The Advisory Centre on WTO Law has come into existence now although it is not yet up and running and will have the mandate to enable developing states to more fully utilize the WTO’s dispute settlement. Whether the Centre will go so far as to provide a “public defender” remains to be seen but as the prominence of the dispute resolution increases, capacity building for developing countries in this area is essential.

### **Reform # 6 – Allowing for Collective Retaliation**

To overcome the problem that small countries, and in particular developing countries, lack the economic power to impose effective retaliation against large countries, and that retaliation can hurt their own economic interests more than that of the large country that they target, the WTO should consider to allow for retaliation not only by the country that originally brought the case before the WTO, but by several WTO members at the same time. In principle, it could be argued, all WTO members should be allowed to retaliate jointly against one member that violates the rules. After all, the rules were agreed among all WTO member countries, and hence all members jointly should have the right to bring the violating member back on track. However, in practice if all WTO members were allowed to retaliate at the same time, then it would be difficult to determine which country could impose retaliatory tariffs on which volume of trade. After all, the rule still is that retaliation should not be more than equivalent in economic terms to the violation. That rule could well be discussed, because the purpose of retaliation is to signal to the violating country that it should bring its policies into conformity with WTO requirements, and if “strong” retaliation achieves this more effectively than equivalent retaliation, why should “strong” retaliation then not be allowed? However, if the principle of equivalence of retaliation were given up, then a significant imbalance of effective rights could result between large and small countries. Hence it is probably better to maintain the principle that retaliation should not be more than equivalent to the violation, or at least that retaliation must not be more than x times the value of the original violation.

However, small countries may find it difficult to impose even equivalent retaliation. This problem could be overcome if the WTO were to allow complaining countries to bring together a group of WTO member countries that jointly engage in collective retaliation. It would then be up to that group of countries to agree amongst them as to who retaliates how much, as long as the aggregate value of retaliation does not exceed the acceptable level. Under this provision, several developing countries could get together to fight jointly against a breach of rules that one big developed country is committing. It should, then, also be possible to engage in carousel sanctions, where retaliation moves from one country in the group to another. A provision like this may go a long way towards allowing developing countries to feel that they have effective leverage in the WTO.

## **4.4 Reforms to Cope with Legitimate Concerns of NGOs**

### **Rationale**

The first challenge to be overcome in order to achieve greater accountability is to determine to whom the WTO is to be accountable. It is apparent, however, that present participation in the WTO is quite exclusive and this inaccessibility is one of the issues that the WTO must face concerning its governance and credibility.

It would be very unrealistic to expect the WTO to completely reject the informal nature of its negotiations because, as an international organization, it must balance the operation of its agenda with the sovereignty requirements of its members. However, there are a number of changes the WTO could implement to improve the accountability of the process. For instance, the WTO could appoint a committee to hold public hearings and collect submissions from the public. The committee would then prepare a report for the consideration of members as they enter into negotiations. This would create a forum for the public to voice their concerns about needed reforms. Next, draft texts should be publicly circulated prior to endorsement as accountability requires access to information. This would allow members to seek feedback from their citizens. As mentioned above, accredited NGOs could be permitted to attend the actual negotiations. Their role would be two-fold: to improve the transparency of the process by reporting back to their members and to serve as important resources. NGOs with specific expertise in a trade-related matter would provide valuable insights into the negotiations.<sup>34</sup> Last, formal reporting periods are needed following informal discussions to ensure that all members are aware of the progress of the negotiations. Admittedly, the success of these reports will rely on the honesty of members; thus, it must be stressed that dishonesty will only serve to undermine the legitimacy of the institution.

NGOs have also raised concerns regarding openness and transparency of the dispute settlement process. They seek to be provided with more information sooner in order to participate in the process and defend their positions. It is argued that this will "...heighten public awareness [and] increase the legitimacy of the system".<sup>35</sup> To achieve this the restrictions on documents, at least the non-confidential ones need to be removed. Also, there should also be a mandatory review of *amicus curiae* briefs and a conversion to public hearings. Last, the DSU could be amended to require a timely summary of the parties' positions to the public.

On the other hand many members are fearful of the impact of greater transparency. It could harm the intergovernmental character of the WTO. Despite the legalization of the dispute settlement process, it is still perceived by many as essentially conciliatory in nature. Moreover, it can be expected that those who oppose the broadening of the WTO's focus to include such non-trade issues as the environment or human rights are also apprehensive about greater transparency. If increased openness leads to more participation by NGOs, the WTO may be forced to address non-trade issues thereby 'polluting' its trade focus.

