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ABSTRACT

The object of this paper is to analyse the evolution of the international trading system from its inception as GATT in 1947 to its latest incarnation as WTO, comprising the complex array of agreements forming its substance and mandate. The study focuses on the adequacy or the inadequacy of the system as it evolved and functioned in an environment of changing international economic and political reality. The study also attempts to grapple with the more difficult question of looking at the future prospects of the system, the strains that it will need to face and the subsequent changes that are called for in its approach, content and functioning.

The paper consists of six parts. The first parts deals with the birth and features of GATT. It views GATT in its historical context and refers to the demise of the Havana Charter, the attenuation of multilateralism and the emphasis on European consolidation in the context of the cold war. The second part provides a synopsis of GATT's functioning during the first three decades of its existence (1950-79). The third parts deals with the period 1980 through 1994. The fourth part devotes itself to the analysis of the paradigm shift brought about by WTO. In this part, the new issues (TRIMS, TRIPS and services) as well as the old elements of the WTO system are analysed (agriculture, textiles and clothing and some systemic issues such as safeguard system, balance-of-payments rules and dispute settlement). The fifth part traces the journey of WTO from triumph (Marrakesh 1994) to fiasco (Seattle 1999).

The last part of the Working Paper attempts to delineate what is to be done. The possibility of a degree of moderation, if not redress, to the on-going process of inequitable integration can emerge only if formal democratic representation, as mandated in the constitution of WTO, is strategically exercised by those majority members who bear the costs of integration.

INTRODUCTION

The object of this paper is to analyse the evolution of the international trading system from its inception as the General Agreement on Tariffs and Trade (GATT) in 1947 to its latest incarnation in the form of the World Trade Organization (WTO) comprising the complex array of agreements forming its substance and mandate. The study focuses on the adequacy or the inadequacy of the system as it evolved and functioned in an environment of changing international economic and political reality. The study also attempts to grapple with the more difficult question of looking at the future prospects of the system, the strains that it will need to face and the subsequent changes that are called for in its approach, content and functioning, taking into account the future governance needs of the world economy and polity.

The paper consists of six parts. The first part deals with the inception and basic elements of GATT. The second part provides a synopsis of the functioning of the agreement from 1950 to 1979. The third part analyses the crisis that gripped the system in the 1980s and the denouement that followed. The fourth part is devoted to a brief analysis of the outcome of the Uruguay Round, viz. the emergence of the World Trade Organization system in Marrakesh in 1994 and the paradigm shift that WTO introduced. The fifth section attempts to take stock of its operations in recent years and to size up the challenges it has brought about. The last part concentrates on what is to be done, outlining political and strategic considerations and defining certain institutional and programmatic initiatives.

I GATT: ITS BIRTH AND FEATURES

Three decades of troubled trade and monetary relations, marked by a syndrome of 'beggar-thy-neighbour' policies and the onset of the great depression formed the background to GATT. The outbreak of the Second World War gave the decisive push to the efforts of the architects of the postwar trade and monetary policies. The interplay of interests and concerns of the UK and the USA, the two initiators of this endeavour, shaped its outcome.[1] The more powerful of the two countries had, for almost a decade, tested and tried the reciprocal trade agreements 'many of which had clauses that foreshadowed those that are currently in GATT'

(Jackson 1992: 31). In other words, 'GATT was constructed … out of old trade agreement lumber ready at hand' (Snape 1986: 21). Naturally, the results were not quite like the neat models of trade theory based on the comparative advantage principle; nor were they in accordance with the political rhetoric of free trade.

The General Agreement on Tariffs and Trade came into existence on 30 October 1947, about six months before the signing of the more comprehensive and more ambitious Havana Charter that embodied the agreement on the International Trade Organization (ITO). GATT was to be an interim arrangement pending the conclusion of the Havana Charter (ITO), which was to incorporate GATT. Events, however, moved differently: only GATT survived and the Havana Charter, after languishing in limbo for a couple of years, was finally archived, following a decision by the president of USA in December 1950 not to submit it to the Congress for approval.

Eight basic principles characterized the system that emerged:

i) *Non-discrimination*, i.e. in the matter of tariffs and trade regulations no signatory to the agreement can discriminate against its trading partners who are also parties to it. If a country chooses to offer any concessions to a non-member, it must offer equal concessions to all parties of the agreement. This is the celebrated 'most favoured nation' (MFN) clause. This principle is embodied in Article I, which also incorporates the major exception to the rule: the Commonwealth (Imperial) preferences as well as the French, Belgian, Dutch and the US preferences with regard to their respective dependent/associate territories.

ii) *The prohibition of quantitative restrictions and the acceptance of tariffs*, *i.e. price-based measures as the only legitimate tool for regulating external trade*. This is provided in Article XI, which again has certain built-in exceptions. The major exception was introduced by the United States with the aim of adapting the principle to support its system of domestic agricultural support.

iii) The principle of *national treatment*, recorded in Article III, stipulates that internal taxes or regulations must not be used to moderate or counter-act tariff rates and concessions.

iv) The fourth element relates to the process of tariff negotiations and the underlying principle of *reciprocity*. The process of tariff

reduction negotiations is based largely on techniques refined in the American reciprocal trade agreements.

v) The fifth feature, usually referred to as *retaliation,* is related to the sanction offered by the system. This is the ultimate weapon provided in Article XXIII, to be used after all other measures such as consultation, investigation and adjudication have been exhausted.

vi) The *safeguard mechanism* (Article XIX) can be applied in emergency situations where excessive imports of a product cause, or threaten to cause, serious injury to domestic producers of like product, and the party affected is free to suspend its obligation or to modify its concession in respect of the product in question, to the extent necessary to prevent or remedy the injury.

vii) The seventh element is the rather obvious one of GATT being designed to deal with *international, i.e. cross-border, trade* in goods.[2]

viii) The last principle concerns *voting rights, decision-making procedure and amendment procedures* under Articles XXV and XXX. Every contracting party has one vote. Decisions are made according to a simple majority, except in instances where a different procedure is specifically provided. Article XXX stipulates that amendment to Part I of GATT, which includes the MFN clause, requires unanimity. It gives implicit veto to every contracting party with regard to any amendment, which would amount to an infringement or abridgement of its right to continued enjoyment of non-discriminatory treatment at the hands of other contracting parties.[3]

1.1 The Havana Charter (ITO) and its demise

The Havana Charter (ITO) was the result of the multilateralization of an earlier bilateral process formulating a postwar international trade order. Reflecting concerns of the wider global community, it was qualitatively different from GATT in its emphasis on employment, development and reconstruction goals; its perception of the failure of the market in areas of competition and commodities; its recognition of the role of governments in maintaining higher levels of employment, regulating foreign investment,

correcting market failures in commodities and preventing restrictive business practices; and, finally, its adoption of a less asymmetrical approach to the obligations to be undertaken by members.

With the stillbirth of ITO, all of this—and also the status as an international organization—was lost to GATT. We have mentioned earlier the proximate cause for ITO's demise. The more deep-rooted causes have been analysed by several scholars.[4] Gardner has pointed to the political and economic dis-equilibrium of 1947, which dashed earlier hopes of a speedy return to equilibrium after the end of armed hostilities. This was the precursor to the cold war era. The failure of the foreign ministers of the allied powers at the Moscow conference in April 1947 to move toward a peace treaty gave the Americans the decisive moment to introduce the Marshall Plan, a massive regional initiative. Economic recovery and integration of Western Europe became the priority.[5]

With this shift, it was inevitable that the task of consolidating Western Europe—with massive American involvement—against the perceived threat from Russia would replace the rhetoric of world prosperity founded on multilateralism. The complicated outcome of the exasperating international negotiations was easily set aside, particularly, as it contained a degree of international oversight, an element to which the American Congress had always been very sensitive. The architects of the postwar trade order were looking for a framework that would facilitate the pursuit of corporate capitalist interests in an orderly world, once the worst challenge from within the system had been eliminated. Based on their own recent experiences, they worked out a body of rules and principles, which responded to the emerging needs and which, at the same time, broadly reflected the changing power equations. To some extent, the wider concerns that resulted from the multilateralization of the negotiations were included, and the ultimate product was hailed as a world trade order based on multilateralism. However, the successors of the architects of the postwar trade order soon abandoned it when they were faced with a challenge to the self-same interests arising outside the system as a diametrically opposite alternative. What was of supreme importance to them was the continuation and expansion of the system. If it required strong reinforcement of regionalism by massive aid flows, so be it. If it implied attenuation or even abandonment of some of the multilateral instruments newly fashioned, it was no problem.

II THREE DECADES OF GATT (1950-79)

The three decades that ended with the conclusion of the Tokyo Round of Multilateral Trade Negotiations (MTN) mark an era in the life of GATT characterized by notable achievements and serious shortcomings. GATT tried to graft institutional muscle on the bare bones of an interim international agreement, while still staying within its framework. True to its objective, it launched an impressive tariff reduction exercise, but also overlooked, connived at, and, even presided over glaring breaches of its own basic tenets. It tried to respond to the changing political and economic environment but could not quite adjust to the new realities or the emerging aspirations of most of its members. It tried to grapple with the new generation of trade problems, but nearly ended up with a challenge to its integrity. In its handling of issues, GATT was torn between adherence to its operational rules and the reality of the weight of the trade powers. And it existed and shaped itself according to the defining influence of the power structure that supported the institution; it exhibited minimal determination and even less ability to shape reality toward the perspective goals that ostensibly had inspired its formation. All in all, it is a mixed story, and one in which the 'golden age' is rather obscure.

2.1 Tariff reduction: cause or consequence of growth?

Let us first review GATT's major objective—tariff reduction. This was pursued systematically in seven 'rounds' of trade negotiations, and remarkable cuts to the expanding coverage were achieved in conjunction with the Geneva Round at the inception of GATT, and the subsequent Kennedy Round (1963-67), and Tokyo Round (1973-79). Reductions largely affected the rapidly expanding sectors of industry, but not agriculture or textiles and clothing. With the implementation of the Tokyo Round, ' … the average import weighted tariff on manufactured products maintained by industrialized nations declined to about 6 per cent' (Hoekman and Kostecki 1995: 19). The impact of tariff cuts was far less on products of export interest to developing countries.[6]

Starting from 1950, the next 20 years were a remarkable era of economic upswing, as industrial countries recorded an unprecedented rate of growth. Without a doubt, an important stimulus for growth in this period was trade. But it needs to be remembered that trade could increase because production facilities in the war-devastated economies of Europe were being

reconstructed with huge inflows of capital from the other side of the Atlantic and the European states were pursuing expansionary policies, which maintained effective demand at high levels. The elimination of exchange and trade restrictions facilitated larger trade volumes and more efficient use of resources to serve bigger markets, exploiting the economies of scale. Mass consumption of standardized goods expanded rapidly in the postwar period and American steel, chemical, automotive, rubber and electrical machinery industries faced insatiable demand. Given the GATT philosophy and the ensuing period of non-discriminatory tariff reduction, these American industries enjoyed the prospect of being able to maintain their leading position, while at the same time, letting European economies share in the growth. For them, 'free trade promised nothing but expanding exports' (Reich 1983: 780).

Later in this period, other significant developments were taking place.[7] These included rapidly increasing international mobility of industrial capital among the developed countries; narrow segment specialization leading to a fast increase in intra-industry trade; increasingly oligopolistic organization of industrial production; and intra-corporation but international division of production processes. 'Interlocking these four trends is the multinational corporation, which has provided a dynamic infrastructure to the direction and composition of international trade flows' (Tussie 1987: 5-6). The cumulative impact of these tendencies eventually led to a vast escalation in intra–corporation trade. It also led to the internalization of tariffs and to what Tussie calls, 'painless tariff-cutting'. The tariff-cutting exercise in this situation appeared to be more the consequence than the cause of trade expansion. Or, put more accurately, both phenomena were caused by basic changes in investment patterns as well as in the organizational aspects of production.

Another factor underlying the tariff reduction exercise under the aegis of GATT was linked to the simple political and strategic objective of the cold war.[8]

Interestingly, impressive reductions were achieved in the Kennedy (1963-67) and Tokyo (1973-79) Rounds, the former coinciding with the final years of remarkable growth, and the latter at a time when the institutional underpinnings of the earlier era had all but disappeared, the expansionary phase was already faltering and the trade order represented by GATT was being questioned. All in all, GATT seemed to be responding to and participating in a more complex process shaped and conditioned by various political and economic factors that were unique to its historical

environment. Thus, the widely held belief that GATT tariff reductions caused the phenomenal trade expansion (and growth) does not seem warranted. Even less sound would appear the claim that such causal linkage is valid for all situations and times.

2.2 Developing countries: GATT's response

Let us turn to the question of the developing countries, the second major area of GATT's activity. Decolonization resulted in a large number of new nations, and the second and third decades of GATT witnessed an upsurge in its membership. At the end of the 1950s, the industrialized world with 21 countries out of a total membership of 37 constituted the majority at GATT. The 1960s witnessed the inclusion of 36 developing countries, thus changing the equation overwhelmingly in favour of the developing countries. Their numbers increased further, as another 16 joined in the 1970s and early 1980s. Even though most of the developing countries did not join its ranks until the 1960s or later, the desire to bring new nations in its sphere had started to influence the thinking in GATT already in the 1950s, and the specific problems of these countries were included in its deliberations.