Yet the "green room" practice has permitted members to exclude dissent and those who wish to address 'non-economic' aspects of international trade by dictating a very focused agenda of the negotiations. If broad participation is mandated, the WTO will not be permitted to continue to remain focused solely on economic aspects of liberalized trade. As participation becomes more diverse, one can expect a more comprehensive agenda to emerge. Like increased participation, if transparency increases in the WTO it will be easier to hold national governments accountable for

their commitments. If the process is fully transparent, negotiations will become a matter for public scrutiny. Governments will then be forced to assume ownership for commitments because any failure to do so could affect their legitimacy as representatives at home.

Improving transparency will also better ensure that the trade agenda is responsive to the needs of and meets the approval of the public. If agendas are revealed prior to negotiations, there will be sufficient time for public comment, and errors and omissions will be identified before the negotiations occur. Unlike previous negotiations, trade agreements will not be presented to the public for the first time as a *fait accompli*. Pressure can be placed on governments not to sign agreements unless the document is responsive to the comprehensive trade concerns of the public. In this way, one can expect transparency to serve to support the WTO as a legitimate form of international governance.

### **Reform # 7 – Accreditation and Formal Participation of NGOs**

In the post-Seattle WTO, it is inevitable that NGOs will have a more vocal and involved role in the WTO. If WTO members do not initiate ways to include participation by NGOs, one can expect that they will be forced to do so by the NGOs themselves who expressed very effectively in Seattle their frustration with exclusion. Calls for a formal accreditation program are coming from both governments and NGOs.<sup>36</sup> Such programs exist in other international institutions.<sup>37</sup> Their experiences can serve as an important source of information for the WTO. To ensure the integrity of the WTO, there needs to be a way to distinguish between NGOs who misleadingly advance an agenda claimed to be one of those they represent, and those who actually do articulate the collective perspective of its membership. The WTO has commenced this task with its initiative to improve the external transparency of the WTO. But does its present policy go far enough?

Accreditation of NGOs will increase the WTO's legitimacy for a number of reasons. First, there will be a formal process whereby NGOs can engage to participate. Provided that the process is transparent, it will also become readily apparent if certain interests or communities are over-represented. Likewise, it may become easier to identify whose interests are not being represented, whereas the WTO can seek out participation to compensate. Last, if the body is self-regulating like the NGO steering committee of the UN Commission on Sustainable Development, there will be no claims that WTO members are avoiding opposition by selecting only supportive NGOs with which to work.

### **5. Conclusion**

The WTO needs reform in order to maintain (or in some cases regain) the confidence of its members and the public. Without reform, its legitimacy will continue to be questioned and this will serve to undermine its ability to structure and govern international trade. The legitimacy of the WTO depends primarily on rationally limiting the ever-increasing scope of the WTO, maintaining the appropriate consensus/judicial balance and achieving greater accountability in its operation. To achieve greater accountability and comprehensiveness, the WTO will need to broaden participation and improve the transparency of its operation. However, in order not to overwhelm the institution, expanding the scope of the WTO must be initiated with caution.

Attention must be given to the limitations of its infrastructure and expertise. The effectiveness of the WTO will be undermined if it attempts to regulate, without support, areas where it lacks sufficient resources.

The WTO is experiencing a crisis of success. It is evident from the recent public protests at the 1999 plenary meeting of its membership in Seattle and the growing split between developed and developing nations that significant institutional changes are needed. There may be better proposals to solve each of the problems we have identified and discussed, and other solutions for problems not considered in this paper. However, some significant changes will have to be made to the WTO institutional framework in the near future if the credibility of and support for a rule-based regime for international trade are to be maintained. All sectors of international trade will benefit from such reforms, including trade in meat and meat products.