Two initiatives followed. First, the review session of 1954-55 concluded that the use of import restrictions by third world countries for development purposes could help to achieve the GATT objectives. Thus, a new article was introduced (Article XVIII) to recognize the right of developing countries to resort to restrictive measures to protect infant industries and to safeguard balance of payments. In its coverage of the latter, Article XVIII.B refrained from setting a time limit on the continued use of import restrictions, thus making this Article the most effective, widely conceived and legally enforceable right of developing countries to safeguard their policy-making autonomy.

Second, in 1957 GATT commissioned an expert study under the chairmanship of Mr Haberler on developing-country trade problems, such as the low export growth, fluctuating commodity prices and protectionist policies of the industrial countries on agriculture. In 1958, the panel submitted its report, popularly known as the Haberler Report. 'The substance of the report was that the predicament of the underdeveloped countries was due in no small measure to the trade policies of the developed countries' (Dam 1970: 229).

The rules on tariff negotiations were also criticized. In short, the developing countries faced a double handicap: the industrial countries were not following specific GATT regulations affecting their areas of interest, and the basic rules of GATT were weighted against them.

The Haberler Report and the process following it caused considerable turmoil at GATT and led to the developing countries uniting to issue a collective initiative, calling for the reform of the system. They pressured to link trade and development issues in the United Nations forum and in May 1964 this led to the establishment of the United Nations Conference on Trade and Development (UNCTAD). The same year marked the emergence of Group 77, a common front of the developing countries to improve their bargaining power through collective action. The events leading to the establishment of UNCTAD also influenced GATT where discussions on reform were initiated in May 1963. The process culminated in the addition of Part IV entitled 'Trade and Development' in February 1965.

Part IV was impressive in its format and general statement of principle. But as an instrument to correct the distortion in GATT's structure and function by placing specific obligations on the industrialized countries, its value was limited. The only operationally significant provision in Part IV was related to the interpretation of the reciprocity concept in the context of developed-developing country relationship. Wider in scope and more specific in contents, the formulation[9] was an improvement over the already existing Article XXVIII bis. Nevertheless, the entire negotiating mechanics was left to the discretion of the stronger parties.

Two other elements of GATT's response to the demand for reform should be noted. The first related to waivers granted to developing countries. Developing countries had long been critical of the non-discrimination principle of GATT, which treated unequals equally, and had pushed for a legal basis that would permit preferential treatment in their favour. With the creation of UNCTAD, the demand gained momentum. In 1971, GATT granted two waivers, valid for ten years: one implemented the generalized system of preferences (GSP) which enabled industrialized countries to extend preferences to developing countries; and the other allowed developing countries to exchange preferences amongst themselves.

The second element was related to the Framework Agreements articulated in the Tokyo Round (1973-79). These agreements granted a permanent legal basis to what had been secured for a limited period with the 1971 waivers. The preferential concept introduced to modify the 'most-favoured-nation' principle was, however, eroded by 'graduation', a concept based on the assumption that the developing countries, as their economies progressively developed, would participate more fully in the framework of rights and obligations. Framework Agreements also included a declaration on balance-of-payments measures. This was the first move by the developed countries to circumscribe Article XVIII.B.

Developing countries, who formed an overwhelming majority in GATT, were interested in establishing effective trade–development linkages. GATT's response—regardless of whether evaluated in terms of the Haberler Report or according to the expectations of the developing countries—was inadequate, both conceptually as well as politically. The inadequacy was compounded by major departures from the rules as permitted or encouraged by GATT. And here we turn to the systemic and chronic exceptions which relate to two areas of interest to developing countries: agriculture and textiles and clothing.

2.3 Agriculture

At the time of GATT's inception, a built-in exception was provided by Article XI, which prohibited quantitative restrictions, in order to adapt it to the requirements of the American policy on domestic support to agriculture. When this was inadequate to meet domestic exigency, the US obtained a very liberal waiver from GATT obligations in 1955, enabling it to continue with wide-ranging agricultural protection. Later, EEC's common agricultural policy (CAP) came into effect. EEC's domestic production was effectively isolated from world market forces by its border mechanism of variable levies. Its 'export restitution' mechanism guaranteed exporters the difference between domestic support price and competitive world price. In due course, CAP, with the dual intervention mechanism, transformed farming in Europe, converting the continent from a large importer to a massive exporter of agricultural products.

Considering the track-record of the two major powers, it is no surprise that GATT's agricultural regime was marked by lax discipline on quotas, lesser

bindings on tariffs, little discipline on domestic support or subsidization, and a mere appeal to avoid export subsidies which would disturb the relative shares in the world market. All this grossly hurt the trade prospects of efficient producers, including many developing countries.

2.4 Textiles and clothing

A discriminatory and restrictive regime was clamped on efficient producers of textiles, beginning with Japan. Later, on the grounds that imports from 'low-wage' regions were causing 'market disruption', this was extended to cover all textile exporting countries in the developing world. This was a total reversal of the GATT philosophy, and with every successive renewal, the regime became more extensive in scope and more restrictive in content. Conceived as a temporary measure to enable the textile industry in the developed world to adjust to market forces, the system remained in position throughout GATT's lifetime and beyond. Paradoxically, its origin was closely linked with trade liberalization measures launched in GATT.[10] Concurrently as these developments were taking place in the textiles sector under GATT's benign supervision, a good deal of activity was being carried out by the same agency, with the ostensible purpose of providing special and more favourable treatment for the developing countries. The irony of the situation is obvious.

The story of textiles and clothing encapsulates the basic contradiction in the system: the continuing need for expansion on the one hand, and, on the other, the built-in tendency to pass the relevant costs of adjustment onto its weaker constituents; the contradiction between the on-going process of integration (acquiring new members and territories, and eventually, new issues and activities) and exclusion (building in exceptions; evading application of the basic norms and principles; bending the rules and discriminating against weaker members; and, creating exclusive sub-systems). The process can be described as 'exclusion built into integration'. The contradiction inherent in the process has generated recurring tensions within the system and even threatened its viability.

The third decade of GATT was marked by incipient strains in other industrial sectors that were to plague the system into the 1980s. They were obvious in the steel and automotive industries of the United States as well as in the EEC. The American economy was already displaying signs of ill

health. But causing greater concern were the developments in the world monetary system, as the underpinnings of the post–world war system were unravelling, and this environment contributed to the pressures that endangered the trading system in 1980s.

2.5 Conflicting reactions: halfway solutions

Two major reactions ensued. One accentuated the system's inherent tendency of exclusion, while the other focussed on the hope of reforming, if not replacing, the system. The launch of the Tokyo Round of MTN (1973-79) marked the former, although at that time, exclusivity was rather subdued, acquiring its virulent form only later in the 1980s. The third world initiative in the United Nations for the 'new international economic order' (NIEO) exemplified the latter. Enthused with the use of the 'oil weapon', and dissatisfied with GATT's lukewarm recognition of its problems, the third world put forward comprehensive proposals in the United Nations, including complete reform of the global economic system.[11] The underlying concept covered a grand, mutually beneficial, international bargain of technology and finance in exchange for resources and markets. The grandeur of the idea was matched only by its naivete. The idea did not survive the 1970s, and was turned upside down with a counter-initiative from GATT's industrialized countries in the 1980s.

The tendency of exclusion manifested in various ways. Authority for negotiations for the Tokyo Round was obtained by the US administration with a promise of 'more effective' (read more restrictive and more extensive) system to govern the textile trade with the Multifibre Arrangement (1973-77). Serious concerns were raised by the United States about the implications of the increasing membership of developing countries in GATT. Proposals for trade reform were introduced to elude the 'force-of-numbers' logic and to keep control of the decision-making process with the trading majors;[12] and, the so-called 'code' or 'side agreement' approach emerged prominently at GATT.

During the Tokyo Round, 'codes' were defined on such non-tariff measures as government procurement, subsidies, dumping and countervail. Unlike tariffs, these codes impinged more closely on domestic policies and required a degree of commonality in approach and circumstances. There

was a tendency among the trading majors to limit code negotiations to a small group of industrial countries, to present the outcome to other members as more or less a *fait accompli* and to extend benefits to signatories only. Underdeveloped countries viewed these negotiations with misgiving. Codes thus articulated and conditionally and selectively applied, violated the basic principle of non-discrimination and threatened the integrity of the GATT system, perpetrating yet another exclusion.[13]

The emergence of the 'code' approach, the US predilection for the conditional MFN and the underlying distrust of the 'force of majority' were all symptoms of the more basic tensions at work in the world at large, and these generated tremors in GATT. On the one hand, because the era of expansion was coming to an end, the system needed, more urgently than before, the space provided by the worldwide markets. Competition and tension between the EEC, Japan and the USA were becoming sharper, and the underpinnings of the system, which had facilitated all-round growth in the industrialized capitalist world while maintaining the relative dominance of the USA, had disappeared. On the other hand, the third world, which held the promise of expanding markets and which included countries that owned the world's largest oil sources, was vociferously demanding for a new international economic order. Faced with these diverging interests, the trading majors in GATT had to settle for halfway solutions, cosmetic compromises and the shelving of the more difficult problems. These included (i) the tightening of restrictions on textiles and clothing; (ii) taking forward the tariff-cutting exercise to a new, historically low level; (iii) the concession to preferential treatment with the 'graduation' principle to circumscribe its effects; (iv) promotion of the 'side' approach but without full endorsement for GATT Plus arrangements; (v) tackling of the non-tariff barriers question and the attempt to introduce a modest level of *inter se* harmonization of domestic policies and standards; and, (vi) deferment of the difficult problem of agriculture, and the dilemmas in the safeguard discipline. And waiting for the euphoria of the third world to subside—thus ended the third decade of GATT.

III CRISIS AND DENOUEMENT (1980-94)

The years 1980-94 in GATT's history were turbulent and full of trouble, because of pressures induced by the changing global economic

environment and the inability or unwillingness of the trading majors to abide by the rules they themselves had set up. The turbulence was exacerbated because of the characteristic manner in which the majors tried to force a denouement to their overwhelming advantage, finally succeeding. It is this aspect that we turn to now.

The decade of the 1980s witnessed increasing strains on the GATT system. The USA was already losing its competitive edge in manufacturing. Japan and Germany had posed a threat for some time, while South Korea, Brazil, Mexico, Taiwan, and Singapore were now entering the arena with increasingly sophisticated industries. American steel, automotive, electronics, machine tools industries were no longer world leaders. Import competition faced by American industries was becoming more acute, and EEC's emergence as a mega-exporter of agricultural products also threatened America's share of the world markets.

Demand for protection grew fast in the United States. Flexible exchange rates and absence of coordination of macroeconomic policies among the major industrialized nations provided a congenial atmosphere for cries of 'unfair trade' against the competitive foreign producers. Furthermore, neither was the EEC immune to competition from Japan and the newcomers. According to the GATT discipline, safeguard measures to cope with a sudden surge in imports, which could threaten domestic industry were to be undertaken in a non-discriminatory manner. In certain circumstances, safeguard efforts could result in compensatory claims by third parties adversely affected by such measures. Consequently, the two majors were inclined to by-pass the multilateral discipline by taking advantage of perceived or genuine ambiguities in the GATT law and to introduce instead with the 'consent' of the affected party, bilateral, extra-GATT agreements or understandings on import restrictions that would not be contested in GATT. Thus these 'grey area' measures replaced the philosophy of 'open markets – nondiscrimination – competition' with an approach characterized by 'market sharing – discriminatory bilateralism – managed trade'. Under protectionist pressures, the coverage of these measures expanded and included iron and steel, automotive industry, electronic products, footwear and even semi-conductors. These were anti-GATT, although not strictly GATT–illegal.

3.1 Aggressive unilateralism

These grey area measures in the USA were further reinforced by what Bhagwati (1991) has dubbed as 'aggressive unilateralism', and two far-reaching legislative acts, viz. the Trade and Tariff Act of 1984 and the Omnibus Trade and Competitiveness Act of 1988 were passed. The legislation was a culmination of the severe pressure by the American Congress on the administration to 'do something' about trade. Apart from being a response to protectionist pressures, it appeared to be 'more about unilateral armament to make the demands for reciprocity effective and decisively influence the shape of the future international trading system' (Low 1993: 62-3).

3.2 US initiative: GATT ministerial meeting (1982)

The search for new opportunities by the US covered high technology industries and the services, particularly, banking, insurance and other financial services, as well as audio-visual services, telecommunications, and other measures to increase space for the expansion of transnational corporations. It also included a move to bring agricultural trade under effective GATT discipline. The services issue was at the core of the American trade agenda, not only because the US occupied the dominating position in this area, but also because this issue was the key to the transformation of GATT. The issue of services, transcending the narrow confines of cross-border transactions, had the potential of transforming GATT and rendering it into an effective instrument to support and promote the activities of the transnational corporations.

At the instance of the United States, a ministerial meeting was held in November 1982. The 1982 meeting was stormy and exposed two major controversies in GATT. The issue of trade in services caused friction between the US and the developing countries, who opposed the American move on the grounds of GATT law as well as on the wider political-economic considerations of the issue, as they perceived it. The other major conflict to surface was between the USA and the EEC. The USA was supported by competitive exporters of agricultural products interested in bringing agriculture under GATT discipline, while the EEC opposed agricultural negotiations, as these would mean that a vital and politically sensitive element of its regional integration process, CAP, would be questioned.

Ultimately, the Americans, by including the services issue in the 'work programme' agreed at the ministerial meeting, succeeded in placing it on the GATT agenda, albeit with a lot of formal hedging and circumscribing by the developing countries. Howsoever slight it may have seemed at the time, this was a turning point in the history of GATT. As for agriculture, countries exporting agricultural products in general and the Americans and the Australians in particular did not hide their disappointment at the lack of achievement of the meeting. EEC had succeeded in holding off pressures for moving toward substantive negotiations on agriculture.

3.3 Towards a 'new' round: conflict and a via-media (1982-86)

The work programme generated by the GATT ministerial for the various subjects in its agenda was to be accomplished in two years. Without waiting for the results of this programme, in May 1983 the US introduced the idea of a new round with the new issues included in its agenda. This was followed by a formal call for a new round by Japan in November 1983. The third major entity, viz. EEC, was yet to take a stand on the new issues, but its reluctance to enter into negotiations on agriculture was unmistakable. As the work programme was still awaiting implementation, the developing countries—apprehensive that new issues were being pushed to their disadvantage into GATT—were against a new round. In May 1984, they announced in one voice, 'Unless and until the work programme is fully implemented … any initiative such as a new round of negotiations would be lacking in credibility and devoid of relevance, particularly for developing countries' (Croome 1995: 22).

The next two years were filled with controversies, moves and counter-moves, and tortuous negotiations at the formal as well as informal levels. It was not until September 1986 that the new round could be initiated. No previous GATT round had been launched with so long a gestation period or so acute labour pains. The reason was simple: the stakes were high for all, as all parties were acutely aware.

As stated earlier, the services issue was at the core of the American agenda for trade negotiations. Opposition by the developing countries was, at one level, rooted in their collective memory of the colonial period. At another level, its rationale lay in a sophisticated analysis of the contemporary stage in the development of global capitalism and its perceived dangers to the third world's autocentric pursuit of development. Developing countries were apprehensive that access for their goods to the markets of the

industrialized world would be made conditional on the third world opening its services markets for service providers from the industrial countries. Arguing that the issue lay outside GATT's legal jurisdiction, the developing countries in the early stages were able to put up a fairly united stand. They succeeded initially in limiting and diluting the 1982 ministerial meeting's decision on the services issue, although they could not prevent the US from adding it on the GATT agenda. In the period that followed, they succeeded for some time in blocking the progress of the preparatory work for a new round on the new issues, and using that breather for partially modifying the mandate of negotiations, particularly on the new issues, succeeded in minimizing their disadvantage.

The Americans continued to mount pressure on the EEC to openly support the new round with the new issues included in the agenda. The US also elaborated its agenda on the new issues in concert with business groups and major transnational corporations, thereby generating internal pressures within EEC in favour of the new issues. On the one hand, the Americans were using their bilateral leverage with a number of developing countries, particularly in Latin America and South East Asia, to make them fall in line; on the other, they were issuing general 'warnings' to other countries, particularly the larger ones putting up a strong resistance to the proposal for a new round with the new issues.[14]

Many smaller developed as well as developing countries dreaded the prospect of the United States retreating from multilateralism and were consequently uncomfortable with the developing confrontation over the new issues. Some developing countries tended to view the controversy as a part of the bargaining process for improved access to the markets of developed countries for their exports in general and for agricultural or tropical products in particular. As a result, the number of developing countries firmly opposing the inclusion of the new issues started to dwindle under US pressure. In May 1984, *all* developing countries had stood against the proposal for a new round with the new issues; some thirteen months later, 24 developing countries were firmly opposed, and by September 1986, only ten remained (Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia). However, the unyielding opposition of this 'group of ten' rendered the work of the preparatory committee infructuous. The committee was forced to simply forward the varying proposals, with their fundamentally diverging views as well as the raging controversy on the basic issues, to the ministerial meeting to be held in Punta del Este (Uruguay) in September 1986.

While these events were taking place at the formal level and the impasse was being formally referred to the ministers for solution, an important behind-the-scene process of secret negotiations was being conducted in Geneva between India, Brazil and the EEC (which had initially been ambivalent on the issue of services and, fearing a build–up of pressure on agriculture and on CAP which constituted a sensitive element in the regional integration process, had also been cool to the idea of the new round). The aim was to explore the contours of a possible compromise on the main controversial issue of services and to find a satisfactory solution to the legal element arising out of the lack of GATT's jurisdictional competence in the matter of trade in services.[15] The results of these informal negotiations came to be nicknamed the 'common working platform'.[16]

3.4 The Punta del Este solution (1986)

According to the formal position of 'the group of ten' led by India and Brazil, there could be no negotiations on services in the new GATT round. The compromise hammered out in the 'common working platform' envisaged negotiations, provided that (i) there was a clear legal separation of the two negotiation streams, one for goods, and the other for services; (ii) the service negotiations were given a development orientation, and (iii) national laws and regulations in the services sector were to be respected. Obviously this was a far cry from the position originally proposed by the US that would have simply grafted services onto existing GATT and used the leverage in goods to access the protected services markets of developing countries. In the end, the US accepted the compromise with some modifications that did not affect its substance.[17] This was possible legally because the US could not have pursued its original design through the amendment route and it was possible politically because EEC, for its own reasons, was already a party to the compromise.

The other two new issues, viz. trade-related investment measures (TRIMS) and trade-related intellectual property rights (TRIPS) were tackled largely within the confines of the relevant GATT articles, with the outcome that the resulting mandates were modest, and did not transgress the GATT framework.[18]

In sum, the outcome of the Punta del Este meeting on the new issues was far short of the objectives of the United States. But the US did succeed in

getting the new round of multilateral trade negotiations launched with services as part of it. This was, as later developments would bear out, a further milestone on their march toward the goal of transforming GATT.

Of the other subjects, two old veterans need mention. The mandate on agriculture was a true compromise between the positions of the EEC and of the US, Australia and other agriculture exporter countries.[19] These two would continue to confront each other and the stalemate eventually led to the failure of two ministerial meetings. The mandate on textiles and clothing spoke of 'eventual integration of this sector into GATT', but with the qualifying phrase 'on the basis of strengthened GATT rules and disciplines'. This kept open the possibility of including in the safeguard discipline loopholes specifically for this sector.

3.5 From the Punta del Este solution to the Montreal stalemate (1986-88)

Soon after the launch of the Uruguay Round at Punta del Este, a major confrontation developed on the question of TRIPS, given the determined bid by the United States to stretch the mandate of the negotiations far beyond the jurisdiction of GATT, and an equally resolute stance by many of the developing countries to resist the move, with India and Brazil spearheading the resistance. The EEC stance, in the beginning, was somewhat low-key. However, once the coalition of American, European and Japanese drugs and pharmaceutical industries initiated a powerful offensive,[20] the three GATT majors united to bring the substantive issue of norms and standards of intellectual property rights within the scope of the negotiations, disregarding the consensus so laboriously built at Punta del Este.

The industry coalition wanted to enforce globally high standards of protection for all forms of intellectual property through an international regime singularly oriented to the requirements of the intellectual property rights (IPR) holders. They considered the IPR limitations, provided in national legislations on the grounds of public interest, as equivalent to licensing piracy. They wanted to compel national regimes on patents, such as those in India, Brazil, South Korea and Argentina, to fall in line with their conception of a global regime. Bringing the subject of norms and standards into GATT would not only facilitate the orientation of the global regime to their corporate goals, it would also provide them with the power

of the enforcement mechanism, which was not available in other forums like the World Intellectual Property Organization (WIPO).

The developing countries opposed the move because they perceived it as yet another challenge to their economic sovereignty and a threat to their policies of development and public welfare. Recognizing the necessity of reasonable and functional protection for IPR, they argued that a balance between such rights and public interest requirements had to be achieved by the relevant countries through their national legislation. In that regard, there could be no globally applicable standard formula. Also, the subject was entirely outside the scope and jurisdiction of GATT. And finally, these countries argued that the insistence on bringing the subject into GATT was a breach of the consensus on which the round was based. No agreement could be possible before the mid-term ministerial meeting scheduled in December 1988 at Montreal.[21]

The services issue was taken up at the Montreal ministerial meeting with a number of outstanding differences but intensive negotiations and continued commitment by all parties to the compromise reached at Punta del Este helped to achieve a balanced outcome. This formed not only the guideline for future negotiations, but also provided the basic framework of the agreement concluded later. At the Montreal meeting, the key to the positive outcome on this issue was the realistic approach adopted to the complex problem of services, which favoured a rather thin layer of multilateralism or harmonization, and the care taken in each of the areas under discussion to incorporate the concerns of the developing countries.[22]

On the question of TRIPS, however, disagreement and conflict were inevitable, given the uncompromising stance of the developed countries. The differences between the two opposing views were too fundamental[23] to be resolved.

The issue of agriculture stole the limelight at the 1988 Montreal meeting. The differences in the position of the USA and EEC were too large to be bridged. The US wanted the EEC to recognize the long-term goal in terms of what came to be described as a 'zero-zero' option, i.e. total elimination of border protection and all trade–distorting subsidies. In the short run, US wanted agreement on freezing export subsidies, domestic support and measures of border protection. Clearly this was not acceptable to EEC. When both EEC and USA were faced with the possible collapse of the meeting on this issue, they tried to get the agreement of all members on announcing the agreements reached in some other areas and thus avoiding

the spectacle of total failure. But now it was the turn of the five Latin American countries, who had been prominent in the agriculture exporters' coalition, to insist that all other issues be put on hold until the agricultural question had been resolved.

On the subjects of textiles and clothing and safeguard, India increased the stakes by insisting that a definite timetable be set for integrating the textiles trade into GATT. It also asked for an unqualified and *a priori* recognition of non-discrimination as the cornerstone of the safeguard discipline and an agreement to remove all discriminatory trade restrictions. This was, in the eyes of US and EEC, an attempt to prejudge the ultimate results of the negotiations, a fact which they considered unacceptable, and these issues also remained deadlocked.

As a result, at the end of the Montreal mid-term ministerial meeting in December 1988, the achievements in other areas were put on hold, pending resolution of the problems in agriculture, TRIPS, textiles and safeguard. They were expected to be resolved in the subsequent four months through the efforts of the director-general.

3.6 The compromise (April 1989)

3.6.1 Agriculture

By April 1989, a compromise became possible on the question of agriculture, as the Americans had given up the ambitious and unrealizable zero-zero option, and EEC had moved closer to accepting the reduction of barriers to agricultural trade. Agreement was based on the long-term goal of 'substantive progressive reduction' in border protection as well as all trade-distorting support measures. A freeze on domestic and export support levels calculated with reference to the agreed base level of 1987-88 was to be made effective immediately.

3.6.2 TRIPS: The give-away

On the question of TRIPS, there was, in the name of compromise, a major give-away by the developing countries. Contrary to their earlier resolute stance, they virtually accepted the chairman's proposals which essentially reflected the stand of the industrial countries, with some insipid verbiage thrown in ostensibly to meet the concerns of developing countries.[24] Thus, the developed countries succeeded in getting what they had been striving

for since the Punta del Este meeting. The inevitable fallout from this capitulation would undermine the efforts of keeping extraneous subjects out of GATT and its enforcement mechanism. It marked the beginning of the new, expanded GATT, as conceptualized by the US. It also marked the end of the developing country resistance that had been voiced since 1982 ministerial meeting.

How did this dramatic reversal in the position of developing countries come about? The event was widely commented upon in the local press in India and in other third world countries.[25] US had fashioned a powerful weapon out of 'aggressive unilateralism' since 1984. It was used against Brazil before the April 1989 capitulation. India was also targeted during this period and actual implementation followed in May. The internal political situation in both countries was fluid and resulted in a weakening of the political willpower to stand firmly in their positions. The arm-twisting was to have its effect, and the Indian-Brazilian coalition weakened, inducing a lack of consultation and coordination that dented mutual trust. When the two countries faltered, the opposition they had so carefully built against the US-EEC-Japan offensive also collapsed. Industrial countries seized the opportunity to press their advantage.

3.6.3 Textiles and clothing, and safeguard

The two other outstanding issues, namely, textiles and clothing and safeguard were squared up without conceding the basic points raised by India. This was to be expected, because 'upping the ante' that India had done during the closing stages in Montreal, was essentially tactical to improve the bargaining position on TRIPS and, once members had relented on that crucial issue, it was pointless for India to keep holding on to the tactical position in other areas.

3.6.4 The collapse of the Brussels ministerial meeting

The negotiations thereafter proceeded in all areas without major snags, with the exception of agriculture and services. Even though the agricultural exporting countries pushed hard to move negotiations further and faster, it was the EEC that set the pace and decisively influenced the outcome. With regard to services, there were time overruns and on the part of some participants, a virtual reversal of position. This came about not only due to the complexity of the subject matter, but also because the proponents of the original idea realized somewhat late in the day that

international discipline in services would raise many ticklish problems in sensitive areas and that their professed commitment to the basic GATT principles would also be put to a severe test. The inability or unwillingness of many developing countries to 'offer' sectors or sub-sectors for liberalization, was another contributory factor.[26] The developing countries, having lost the main battle in the area of TRIPS, were now engaged in rearguard action to restrict and dilute the substantive provisions of the global regime. In TRIMS, the developed countries under the leadership of Japan were engaged in expanding the scope of the discipline. The matter of dispute settlement was still under discussion. All in all, the picture that emerged on the eve of the Brussels meeting in December 1990, the intended concluding meeting of the Uruguay Round, was far removed from the agreed disciplines that could form the substance of the reformed GATT. The meeting, however, did not fail for that reason. It failed because EEC just then was not prepared to take on any substantial commitments in agriculture. Their internal debates on the reform of CAP were still inconclusive and EEC did not want to be seen as buckling under outside pressure.