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- <sup>3</sup> These commitments are contained in the national schedules in one or more of the five parts (GATT-bound tariffs and tariff quotas on agricultural products; GATT-bound tariffs on other products; preferential tariffs; non-tariff concessions; and domestic and export subsidization commitments with respect to agricultural products) and are made pursuant to Annex 1A (Multilateral Agreements on Trade in Goods) of the WTOA, especially as set out in the Agreement on Agriculture. It is important to note, however, that not all countries guaranteed 5% market access by 2001, notably Japan.
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- <sup>10</sup> *Ibid* at 7.
- <sup>11</sup> *Supra* note 8 at 4.
- <sup>12</sup> *Supra* note 8 at 5.
- <sup>13</sup> G.P. Sampson (2000), The World Trade Organisation After Seattle. “The World Economy”, Vol 23 No. 9, pp.1097-1117.
- <sup>14</sup> *Supra* note 2.
- <sup>15</sup> *Supra* note 1.
- <sup>16</sup> D.P. Steger, (1998) “WTO Dispute Settlement” in P. Ruttley, I. MacVay & C. George, eds., *The WTO and International Trade Regulation* (London: Cameron May) at 53.
- <sup>17</sup> S. Suranovic, ed. “A Three-Year Review of the World Trade Organization” at <http://www.internationalecon.com/wto/ch2.html> (date accessed: 6 June 2000).
- <sup>18</sup> World Trade Organization, “Dispute Settlement: List of panel and Appellate Body reports” at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm) (date accessed: 22 December 2000).
- <sup>19</sup> *Ibid*.
- <sup>20</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 17.6.
- <sup>21</sup> G.P. Sampson (2000), The World Trade Organisation After Seattle. “The World Economy”, Vol 23 No. 9, pp.1097-1117.
- <sup>22</sup> On the proposal to establish an executive body in the WTO, see also J.S. Odell, The Seattle Impasse and Its Implications for the World Trade Organization. Paper presented at the conference on “The Political Economy of International Trade Law”, held to honor Robert Hudec, Minneapolis, 15-16 September 2000.
- <sup>23</sup> J.S. Odell, The Seattle Impasse and Its Implications for the World Trade Organization. Paper presented at the conference on “The Political Economy of International Trade Law”, held to honor Robert Hudec, Minneapolis, 15-16 September 2000.
- <sup>24</sup> On changing the green room process in the direction of having the whole WTO membership decided which states are invited, see J.S. Odell, The Seattle Impasse and Its Implications for the World Trade Organization. Paper presented at the conference on “The Political Economy of International Trade Law”, held to honor Robert Hudec, Minneapolis, 15-16 September 2000.

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- <sup>25</sup> European Commission, Directorate-General for Trade, EC Communication to the General Council, Brussels, 25 January 2000, “Improving the Functioning of the WTO: Suggestions for a Way Forward”. See also G.P. Sampson (2000), *The World Trade Organisation After Seattle*. “The World Economy”, Vol 23 No. 9, pp.1097-1117.
- <sup>26</sup> D. Buckingham and P. Phillips “Hot Potato, Hot Potato: Regulating Products of Biotechnology by the International Community” *Journal of World Trade*, February 2001.
- <sup>27</sup> J.S. Odell, *The Seattle Impasse and Its Implications for the World Trade Organization*. Paper presented at the conference on “The Political Economy of International Trade Law”, held to honor Robert Hudec, Minneapolis, 15-16 September 2000.
- <sup>28</sup> World Trade Organization, “Seattle: What’s at Stake? Resource Booklet For The Seattle Ministerial Meeting”. Available at the WTO Homepage <<http://www.wto.org>>.
- <sup>29</sup> Rohinton Medhora, “Issues of Concern to Canada at Future WTO Negotiations”. Submission of the International Development Research Centre (IDRC) to the House of Commons Standing Committee on Foreign Affairs and International Trade, 21 April 1999. Available at: <<http://www.idrc.ca/tec/wtohoce.html>>.
- <sup>30</sup> *Ibid.*
- <sup>31</sup> *Ibid* at 13.
- <sup>32</sup> CUTS Centre for International Trade, Economics and Environment, “Dispute Settlement at WTO – From Politics to Legality?” Briefing Paper No. 3, 1999.
- <sup>33</sup> B.M. Hoekman and P.C. Mavroidis “WTO Dispute Settlement, Transparency and Surveillance” (unpublished) November 19, 1999 at 11.
- <sup>34</sup> Not all analysts would agree to this role for NGOs in the WTO. For a critical view, see D. Robertson (2000), *Civil Society and the WTO*. “The World Economy”, Vol. 23 No. 9, pp. 1119-1134.
- <sup>35</sup> Kim Van der Broght, (1999) “The Review of the WTO Understanding on Dispute Settlement: Some reflections on the Current Debate” 14 *Am. U. Int’l. L. Rev.* 1223 at 1228.
- <sup>36</sup> For Canada’s position see *Canada and the Future of the World Trade Organization: Advancing a Millennium Agenda in the Public Interest*, The Report of Standing Committee on Foreign Affairs and International Trade (June 1999). For the EU’s position see: European Commission, Directorate-General for Trade, EC Communication to the General Council, Brussels, 25 January 2000, “Improving the Functioning of the WTO: Suggestions for a Way Forward”. For a NGOs position see: Consumers International “Consultation and Transparency in the WTO: Trade Briefing Paper No 2” August 1999. <<[http://www.consumersinternational.org/trade/trade\\_brief/transparent.html](http://www.consumersinternational.org/trade/trade_brief/transparent.html)>> (date accessed 23 June 2000).
- <sup>37</sup> Information about the NGO accreditation program of United Nation’s Conference on Trade and Development (UNCTAD) is available at its Homepage: <<http://www.unctad.org/en/subsites/ngo/status.htm>>.