3.6.5 From Brussels to Marrakesh: four major developments

The period between ministerial meetings held in Brussels in December 1990 and Marrakesh in April 1994 (which ushered in the World Trade Organization (WTO)) was marked by four significant developments.

First, a proposal emerged to set up a new organization, then christened the *Multilateral Trade Organization* (MTO) to provide institutional underpinning for the outcome of the Uruguay Round. More important, it was to provide a solution to what was considered by the system majors to be the problem of amending GATT, particularly for imposing new obligations or conditionalities on member countries who were unwilling to accept them, and who yet retained their right to continued enjoyment of the MFN rights. Recourse via the amendment route prescribed in GATT was admittedly difficult.[27] Indeed, the major traders had agreed to the Punta del Este compromise of separate negotiations for services to be conducted outside GATT's juridical framework because they realized that they would fail, should they adopt the amendment route to include services within the ambit of GATT. The question of how to treat the results of the two-track negotiations was kept open, to be revisited at the end of the round. Meanwhile, the April 1989 capitulation by the developing countries in the TRIPS issue undermined the possibility of a fresh, legal-cum-political

challenge similar to the earlier one launched on the services issue. This encouraged those intent on expanding the reach and power of GATT, and within a year, the idea of MTO surfaced. It was not warranted by the Punta del Este mandate, nor did it originate in the course of the negotiations proper. It was developed by an outside expert and hurriedly implanted with the support of the industrial countries, particularly Canada and EEC, during the penultimate stage of the negotiations. The fact that such a fundamental systemic change was introduced surreptitiously and without serious challenge from the developing countries, speaks volumes about the disarray and low morale prevailing in the third world camp.

While the concept of the Multilateral Trade Organization was being pursued, the original idea of treating the negotiations as 'a single undertaking' was changed subtly to mean that *all* results of *all* negotiations were to be applicable as 'a single whole' to *all* contracting parties. This totally ignored the legally separate character of the two-track negotiations on goods and services. It also turned a blind eye to the qualitative change that had in the meantime been introduced to the negotiating mandate for TRIPS.[28] At another level, the concept of an 'integrated' dispute settlement mechanism was also being pushed.

Toward the end of 1991, all these moves culminated in a full-fledged proposal for the establishment of MTO, thus heralding the paradigm shift.

The second development was the presentation of the *Draft Final Act* on 20 December 1991 (GATT Secretariat 1991). It was not a document reflecting consensus: it contained a number of important formulations on which no agreement had been reached. The document, which became known as the Dunkel Draft Text, was put forward by the director-general, Arthur Dunkel, on his initiative. It contained the MTO proposal, albeit without agreement on its basic features, such as its scope or the integrated dispute settlement mechanism that sanctioned 'cross-retaliation'. The latter, in plain language, amounted to legitimizing trade leverages in goods to force open markets for services, for example, or to impose new disciplines in IPR, for example, on unwilling members. The document included the TRIPS Agreement which had brushed aside a number of counterproposals and reservations presented by the major developing countries since the restart of the negotiations in April 1989. The Draft Final Act also incorporated the TRIMS Agreement containing a belated insertion of the review clause which, strangely, exceeded the scope of the agreement itself and spoke of 'investment and competition policy'.

A peculiar back-to-front application of the consensus ruling was invented: a departure from the Dunkel Draft Text was permitted only if there was a consensus in favour of said deviation! Consequently, there were very few modifications to the draft text, with the exception of agriculture, where the two majors involved agreed to incorporate some changes. The rest of the draft, remaining largely as presented by the director-general, eventually became incorporated in the Final Act that was subsequently approved for adoption by the ministers at Marrakesh in April 1994.

This process of achieving a 'consensus' was non-transparent and undemocratic. It forced a paradigm shift on reluctant members. Straightforward legal avenues available in the GATT treaty had been bypassed and rendered ineffective in order to eliminate the possibility of an opposing decision. The fear of the 'force-of-numbers' was at the root of the manoeuvres, and all devices had been employed to keep normal rules unoperationable and in suspension.

The third development was *EEC's progress with its reform of CAP*, which was mainly 'driven by the realization that from a budgetary perspective, its support policies were unsustainable' (Low 1993: 222). This ultimately made possible the US-EEC accord on the question of agriculture, known as the Blair House Accord of November 1992. The road to the conclusion of the Uruguay Round had been cleared once the two majors found a mutually satisfactory settlement on the issue that had been responsible for the failure of two earlier ministerial meetings.

And the fourth significant factor was related to the *US's pursuit of regional trade initiatives with Canada, Mexico and the Latin American countries*. Obviously the United States was seriously exploring regional alternatives. The message was that multilateralism was acceptable, provided that it was cast in a design moulded by US. If it were not so cast, other options were open; indeed, these options were being harnessed to shape multilateralism according to the American choice.

Peter Sutherland, the director-general of GATT, described the event at the conclusion of the negotiations on 15 December 1993 when the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (GATT Secretariat 1993) was approved for adoption by the ministers, as a 'defining moment in history'. In what way, we shall soon see.

IV WTO: A PARADIGM SHIFT

The stage had now been set for ushering in the World Trade Organization at the ministerial meeting at Marrakesh (Morocco) scheduled for April 1994. The outcome that emerged was not just 'GATT–II' or 'GATT Plus': it was nothing short of a paradigm shift.

GATT was designed to deal with cross-border trade in goods; it avoided involvement in domestic policy-making. GATT also conferred the privilege of most-favoured-nation treatment on its members. This MFN privilege could not be abridged or infringed with new conditionalities or additional obligations except by amendment to the basic tenet in Article I that had the unanimous agreement of all contracting parties. The WTO system (that is to say, the array of agreements, declarations, decisions and understandings that the WTO Agreement comprises) has superseded both aspects.

The WTO system is no longer confined to cross-border transactions in tangible goods and currently extends to transactions in intangibles, such as services. Going beyond the border paradigm, it is becoming involved with the supply, through commercial presence in foreign countries, of services. Furthermore, the system is no longer restricted to exchange transactions, but also stipulates the criteria that determine the permissibility of policies and practices which may restrict the production or trade options of investors. It is establishing a bridgehead for the future introduction of norms with regard to investment and competition policy. Most important, it is laying down a model law for its member countries for the protection of intellectual property rights. And it provides a common enforcement mechanism for all disciplines comprised within the system. Thus, the system is creating its own rules with regard to intra-border transactions, and is laying down the norms and standards of member countries' domestic policies, making these enforceable by denying, to those who fail to endorse the new system, MFN privileges for goods trade.

Equally far-reaching is the potential power of the WTO to bring any new subject within its ambit with a two-thirds majority at a ministerial meeting and to enforce it on recalcitrant member(s) with an ultimatum of expulsion. WTO thus keeps open the possibility of MFN privileges in goods being made contingent upon acceptance of new conditionalities and obligations, as may be imposed in the future. Clearly, under the new system, the veto implicit in the requirement of unanimity for amending the MFN principle or making it conditional on the acceptance of additional or new obligations,

has been rendered ineffective. Earlier, this veto had been available to all GATT members, irrespective of their trade weight.[29]

4.1 Elements of the WTO system: old and new

With respect to 'old' topics, agriculture, textiles and clothing and some systemic issues need mention.

4.1.1 Agriculture

In agriculture, GATT had generally followed the doctrine of minimal interference. In sharp contrast, the Agreement on Agriculture takes a more integrated view of agricultural trade; it tries to reduce the trade distorting effects of border protection, domestic support policies and export subsidies, and attempts to subject trade and domestic support regimes to a comprehensive GATT discipline.

The underlying approach, however, does not adequately take into account the vastly different role that agriculture plays in large countries like India and China on the one hand, and, on the other, in a number of smaller countries in the non–temperate zones, including the least developed countries of Sub-Sahara. In these countries, the contribution of agriculture to GDP and the proportion of the labour force dependent on farming are far higher. For these people, the priority is food security, not trade expansion. Similarly their policies for the development of agriculture are central to their overall economic development; these policies cannot be seen as mere exceptions to be carved out of an approach totally based on the control and reduction of support to agriculture. There is apprehension that the integration of these countries' agriculture into the trade-driven global system may eventually lead to a re-emergence and/or reinforcement of colonial patterns for agricultural production and, in extreme cases, to hunger and famine. The framework of the agreement on agriculture is totally oblivious to these concerns.

Nevertheless, the agreement, considering the type of trade regime that had prevailed in this sector throughout the life-time of GATT, does incorporate some degree of discipline particularly for the industrial countries, which should to some extent help the small and efficient exporter countries. However, commitments on the reduction of domestic support and export subsidies by the industrial countries are modest in comparison to the

prevailing heavy subsidization level.[30] On the other hand, a large number of developing countries may find the discipline too taxing: higher permissible subsidies may not benefit these nations very much because of their chronic shortage of resources for the purpose. The obligation of binding all agricultural tariffs is inequitably difficult for them, considering that they would then have no flexibility to utilize border measures, the tool used by industrial countries throughout the history of GATT.

4.1.2 Textiles and clothing

The pace of integration of this sector, the pariah of the system, into GATT as provided in the Agreement on Textiles and Clothing is very slow and 'back-loaded', i.e. half of the quota regime is to be liberalized by the end of a ten-year integration period. However, even at the end of this period, tariffs will continue to be 12 per cent, much higher than the average level for manufactures. The first half of the period may witness only token liberalization in the sense that products covered by the agreement but not included in the quota regime will also be counted as efforts to achieve the liberalization target. The danger that anti-dumping duties will be abused to cancel liberalization is real. Talk of social dumping is already becoming louder in the industrialized countries, and it is entirely possible that instead of gaining momentum, the integration process will become frustrated, particularly when one takes into account the history of this sector in GATT.

4.1.3 Systemic issues

There are three important areas of systemic significance covered by agreements/understandings that should be mentioned: (i) safeguards, (ii) balance-of-payment measures and (iii) the dispute settlement system.

The Agreement on Safeguards succeeded in bringing about a measure of discipline to the grey area issues. The agreement outlawed the most prevalent form of these measures, the 'voluntary export restraints', and stipulated that these be phased out. There is to be a transparent process of investigation, with public notice, to reach a decision on whether the application of the safeguard measure is in the public interest.[31] The agreement does provide some room for selectivity in the application of quantitative restrictions (QRs). This could become the wedge for discriminatory action against imports from low-wage countries. But on the whole, the agreement constituted a step forward in preventing abuse of the escape clause.

The provisions in the *Understanding on the Balance-of-Payments* further dilute GATT Article XXVIII.B. A member resorting to measures to safeguard its external financial position is to provide a timetable for the phasing out of said measures. This, in effect, is a time-limitation for the application of these safeguards and restricts the right of a member country under the Article XVIII.B. In addition, preference must be given to price-based measures, which further limits the discretion of the member. Furthermore, members are to avoid imposing new quantitative restrictions for balance-of-payments purposes. They will also need to provide adequate justification on the criteria used for determining which products are singled-out for restrictive measures. These stipulations effectively circumscribe the only substantive right that the developing countries exclusively enjoyed within the GATT system.

The *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) is notable for two features. The erstwhile system was prone to being blocked by the parties being complained against, virtually at any and every stage. DSU reaffirms a member country's right to initiate the process, and the opposing party cannot hinder the appointment of the panel. Moreover, the process of adoption is also automatic: panel findings are deemed justified for adoption, unless there is an appeal, for which there is provision in DSU. The decision of the appellate authority is final and to be adopted, unless it is rejected by consensus. This is a vast improvement over the dilatory processes of the past, but it also allows the appellate body considerable opportunity to establish judicial law. Considering the expanding scope of the WTO and its increasingly intrusive role with regard to the norms and standards for domestic laws and regulations of member countries, this particular aspect of DSU is a cause for serious concern.

The other important element of DSU is the integrated system of enforcement introduced therein. Article 22 clearly provides room for 'cross-sector' and 'cross-agreement' retaliation. Before taking recourse in another sector under the same agreement, the options of withdrawal of concessions or suspension of obligations in the same sector must be exhausted. A similar process is to be followed before moving from one agreement to another. Presumably, the sequence was adopted to minimize developing country apprehension that the industrialized world would invariably resort to cross-retaliation in goods to enforce compliance to new disciplines. However, in practice, the prescribed sequence may have little effect in that direction: the skewed distribution of the subject matter of the disciplines in the new areas, as between developed and developing countries, ultimately renders the moderating sequence inapplicable or limited in value. As long

as this aspect remains unchanged, cross-retaliation cannot be moderated, much less eschewed, through a procedural sequence. The futility of such procedural safeguards should not come as a surprise, because the whole exercise of bringing extraneous issues within the ambit of GATT was motivated, in the first instance, by the desire to use the leverage in the goods trade to enforce disciplines in the new issues.

4.2 New disciplines

4.2.1 TRIMS

The point of departure for TRIMS was an element already incorporated in GATT, viz. national treatment of imported products; in other words, no measures were to be applied to discourage the use of said products in production processes. The agreement took the concept further to include practices such as export obligations, import entitlements based on export performance, or export–import balancing requirements. Even with these additions, the approach resembled the GATT-concept, as certain practices were prohibited and no attempt was made to lay down a global policy or law on investment *per se*. A significant move in that direction was the TRIMS article which stipulated that the review process of the agreement include consideration of whether the agreement should be complemented with provisions on investment policy and competition policy.[32]

4.2.2 TRIPS

TRIPS Agreement is not so much an effort to harmonize the policies of all member governments as it is an attempt to align or upgrade the policies and laws of developing countries to those of the major industrial countries, or rather to the requirements of the transnational corporations.[33] This implies that the balance struck by the concerned polity between considerations of public interest and the private interests of IPR owners is to be replaced by the norms and standards incorporated in an international agreement—an agreement which did not result from willing participation or objective assessment of the issues involved, but was largely the outcome of pressure by the powerful IPR lobbies and trade intimidation by the major industrial countries.

An important feature that deserves to be noted is the so-called 'transitional arrangements'. The complex challenge of development has been reduced to

a simple formula of allowing the transition a few more years of grace and providing technical assistance![34] Even though many industrial countries had maintained low levels of protection for more than half a century and have thus reaped substantial benefits with inexpensive replication and reverse engineering, the TRIPS Agreement prescribes that even the least developed countries must achieve, in a mere ten-year period, protection levels to match those of the industrial countries. And the promise of technical assistance is intended neither for the promotion of technological development, nor for the absorption and diffusion of technology: it is for the 'preparation of laws and regulations on the protection of intellectual property rights as well as for the prevention of their abuse'! The bias of TRIPS is much too obvious.[35]

4.2.3 Services

The General Agreement on Trade in Services (GATS) extended its influence, in principle, beyond national frontiers. It defined services in a circular but all embracing fashion, to 'include any service in any sector except services supplied in the exercise of governmental authority' and further as the 'supply of service to include production, distribution, marketing, sale and delivery'.[36] But when it came to application, the process (at least in the first round of negotiations) was constrained by two elements embedded in the agreement: the development orientation, on the one hand, and the respect for policy objectives underlying national laws, on the other. The negotiating mechanics was tuned to the requirements of the development process. The modality of exchanging concessions was based on a positive approach list. Instead of the premise that everything was negotiable, every country was to indicate which service sector, sub-sector or activity it was willing to offer. Furthermore, such offers could be subjected to specific conditions and limitations. Most important, national treatment as an unqualified, basic principle governing national regulations or policies in services-sector transactions was not to be recognized in the agreement. The question of national treatment could arise only after access had been granted and access was left to the decision of member countries. National treatment is at best an objective to strive for, and it can be subjected to limitations and conditions as may be specified by members.[37]

A major shortcoming of GATS was that it virtually overlooked the labour sector. Although mention is made of the supply of a service 'through the presence of natural persons' in a foreign country, the Annex on Movement of Natural Persons Supplying Services under the agreement made it clear

that, 'The agreement shall not apply to measures affecting natural persons seeking access to the employment market … nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis'. While it is reasonable to exclude matters relating to citizenship from the agreement, there is no justification to dismiss the question of access to the employment markets of labour-deficit economies for workers from labour-surplus economies. The restrictive approach to labour services has introduced a heavy bias in the agreement in favour of capital- and technology–intensive services, and, consequently in favour of the industrial countries in general. GATS will, in no way, moderate or liberalize the ubiquitous and strong barriers existing in the industrial countries that effectively prevent the inflow of labour. The scope of mobility for natural persons is limited to selected individuals in the highly skilled categories, largely associated with specific projects or activities. This stands in sharp contrast to the broad definition of the supply of service in GATS. The vast potential of welfare gain from the exchange of services has thus been pre-empted. Developing countries with a surplus of unskilled, semi-skilled, particular-skilled workers are the main losers. The demandants of the service negotiation were keen to seek 'the right of establishment' for capital, which was countered by the developing countries by tabling 'the right of residence' for labour. The obvious symmetry is supported by economic rationale.[38] Interestingly, this reasoning was appreciated even in the business sector.[39] But it was not economic logic or business common sense that decided the issue. It was the basic contradiction of the system asserting itself once again: the on-going process of integration and exclusion; or rather, exclusion built into integration.

While the WTO Agreement furnished the legal and institutional infrastructure of the paradigm shift, TRIPS and GATS provided its architecture, with the TRIMS Agreement the blueprints for its future structural expansion. The old peripheral structures on textiles and agriculture were brought within the new complex with certain modifications, but these, with regard to the near future, consisted more of promise and less of performance. The emergency safeguard route was cleansed of illegitimate deals, but danger continued to exist, particularly for those vitally concerned with the old peripheral regimes. The WTO infrastructure is so vast that it can easily support not only further expansion, but also many duplications of the architectural wonders already set up. No wonder that the prospective beneficiaries of the 'magnificent' structure expressed their gratification through the famous remark of the *regie* that its completion marked 'a defining moment in history'. But the

'defining moment' affected different participants differently, in ways that embodied built-in contradictions.

V FROM TRIUMPH TO FIASCO (1995-99)

From the early 1980s through to the emergence of the WTO, the trend of on the part of the major industrial countries has been to cause the GATT/WTO mandate to transcend national frontiers and enter domestic policy areas on a whole range of new issues. Indications since the Marrakesh meeting through to Seattle—whether they concern EEC's push for a global investment regime;[40] the insistence of the US on linking labour standards to trade issues;[41] or the proposal to bind tariffs at zero level on 'e-commerce';[42], or, for that matter, judicial law tailored by the dispute settlement and appellate panels of WTO[43]—all unmistakably reinforce that trend. The process is described as 'harmonization' or 'deeper integration'. GATT's integration, achieved through the international exchange of goods and relevant international disciplines, was 'shallow'. Deeper integration seeks to achieve the standardization of domestic policies in a wide range of issues including investment, competition, technology, government procurement, taxation, labour-standards, and what is perceived by foreigners as 'structural impediments', a term which can, at times, be given an absurdly all-encompassing connotation.[44] And the process may not stop there.[45]

Decades ago, Kenneth Dam wrote in a different context about GATT's efforts to cultivate *new business.*[46] This appetite for new business acquired in the formative years of GATT/WTO, has grown enormously lately. And, unlike in those early years of 'underemployment', new business is not solicited either by its secretariat or representatives accredited to the organization. It is being imposed on them by strong and deep-rooted forces that govern the working of the economic system. The trading system is only a part of the overall picture. The logic of capitalism with its compelling 'requirements of profit maximization, capital accumulation, the constant self-expansion of capital' (Wood 1999) is at work at the national as well as the global levels. This need for 'constant self-expansion' is at the root of GATT/WTO's search for new activities.

The propelling force behind this stupendous exercise is the economic power exercised by the industrial states on behalf of—or at the behest of—

transnational corporations with 'homes' in the industrial nations. The need for deeper integration, arising out of their strategies and calculus of global operations, is the compelling functional requirement of the transnational corporations. The economic-theoretic construct of 'internationally contestable markets'[47] seeks to rationalize this requirement. It is argued that such markets would be welfare–enhancing because they ensure more efficient production, but this overlooks the existence of vast multitudes of humanity with little or no ability to participate in market processes. Nor does it take into account the distributive implications of these processes. Adverse implications for employment, increasing dependence and vulnerability of national economies, or long-term social, political or cultural considerations which may necessitate state intervention have also been ignored.

The other infirmity of this approach at the operational level, is that it minimizes the sheer complexity of the exercise involved. The problem of the different levels of regulation in various countries is not easy to handle in an international norm-setting exercise. The experience of EEC is noteworthy: EEC was a relatively homogenous group of nations bound by common history and culture. The postwar reconstruction in the context of the cold war had created a greater feeling of solidarity, but even so, its progress toward harmonization was slow.[48]

Deeper the process of integration, more glaring the basic contradiction in the system (see section II). The process of deeper integration is being carried forward on the pain of exclusion in two ways. The harmonization of norms and standards is so attained as to exclude the access to, and development of, technology (as in TRIPS), or to exclude access to markets (as in the initiatives on social clause, or the environment). Exclusion, as we have seen, has been practised in this manner throughout. Deeper integration carries the process of exclusion much further by excluding people from the law-making process of their own countries.[49] And it transfers the process, in effect, to the invisible hands of the transnational corporations who have vested interests in the creation of 'internationally contestable markets'. In this sense, deeper integration is anti-democratic.

The WTO has continued GATT's legacy of functioning in a non-transparent, 'green room' fashion,[50] nor has it shed the existing 'trade weight' syndrome in its decision-making process. The WTO is also committed to deeper integration. As a result, legitimate governments are being excluded from the decision–making process. National norms and standards established through democratic processes by sovereign

parliaments are being trumped by global standards set at the behest of powerful transnational corporations. This is being justified on the ground that providing internationally contestable markets is the fundamental goal to which every member country must subscribe. No wonder that WTO's 'democratic deficit' is burgeoning.

The WTO system seemed to be moving in its inexorable trajectory, without any plan to confront or moderate its propelling logic—or, so it seemed, until it received an unprecedented jolt at the Seattle ministerial meeting (November-December 1999). A failed ministerial meeting is not a unique experience in the history of the GATT-WTO system. What was new at Seattle, however, was the manner in which the meeting was derailed. Tensions and contradictions caused by the ambitious expansion plans of the WTO majors finally collided in a total deadlock. There was nothing to show for a week of intensive deliberations, persuasion, subterfuge and arm-twisting. Concluding remarks by the chairperson, which dealt largely with procedural inadequacies and ducked the substantive divide that derailed the meeting, were preceded by criticism from many developing countries from Africa, Latin America and the Caribbean region, decrying the absence of transparency, openness and participation. Many bluntly refused to be part of a 'consensus' that was being forced on them by the trade majors.[51]

There were deep disagreements between the industrial and developing countries on issues relating labour standards, investment and competition policy. There were also large differences between EEC and USA on agriculture, and between the USA and Japan on the anti-dumping discipline. Although some formulations to solve some of the differences were reached, many others seemed unbridgeable.

The domestic politics on the eve of the presidential election year, no doubt, contributed to the exaggerated demonstration of the US position in favour of labour standards, an issue judged by some observers to be the major factor responsible for the failure of the Seattle meeting. Similar circumstances, perhaps, encouraged the EEC to stand firm on the agriculture question and not to yield too much to the lame duck Administration of the US. Clearly, there were a number of factors operating simultaneously to contribute to the final fiasco. But in terms of the system, the significance of open defiance by a large number of 'exclusion' casualties (literally in terms of the Seattle meeting, and substantially in terms of the operational effects of the GATT/WTO system so far) can hardly be exaggerated. The fact that the trade majors were trying for some type of face-saving outcome in the penultimate stage of the conference, albeit

without success, also acknowledges the importance of the strong negative reaction of many developing countries. In hindsight what triggered the collapse was the developing-country representatives' deep dissatisfaction with the palpable exclusion that was practised during substantive negotiations.

The Seattle meeting showed that exclusion can be resisted by collective opposition by those being excluded. The solidarity of the developing countries, without a doubt, manifested itself at Seattle on procedural—and not necessarily substantive—issues. But, in a way, the procedural issue was the most substantial because at its core is the inherently unequal character of the integration practised at WTO. As the Seattle meeting demonstrated, integration that is not aligned with economic or political realities and is unresponsive to the principles of equity and democratic functioning, can throw the whole process of WTO into an impasse.

VI WHAT IS TO BE DONE

6.1 Strategic considerations

The possibility of a degree of moderation, if not redress, to the on-going process of inequitable integration can emerge only if formal democratic representation, as mandated in the constitution of WTO, is strategically exercised by those majority members who bear the costs of integration, which far exceed the gains. In the earlier GATT system, adroit use of the consensus principle in conjunction with a mutual awareness of the legal strength of the implicit veto provided even a small group of countries with an effective means of influencing decisions, to an extent. This possibility has been eroded as a result of the paradigm shift and, therefore, the South's voting strength will have to be strategically mobilized. For this to happen, there are two necessary conditions. First, all members must recognize that when the WTO extends its mandate beyond the cross-border exchange transactions and becomes engaged in the harmonization of norms and standards for domestic policies and regulations, trade weights lose their relevance. The principle of 'one-member-one-vote' is more appropriate than ever before. Second, the solidarity of the South should be based on a shared understanding of the specific issue at hand, as well as the more general approach to the functioning of the global economic system. The strength of

Group 77 arose out of the latter. The foundation of that approach was based on the recognition of the North–South divide. The Informal Group of Developing Countries in GATT was most effective when its operational methods resembled those of Group 77. The scope for similar coordination increased in the 1980s, precisely because GATT was moving away from its traditional agenda. However, a certain lack of perspective on the part of developing countries—combined with the tactical moves made by the USA, presumably with the dual purpose of pressuring EEC on the agricultural issue and neutralizing the larger coalition of developing countries on the new issues—led to 'issue-based' coalitions being formed at the expense of a more general approach which would have reflected the common interests of the South. This could not, however, obliterate the basic divide. In Ricupero's words, '… the North–South dimension pervaded all the negotiations, somewhat like sex in Victorian England, ostensibly ignored but nevertheless present everywhere' (Ricupero 1998: 15).

It should be possible to enter an issue-specific, tactical understanding with the industrial country group or even with one of the trade majors, without hurting the solidarity of the South. Differentiation among the industrialized world is being minimized through the operations of the transnational corporations, enlargement of the EEC, and the emergence of new regional groupings. These developments should reinforce the validity of the South-based approach. Since the brunt of the inequitable integration process is being borne by the countries of the South, possible correction of the WTO trajectory can happen only from their collective effort.

The process of integration with built-in exclusion is unfolding not only at the global level in *inter se* relationships between industrialized core countries and developing countries, but also at the national economy level. It further deepens the social and political divide *within,* highlights the 'democratic deficit' of the process and lays bare the unaccountability of the forces propelling it. This dynamics should provide the South with an objective foundation for the renewal of solidarity, enabling the region to capture the democratic space provided by the constitution of WTO. This will call for certain institutional and programmatic initiatives.

6.2 Institutional and programmatic complements

6.2.1 Revival and strengthening of the Informal Group of Developing Countries

The first step is to revive and strengthen the Informal Group of Developing Countries in the WTO. Indeed, it need no longer be 'informal'. With the replacement of the purely contractual, tariff negotiation-oriented GATT by the all-embracing and harmonization-oriented WTO, the group of developing countries should also acquire a more formal and institutional character in the WTO processes. The group, within itself, should clearly recognize the sub-group of the least developed countries as a necessary element of the solidarity of the South. The revival and re-enforcement of the group should serve to restore a measure of balance in WTO's functioning and, in times of crisis, also provide a safety valve. Needless to say, this step by itself will not require any amendment of the constitution of WTO: all that is required, is an explicit recognition of the political reality by all members of the WTO.

6.2.2 'Standstill' and 'rollback'[52]

The second important and formal step is for the WTO to declare a 'standstill' on the ongoing process of deeper integration. This is necessary in order to restore confidence in the functioning of WTO. All new issues (such as labour standards and global investment regime) should be placed under an embargo for the time being. Further strengthening of the TRIPS and TRIMS disciplines should be postponed. The Group of Developing Countries should take the initiative in this regard. Such a standstill would provide an interval for a collective assessment of how the integration efforts to date have affected member countries, particularly those of the South and, among them, the poor and the least developed countries. Such an exercise cannot be allowed to become just one more in-house exercise of the WTO secretariat. To be meaningful and acceptable, the assessment needs to harness outside experts who have credibility with member states, particularly those of the South. However, before this review is possible, a waiver on the legal compliance of new disciplines such as TRIPS and TRIMS by the specified dates, needs to be issued by the concerned WTO organs. The future of these disciplines should be decided in accordance with the findings of the assessment.

Considering the demanding nature of a new discipline like TRIPS, and the difficulties it engenders for developing countries, it may be necessary to

launch further action in the form of a rollback. The demand for a 'review' of this discipline that surfaced during consideration of the built-in 'implementation' agenda for the Seattle meeting points to the same need. It is possible that the assessment exercise proposed above may produce sufficient material evidence and rationale for initiating a rollback of the integration process, where necessary.

Although the options of a standstill or a rollback should immediately provide the means of restoring the confidence of the majority members in WTO, it will also be necessary to initiate institutional reforms to make the system more equitable and truly universal. The formally democratic constitution of WTO makes it amenable to such a possibility. Nothing should be done to erode or dent this unique aspect of WTO in the name of the so-called efficiency or the 'reality of the trade weights'. On the contrary, lessons need to be learned from recent events. More accommodating and equitable forms of international negotiation and decision-making should be evolved. This will require action at four different levels:

- Plurilateral agreements

  First and foremost, the modality of the plurilateral agreements should be taken out of its present limited context and used more liberally, whenever there is a lack of unanimity among member countries or the presence of strong reservations on the part of some, on the proposed disciplines on new issues calling for deeper integration. According to Article II.3 of the WTO Agreement, 'the Plurilateral Trade Agreements do not create either obligations or rights for members that have not accepted them'. They are essentially 'optional' agreements. This modality is ideal in instances where, because of the different stages of economic development of the members and the diversity of their social goals and priorities, it is neither feasible nor desirable to attempt to subject all of them to a uniform discipline modelled on the systems of a few advanced countries and yoked to the interests of transnational corporations. This modality permits members who are interested in the new transnational disciplines on the new issues to proceed with their project on deeper integration without having, merely in the name of a consensus, to adjust their style to match the position of others. Indeed, if the new disciplines promote universal welfare, they will, in due course, attract a larger membership.

  It would be legitimate for members of such a plurilateral agreement to refrain from extending the benefits of the arrangement to non-members.

They should not, however, be allowed to impose it on non-members as a new conditionality for continued enjoyment by the latter of their trade rights derived from the MFN principle under GATT. In other words, the sting in the paradigm shift brought about by the WTO Agreement should be removed. No new agreement involving deeper integration should be allowed to become an integral part that is 'binding on all members'. Even though this may not call for an amendment of the WTO Agreement as it stands today, it will require an explicit understanding or a decision at the highest legislative level of WTO, viz. ministerial conference, to the effect that no new disciplines are to be added to the WTO Agreement under Clause 2 of Article II. Whether any of the agreements already annexed to the WTO Agreement under this clause need to be converted into a plurilateral agreement or otherwise modified will have to be decided by means of a formal amendment to be considered in the light of the assessment referred to above, in the context of the standstill and rollback.

- Reform of DSU

  This approach to reforming the WTO will necessitate two additional concurrent moves. Both relate to the DSU. The mechanism in Article II.2 of the WTO Agreement is supported by the coercive sanction of cross-retaliation provided in DSU. Thus, it would only be logical that if the resort to Article II.2 in future is relinquished, it is complemented by giving up cross-retaliation prospectively. As far as its application to the agreements already included in Annex 1 is concerned, the standstill and rollback decisions should appropriately provide for keeping cross-retaliation in abeyance.

  Secondly, the provisions of DSU would need to be formally amended to ensure that the dispute settlement and appellate panels do not continue to enjoy unfettered authority to issue new laws through judicial pronouncements furthering deeper integration. This can be achieved by grouping the decisions of these bodies in two categories: (i) those related to the compensation and suspension of trade concessions and (ii) those which introduce 'judicial' law. While decisions related to trade concessions should be administered in accordance with the present provisions regarding appeal and finality, the rulings of a nature of judicial law should not have the virtually 'automatic' and 'no-further-appeal' route. Judicial law-making, which has the potential of trumping national laws or creating new domestic laws for member countries, should be subjected to political approval at the highest legislative body

in the WTO. And there too, decisions should be made by the highest majority, i.e. three-quarters majority. Alternatively, a decision could be made by a two-thirds majority, but would apply to a country only upon its acceptance of it.

- Group system for negotiations

  Recent experience has highlighted the need to introduce transparency and to make negotiations and the decision-making procedure truly participative. The opaque green room procedures will no longer be sustainable. WTO's large membership makes negotiations an increasingly cumbersome process. Considerations of efficiency cannot, however, be allowed to subvert democratic functioning. In the circumstances, resort to some version of a 'group system' of negotiations seems inevitable. The need to revive and strengthen the Group of Developing Countries becomes reinforced in this context. The group system, as it functioned in UNCTAD, had been criticized in the past, and there is an element of truth in the criticism that negotiations thus conducted, tended to settle at the lowest common denominator. But this, in a diverse world, may be inevitable. The recent pursuit of 'efficiency' and highest possible levels of international discipline in the GATT/WTO forum has produced disastrous results.

- Constitution of a three-tier structure

  The most important institutional reform that WTO needs, is to make the organization truly equitable in its approach, functioning and form. Formal equality in terms of one-member-one-vote is crucial, but not sufficient to bring about this objective. Although concern over this element has been visible through the history of GATT, it has not produced results. Indeed, in the late 1970s and more so in the 1980s, an offensive was launched to obliterate this concern, to move the system away from the ideal, and, as we have seen, it succeeded only too well. The events now seem to be making a full circle. WTO does not need a ritualistic reiteration of the principle of 'non-reciprocal, more favourable and differential treatment' in favour of the developing countries. What is needed on the one hand is a formal constitution of a three-tier system and on the other, institutional arrangements to make up for the structural deficiency in the negotiating capability of the developing countries.

  Taking the last item, institutional arrangements, first: negotiations in GATT/WTO have been marked by the non-participation or ineffective participation of many small developing countries, particularly the least

developed countries (LDCs). The maintenance of a permanent mission in Geneva is itself an onerous multilateral obligation. To have a mission with sufficient strength and quality is a problem which even relatively larger developing countries do not find easy to solve. What is essential, particularly for the least developed countries, is to have a WTO/UNCTAD-supported institutional arrangement that would make it possible for these countries to keep abreast of developments. Financial support, in some form, would allow these members to engage experts of their choice to help them to formulate their position on intricate issues.

With regards to the former issue, differences in the capacity of developing countries to take on the obligations of a multilateral system must be recognized. The least developed countries should be entitled to full and unreserved benefits of the system from all members without being compelled to take on obligations. In this regard, other developing countries also should be prepared to extend such benefits to the LDCs without claims for counter-concessions. The next tier in the structure should include other developing countries, who should be entitled to similar treatment from the developed countries in accordance with the Framework Agreements as concluded in the Tokyo Round. The developing countries of this tier should also be prepared to take on additional obligations in line with their development. However, as enunciated earlier, they should have the assurance that the process of deeper integration would be entirely optional and that their trade rights and benefits would not be subjected to additional obligations and conditionalities. The third tier, consisting of the industrial countries, should be free to evolve disciplines to promote deeper integration amongst themselves, without converting these into additional conditionalities for other members.

In other words, the structure and functioning of WTO should be guided by the values of democracy and equity. If integration is conducted within such a framework, it is less likely to be inequitable. Integration, as it is being pursued at present, breeds built-in exclusion and is occasionally confronted by elective exclusion.[53] But the contradiction cannot be resolved by a dogged pursuit—regardless of the exclusion it breeds—of the current process of integration, nor by simply opting out of the system. What is needed is the conscious striving for equitable integration through institutional and political initiatives calculated to resolve the contradiction and achieve harmonious international economic relations. And in that process, the solidarity of the presently 'excluded' will play a decisive role.

The strategy and the plan of action outlined above are undoubtedly rooted in the Southern perspective. This is inevitable because WTO's current impasse has a lot to do with the impact its functioning has on the South. More important, if the process of inequitable integration pursued in the GATT/WTO system has to be redressed, the Southern perspective has a crucial, functional significance. The structural reforms and other initiatives here suggested are intended to contribute to the evolution of a more equitable and viable international trading system, which should be a universal concern.

ANNEX
THE LAW EMBODYING PARADIGM SHIFT

The Marrakesh Agreement establishing the World Trade Organization (WTO Agreement) defines the scope of the WTO in Article II. Article II.2 refers to Annexes 1, 2 and 3 and affirms that 'they are integral parts of this agreement, binding on all members'. In addition to the updated GATT (Annex 1A), these annexes cover:

- General Agreement on Trade in Services (GATS) (Annex 1B)
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Annex 1C);
- Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) (Annex 2); and
- Trade Policy Review Mechanism (Annex 3).

This short and apparently simple provision expanded in one stroke the scope of the erstwhile GATT beyond all confines of the past and made the expanded scope mandatory to all members. The imposition of obligations in the new areas, particularly TRIPS, burdened the MFN right with onerous conditionalities, without the contracting party having an opportunity to exercise its right to oppose and defeat the move. If the regular amendment procedure available under the treaty of GATT had been followed, this option would have been possible. The provision also sanctified cross-retaliation, by integrating these agreements with a common DSU, which provides for cross-sector or cross-agreement retaliation. This ended the confrontation that started with the 1982 GATT ministerial meeting and with it, the cross-border paradigm of GATT.

Article III.2, which deals with the functions, says *inter alia* that the WTO 'may … provide a forum for further negotiations among its members concerning their multilateral trade relations … as may be decided by the ministerial conference'. Note that the term used is 'trade relations'. Considering the history of negotiations, it is realistic to assume that the widest possible interpretation will continue to guide the future connotation of 'trade relations'.

Article XVI.3 gives the WTO Agreement the pre-eminent status as between the complex of agreements it comprises. In case of conflict between provisions of the WTO Agreement and provisions of any other agreement, the terms of the former would prevail, '… the WTO Agreement provisions

on decisions would seem to trump GATT 1994 provisions such as Article XXV, or the practice regarding formal "interpretations" ' (Jackson 1998: 43). Under GATT, there was some ambiguity whether, under the provisions for 'joint action' as per Article XXV, a majority could decide on a definitive interpretation (Jackson 1992: 90-1). That ambiguity has been removed and decisions made by prescribed majorities in the WTO ministerial conferences are final with regard to interpretations.

Under Article X.3, all amendments which would alter the rights and obligations of members have to be approved by a two-thirds majority. A member opposing the amendment, could be asked to withdraw from WTO through a three-fourths majority decision to that effect.

Under this dispensation, the WTO ministerial conference may decide on a broad definition of 'trade relations', start negotiations on any area so identified, generate an agreement casting onerous new obligations, and finally incorporate the new agreement through an amendment to insert a new indent under Annex 1, say, Annex 1D—all by means of a two-thirds majority decision. The acceptance of obligations so generated would become inescapable for all, including opposing members because non-acceptance would invite expulsion, effected by means of a decision supported with a three-fourths majority. In other words, the unconditional MFN right (with respect to trade in goods) of the recalcitrant minority would become contingent upon its acceptance of newer and newer obligations that may be imposed by a majority decision. The MFN privilege would become increasingly meaningless and more conditional.

In contrast, under the dispensation available in the erstwhile GATT by virtue of Article XXX, any contracting party could, on its own, defeat such a move and protect its privilege, because abridgement or infringement of its MFN right could be enforced only with a unanimous decision; there was no fall-back to a majority decision. It was this feature that led the trade majors to resort to the side agreements or codes in the Tokyo Round of MTNs. But they did not succeed: 'A GATT decision in 1979 reaffirmed that the GATT's basic MFN obligations are not affected by the codes, meaning that, even though non-signatories have no rights under the codes themselves, their existing GATT rights—specifically their MFN rights under Article I—entitle them to equally favourable treatment' (Hudec 1987: 89).

Articles II.2, III.2, X.3 and XVI.3 of the WTO Agreement have thus brought about a fundamental departure from the principle embodied in Articles I and XXX of GATT. The provision in Article X.2 of the WTO

Agreement with reference to Article I of GATT becomes meaningless with regard to the imposition of additional conditionalities through new agreements because the same can be introduced by totally bypassing Article I of GATT. Indeed, this was done when the WTO Agreement including all its new disciplines as an integral part of the new system came into effect.

The procedure provided in the WTO Agreement with the fallback to majority decision amounts to a clear constraint on national sovereignty of member countries. The WTO has now acquired the potential of trumping national legislation in ever-widening areas and laying down norms and standards in the name of harmonizing national systems. The process that started at the Uruguay Round, particularly with regard to the TRIPS Agreement, is the beginning. TRIPS has clearly shown the direction and purpose that harmonization will take. National systems will have to follow norms and standards which conform to the requirements of the trade majors in general and the transnational economic operators, in particular.

NOTES

1 For a succinct account of these years, see Clair (1949). See also Gardner (1980) for the interplay of interests between the two players, and Culbert (1987) on 'wartime Anglo-American talks'.

2 The circumstances and discussion surrounded the inception of GATT, and, most important, its actual functioning make this quite clear. However, proponents, wanting to include services in the GATT negotiations, sought to obfuscate this basic fact during the heated debate that preceded the Uruguay Round. The very fact that a separate agreement on trade in services was negotiated in that round, proved that GATT was all about goods.

Nevertheless, it should be mentioned in passing that Article IV deals with the administration of screen quotas for cinematography films. What is visualized therein is that total screentime available (calculated on the basis of, say, screen time per theatre per year) will be apportioned into two parts: one part reserved as the minimum time for screening the films of national origin and the remainder not subject to quotas by sources of supply of cinematic film. The article came into existence because of the American interest in the overseas market for their films. Thus, besides the US agriculture, the American film industry, the largest producer and exporter of films in the world, also had the distinction of obtaining a 'tailor-made' provision in GATT. While this provision, in terms of its significance for trade, is not very important, it is the only provision where GATT deals with the supply of a service. Another noteworthy aspect is that the

administration of screentime quotas is a transaction well within a national border. Once the discipline is extended to a service produced and supplied locally, it becomes inevitable to resort to an approach other than cross-border measures. To that extent, the definition of GATT as a set of rules relating to cross-border trade in goods becomes footnoted, if not dented. In sum, however, it appears to be more a case of 'the exception proving the rule'.

In this context, it may be argued that Article XVI dealing with subsidies also affects matters lying within national borders. But it is clear that the concern with this internal matter resembles that visualized in Article III relating to the national treatment of imported goods with respect to internal taxes and regulations. The subsidy provision is the obverse of that relating to internal tax. In both cases, concern with the internal matter can be said to be reasonably within the purview of GATT because both measures can have a direct bearing on the effectiveness of negotiated tariff concessions. In this respect, they differ from many other issues that relate solely to national policy-making and are not therefore relevant to GATT. To conclude, the existence of Articles IV and XVI does not invalidate GATT's broad *raison d'être*: cross-border trade in goods.

3 The other feature of the amendment procedure is also interesting. '(E)ven those amendments that do not require unanimity and that become effective upon acceptance by a two-thirds majority … are, nevertheless, to be effective only "in respect to those contracting parties which accept them" '. Thus no contracting party can be bound by an amendment unless it specifically accepts that amendment. In this respect Article XXX differs from Article 108 of the United Nations Charter, under which an amendment to the Charter comes into force when adopted and ratified by the two-thirds of the membership, provided that all the permanent members of the Security Council adopt it' (Dam 1970: 344).

4 See Jackson (1992: 34); Dam (1970: 13-6); and Gardner (1980).

5 See Gardner (1980: 293-304).

6 See Hoekman and Kostecki (1995: 17-8); Tussie (1987: 17, 29); Hudec (1987: 62, 75).

7 See Tussie (1987: chapter 3).

8 'With the advent of the cold war … exclusion from MFN treatment could be used as a threat or punishment, inclusion as a bribe or reward. Trade policy was a vehicle for moving Western countries into closer alliance'. President Kennedy 'expressly linked (his initiative for the 1963-67 Round) to the question of Western unity in the face of the Soviet threat' (Pincus 1986: 245-7).

9 The formulation in paragraph 8 of Article XXXVI reads, 'The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties'. This has been elaborated further in the annotation to GATT Annex I in 'notes and supplementary provisions', which articulates that ' … the phrase "do not expect reciprocity" means … that the less-developed contracting parties should not be

expected . . . to make contributions which are inconsistent with their individual development, financial and trade needs . . . '.

[10] It was during the Dillon Round of tariff negotiations (1960-61) that the short-term arrangement came into being. The American textile industry had linked its support to the Trade Agreement Act of 1962 with the restrictions the US wanted to impose on 'market disrupting' imports from 'low-cost' countries. Successful conclusion of the long-term arrangement was considered by the US administration necessary in order to obtain legislative authority for negotiations in the Kennedy Round (1963-67). Likewise, negotiating authority for the Tokyo Round (1973-79) was obtained by promising stronger protection to the US textile industry through what came to be known as MFA (see Low 1993: 107-8; and Hoekman and Kostecki 1995: 219).

[11] UNCTAD occupied prominent position and opened wide ranging negotiations on the common fund for commodities, a code on transfer of technology, a set of principles for the control of restrictive business practices, and supported initiatives for revision of the Paris Convention, Economic Cooperation among Developing Countries, the question of linkages between trade and finance and the reform of the international financial system. See UNGA Resolutions 3202(S-IV) May 1974; 3281 (XXIX) December 1974.

[12] The following exemplifies this concern, 'With certain exceptions, decisions in GATT are taken by simple majority vote and it has become increasingly obvious that countries which accept legally binding and serious obligations governing their mutual trade would not indefinitely submit to a situation in which the administration of the trade rules would be governed by a body in which a vast majority of the members (and an increasingly organized majority), while enjoying all the benefits of the Agreement, has no equivalent commitments and yet by force of numbers has effective control of the decision–making process'. Eric Wyndham-White, the first director-general, who 'was a predominant and omnipresent factor in GATT from the beginning until his retirement in 1968' (Dam 1970: 339) wrote this in his foreword (1975) which was put forward in the context of the Tokyo Round. The proposal advocated, among other things, the 'code' approach to accomplish strengthened disciplines in GATT.

[13] With regard to the code on subsidies, insistence by the US that benefits of the 'material injury test' be made available only to the signatories of the code and its further requirement of having 'commitments' to the subsidy regime from developing-country signatories created a conceptual and a real problem for GATT. Although the issue was settled by the concerned parties outside the 'courts', so to say, there was serious doubt about the legality of the US position.

[14] In November 1985, the pre-preparatory work got log-jammed due to basic differences on the scope of the proposed GATT round and the competence of GATT with regard to the new issues. Yeutter, the then trade representative for the United States warned: 'We simply cannot afford to have a handful of nations with less than 5 per cent of world trade dictating the international trading destiny of nations which conduct 95 per cent or more of international commerce in this world. … Services in particular must be in the round, or we are just not going to have a new GATT round … and we will have to confront those issues in a different way—plurilaterally or multilaterally'.

This was followed by President Reagan's tough stance: ' … we hope that the GATT members see fit to reduce barriers for trade in agricultural products, services, technologies, investments and in mature industries. But if these negotiations are not initiated or if insufficient progress is made, I am instructing our trade negotiators to explore regional and bilateral agreements' (Jackson 1992: 147). It did not occur to these men that by their insistence on the new issues, they were unilaterally redefining in their advantage—without so much as a legal fig-leaf to justify their action—the limits of sovereign economic space of nation-states, particularly in the third world, who opposed their move. In this respect, the trade-weight based argument was a classic *non sequitur*.

15 See Shukla (1994: 95-120).

16 The common working platform contained the following elements: (i) legal separation of the two negotiating processes–one track for goods, which would constitute the subject matter of the GATT discussions, and a second track, which would be outside the juridical framework of GATT, for services negotiations; (ii) the mandate for service negotiations must recognize that the development of developing countries and the growth of all countries should be the objective of these discussions instead of liberalization or dismantling of barriers *per se,* as advocated by the US; transparency and progressive liberalization could only be conditions or means of achieving these goals; (iii) there should be a commitment to respect national laws and regulations governing the service areas; (iv) the question of *inter se* relationship between the results of the dual process of negotiations should not be pre-judged in any way and kept open; and (v) the work of other relevant international organizations should be taken into account.

17 Respect for national laws and regulations was replaced with respect for the policy objectives thereof. The question of the *inter se* relationship with regard to the outcomes of the two negotiation streams was not postponed indefinitely, but was linked to the implementation of the results at the conclusion of the round, when a decision would have to be made on whether the services discipline could be integrated with other issues in a common enforcement mechanism. GATT secretariat would service the negotiations.

18 Article XX(d) recognized that countries may follow their own regimes with respect to patents, copyright, etc. but also stipulated that measures to enforce such regimes should not be applied so as to constitute arbitrary or unjustified discrimination between countries or disguised restriction on international trade.

The mandate was to clarify GATT provisions and elaborate, as appropriate, new rules and disciplines with a view to reducing the distortions and impediments to international trade and ensuring that procedures to enforce the intellectual property rights do not themselves become barriers to legitimate trade. In this effort, 'the need to promote effective and adequate protection of intellectual property rights' was to be taken into account. Thus, the element advocated by the US as the negotiating objective finally became just another factor to be taken into account in an exercise which was to be conducted according GATT's extant approach. It was a very restrictive mandate.

The mandate for other new issue, trade-related aspects of investment measures, was equally restrictive. It was limited to examining the efficacy of GATT articles on the trade restrictive and distorting effects of investment measures. It also visualized the elaboration of further provisions, as necessary, to avoid adverse effects on trade.

19 It recognized the 'urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses … ' which was the EEC claim. It further stipulated that negotiations were 'to achieve greater liberalization of trade in agriculture', which was the argument of the other group.

20 See The Intellectual Property Committee (1988).

21 Three alternative formulations had to be sent to the ministers for resolution at the Montreal meeting: two were variations of the developed-country approach and the third put forward the view of the developing countries (see GATT: MTN.TNC/7 (MIN): 21).

22 These included definition and scope of the subject matter of the agreement; the issue of national regulations; impact of sectoral specificity on the applicability of general multilateral principles; the priority to be given to sectors of export-interest to developing countries; the need to calibrate the participation of developing countries in line with their development situation; eschewing the concept of 'right to establish', that is to say, the right of capital to move, stay and exit across the national borders at will, in search of profit, without any hindrance on the part of the nation-states; consideration of the issue of national treatment as a concession to be extended only in cases where the country has agreed to grant access, instead of as a basic principle of the agreement; measures to strengthen the capacity of domestic service sector of developing countries and to facilitate their access to world markets (see GATT: MTN.TNC/67(MIN): 40-3).

23 The differences were highlighted by the two diametrically opposite drafts that were tabled during the last stage of the Montreal meeting. These included the so-called chairman's proposal which embodied the developed countries' position, and the document put forward by India, which incorporated the stand of the developing countries (see unnumbered documents circulated in the green room at the Montreal ministerial meeting).

24 The decision on TRIPS brought the substantive issue of norms and standards and their enforcement within the ambit of negotiations. The reference to 'public policy objectives' was weak and almost redundant, as all it stated was that 'in the negotiations consideration will be given to concerns raised by participants related to the underlying public policy objectives of the national systems . . . '. This stood in sharp contrast to the formulation in the mandate for service negotiations agreed in Punta del Este, which articulated that 'such framework (i.e. the multilateral framework of principles and rules for trade in services) shall respect the policy objectives of national laws and regulations'. More significant was the fact that the mandate of TRIPS was so altered, while still remaining an integral part of the GATT negotiations or the goods track, i.e. Part I of the ministerial declaration launching the Uruguay Round. There was no decision on *legally*

separating these negotiations from the GATT track, as had been done in the case of services negotiations.

25 See *Economic and Political Weekly* (1989: 201-4); SUNS newsletter (April-May 1989); Raghavan (1990: 271-3); and Shukla (1994: 95-120).

26 'In each of the areas (i.e., financial services, telecommunication, transport, audio-visual services), one or more of the participating countries indicated their unwillingness to apply some of the basic rules of the framework agreement. Usually the objection was to the use of MFN rule. … In the last weeks before the Brussels meeting, it became known that the US in particular had hardened its position; it now stood firm in its wish to exclude some sectors altogether from the services agreement and to tie MFN treatment to the exchange of specific commitments, rather than make it a general obligation linked to acceptance of the agreement as a whole' (Croome 1995: 250).

27 GATT researchers have commented on this aspect; see Dam (1970: 345) and Jackson (1992: 52).

28 Reference to the concept of 'a single undertaking' was included only in Part I of the Punta del Este declaration launching the round, covering the issue of the GATT track, or the goods track. Thus, the 'single entity' did not extend to Part II negotiations on services. Secondly, since the original mandates on TRIPS and TRIMS were narrowly defined to correspond to GATT jurisdiction, automatic application of the single-entity concept to all issues in Part I should have ceased, when the TRIPS mandate, as a result of the April 1989 compromise, was extended beyond its authorization. Third, in view of the separate legal character of the negotiating processes, it was agreed by all that 'international implementation' of the round results was to be addressed at the end of the session, and there was no question of prejudging it.

29 See Annex in this study.

30 With regard to border protection, industrial-country tariffs have been bound. Quantitative restrictions (QR) are to be converted into tariff equivalents. Over a six-year period, tariffs are to be reduced by 36 per cent, and a minimum 5 per cent import access is to be provided. A commonly accepted measurement of domestic support was devised, taking both direct and indirect support into account. As was to be expected, the measure does not reflect sound economic rationale, but more the requirements of the two major negotiating participants. Consequently, the agreed measure excludes vital elements, is narrow in its scope, and includes loopholes. Its main objective is to reduce, in six years, the support level by 20 per cent compared to those prevalent in an agreed base period. A support equivalent of 5 per cent of the value of the output is allowed; for the developing countries, the percentage is 10. Considering the high levels of support existing in both the USA and the EEC, commitment is very modest. Implementation of the commitment is on a global basis, and not on product-by-product basis, which leaves scope for minimizing the trade expansion effect and selecting its direction. With regard to export subsidies, these are to be reduced by 36 per cent in value terms and 21 per cent in terms of volume over a six-year period. Developing countries are allowed to provide transport

and marketing subsidies. Here again, considering the high levels prevailing in industrialized countries, the commitment is modest.

31 See Articles 11.2 and 3 in the Agreement on Safeguards. A safeguard measure can be taken only when a member has determined that imports of the product in question are being made in increased quantities so as to cause or threaten 'serious injury' to the 'domestic industry'. The terms 'serious injury' and 'domestic industry' have been defined strictly to prevent abuse. A quantitative safeguard measure is to be applied in a manner that imports are not ordinarily reduced to levels lower than the average of the past representative period, and the relative proportions of supplying members in imports are maintained. However, a degree of selectivity is permitted in cases where 'imports from certain members have increased in disproportionate percentage in relation to the total increase in imports' (Article 5). A safeguard measure may be valid up to four years, and can, under certain circumstances, be extended to a maximum of eight years. All measures will be progressively liberalized so that termination becomes feasible (Article 7).

32 See Article 9 of the agreement on TRIMS.

33 In the case of patent laws of the developing countries, for example, the coverage has to be expanded, and exclusions removed. The term of patents is to be uniformly extended. Provisions regarding 'compulsory licensing' have to downgraded so as to make them redundant, and no ceiling on the issue of royalties is to be allowed. In short, the welfare and development objectives, if not to be given up altogether, are to be relegated to background.

TRIPS covers a whole range of intellectual property issues, including industrial patents, copyrights, geographical indications, plant varieties, micro-organisms, bio-technological processes, layout designs of integrated circuits and trade secrets. The underlying approach is the same, viz. to create a right where none exists, to strengthen existing rights, to reduce the scope for possible limitation on the grounds of public policy, to establish not only the norms and standards, but also legal procedures, and to enforce model law through the mechanism of cross-retaliation.

34 See Articles 65, 66 and 67 of the Agreement on TRIPS. For developing countries to attain the level of patent protection currently prevalent in the industrial countries, particularly in the US, an additional four-year transitional period has been provided; for introducing product patent, where it is not permissible, the period is nine years. However, the transition, even in the case of LDCs, must be completed in ten years.

35 See the following two assessments: 'The final outcome of the negotiation suggests that US pharmaceutical, entertainment, and informatics industries, which were largely responsible for getting TRIPS on the agenda, obtained much, if not all, of what was desired when the negotiations were launched. It is fair to say that the developing countries agreed to substantially more than even an optimist might have hoped for in 1986 when the round began' (Hoekman and Kostecki 1995: 156). Any comment is superfluous. And the following sums up its impact: ' … TRIPS is a redistributive issue; irrespective of assumptions made with respect to market structure or dynamic response,

the impact effect of enhanced IPR protection ... will be a transfer of wealth from (developing country) consumers and firms to foreign, mostly industrial-country firms' (Rodrik 1995: 157).

36 See Articles I.3 (b) and (c) and XXVIII (b) of GATS.

37 This rather modest approach has been criticized by some who see the elements of GATS which made possible the adoption of such an approach as the main 'weakness' of GATS (Key 1997). This is in tune with the original stand of the proponents of the service negotiations. But it must be remembered that without these 'weaknesses', wider participation in GATS would not have been possible; GATS would have become as unequal and biased as TRIPS.

38 See Nayyar (1988 and 1989); and, for a comprehensive analysis Nayyar (2000); also Bhagwati (1986) and Hindley (1991).

39 See comments by John Reed, chairman, City Corp, and the then-chairman of the Services Advisory Committee of the US Administration:

> US business wanted a global agreement on services with as broad a participation as possible by developing countries. The Reagan Administration should be prepared to trade-off freer movement of third world labor to US projects in return for greater access for US service companies to developing markets (published in *Financial Times,* London, 12 July 1988).

40 The first WTO ministerial meeting in Singapore (1996) introduced the issue of investment onto its agenda. While ostensibly only a study was initiated at that time, EEC tabled a full-fledged proposal on a global investment regime at the Seattle ministerial meeting (1999). EEC had pushed for an ambitious and far-reaching regime, but its enthusiasm has since abated and is now proposing a 'thin' multilateral discipline with the obligations of MFN treatment and transparency. A difference in approach between the USA and EEC is reported, with the USA favouring the stronger discipline first developed in OECD, which would be multilateralized in WTO at a later stage. Many developing countries oppose the idea of a global regime in WTO.

41 It seemed for a while that the Singapore ministerial meeting had succeeded in shelving the issue of 'social clause' or 'labour standards', but it was to surface in Seattle with renewed vigour. USA would like to see a WTO working party take control of the issue. This is a new *avatar* of the erstwhile phobia of low-wage country competition causing market disruptions, albeit in more sophisticated form.

42 Americans have proposed binding tariff rates at zero level for the e-commerce sector. Accordingly, there will be zero duty on transactions conducted through the electronic medium of internet; similarly, products of the 'medium-is-the-message' variety, such as audio-visual transmissions, will also be duty free, while the same product in more tangible form, such as compact disc, continues to carry duty. Various services supplied through the electronic medium will also be entitled to a duty free entry. *Prima facie,* industrial countries are better equipped to benefit from this proposal and will resort to

'e-commerce' to escape tariffs or other restrictions that would otherwise impede market access to the developing countries.

43 Some decisions by the dispute settlement panels and the appellate body in the last few years of WTO's existence have given rise to serious concern as they have far-reaching implications. In a dispute raised by the USA against India with regard to the latter's alleged failure to fulfil its transitional requirements under TRIPS to provide exclusive marketing rights and make arrangements to receive product patent applications in the interim period, India cited sufficient evidence of executive action to prove that it had met its obligations. But the appellate body, maintaining this was not enough, stipulated that India amend its patent law to provide 'adequate legal security' to other members and economic operators. This amounted to an interpretation of the fundamental law of a member country and, in attempting to prescribe what agenda it should adopt in a particular matter, an infringement of its sovereign legislature.

Interestingly, the dispute settlement panel of WTO came to a contradicting conclusion recently on the question whether US trade-sanction laws (Sections 301-310) were in violation of the WTO trade rules. While accepting that provisions of the US law were *prima facie* in violation, the settlement panel ruled that the statement by US administration (which accompanied the legislation but did not constitute a part of it) was adequate guarantee that no provisions of law would be used in violation of the WTO rules to the detriment of other members. Apparently, in the eyes of WTO's dispute settlement mechanism, executive action by one member state is not as good as that of another member state (see Raghavan 2000: 2-5)!

Similarly, the panel has passed rulings which eroded the discipline on general exceptions as mandated in GATT, directly implying that, under certain circumstances, a country can adopt trade restrictive measures for actions that are beyond its jurisdiction, or on actions that induce effects outside its jurisdiction. Panel rulings have also allowed the filing of briefs and opinions by persons and organizations not accredited with governments (Das 1999: 36).

These rulings are indicative of the direction in which the judicial process of WTO is moving. It is enhancing the intrusive role of WTO with regard to the sovereign authority of member countries beyond the limits specified by the WTO Agreement. There seems to be an implicit bias in the sense that the rulings have affected, or have the potential of affecting, weaker members or developing countries adversely.

44 The discussion on Structural Impediment Initiative between the USA and Japan is a case in point: ' ... The gist of complaints against the Japanese is that they study too long and too well, that they work too hard, they consume too little, and they save too much. These odd complaints are made with a straight face' (Palmeter 1990: 61).

45 'As broad and complex as the WTO mandate is, it is clear that there is potentially much more that could be encompassed . . . (T)here are a number of puzzling link issues that will require the attention of the new organization, such as . . . links to human rights practices and democratic institutions, links to monetary policy, questions of trade in armaments and globalization effects on the cultural values of particular societies' (Jackson 1998: 103).

[46] See Dam (1970: 376-7).

[47] Internationally contestable market 'would mean that the conditions of competition prevailing in that market allow for unimpaired market access for foreign goods, services, ideas, investments and business people, so that they are able to benefit from opportunities to compete in that market on terms equal or comparable to those enjoyed by local competitors. Hence market access conditions and, more generally, the competitive process should not be unduly impaired or distorted by the totality of potential barriers, including traditional border barriers, investment conditions, structural impediments, regulatory regimes as well as private anti-competitive practices' (Zampetti and Sauve 1996: 333-43).

[48] For example, the Treaty of Rome (Articles 59-66) stipulates that, 'there shall be free trade in services within European Community. Nevertheless, until the 1992 initiatives there had effectively been no movement towards actually freeing trade in most of the service sector of the EC. The basic reason for this failure was the prior existence of different national levels of regulation' (Hindley 1991: 135).

[49] The whole idea of 'contestable markets' as it has been put forward and is used to buttress the process of 'harmonization' to be carried out in the one-sided way, under duress in the forum of WTO, recalls to mind the establishment of 'factories' and acquisition of rights to customs-free trade in India by the English East India Company in the 17th century or the race amongst the European powers for the establishment of extra-territorial enclaves in China in the last decade of the 18th century. These factories and enclaves were the ancient ancestors of the 'contestable markets', never mind their unsophisticated appearance or violent and corrupt ways. They were the vanguard of the first and, perhaps, the deepest integration that engulfed the whole world (see Roychaudhuri Tapan and Habib Irfan 1984: 390-94 and Hobsbawm 1987: 281).

[50] The 'green room' procedure refers to the selective, informal consultations that GATT's director-general conducted confidentially, apparently to make his own assessment of a possible consensus or a way out, on a given but difficult issue under negotiation. Consultations were usually carried on in a small meeting room with grey-green walls, hence the name. The director-general's sensitivity to the 'trade weight' led to restricting these meetings to the trade majors and a few others, who, for one reason or another, were deemed important enough to be included, but to the exclusion of a large majority of members. No records were kept. Later, when the outcomes of the green room discussions were introduced as a consensus at the more formal GATT meetings, some participants disassociated themselves from—or even strongly opposed—these conclusions. The procedure, at its best, helped the director-general to recognize the needs of the trade majors; at its worst, it was a backroom manoeuvre, mostly at the behest of the trade majors, to foist decisions on the unwilling or unsuspecting majority in a manner not quite regular or democratic.

[51] The texts of the statements were reported in *Third World Economics* (1999: 4, 12).

[52] The terms 'standstill' and 'rollback' came into usage at GATT in the context of tariffs and non-tariff measures. The former implies the collective commitment to refrain from

new non-tariff measures or from increases in the prevalent non-bound tariff rates, pending further multilateral negotiations, or on the eve of a new round of GATT negotiations. The aim was not to aggravate competitive worsening of the bad situation. Also, it was used for maintaining *status quo* prior to the commencement of negotiations.

Rollback referred to collective agreement to rescind past measures, which violated the commitment to GATT principles, and to create a more congenial atmosphere for multilateral negotiations. GATT's 1982 ministerial meeting placed considerable emphasis on the standstill and rollback commitments for restoring GATT morale. No binding commitments, however, emerged from the meeting; the only result was a 'best endeavour' statement. The terms are used here in a wider context, without distortion to their basic import.

[53] The case of People's Republic of China from 1950 through late 1980s is illustrative of 'elective exclusion'.

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