External Transparency in Trade Policy

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I. Introduction

The word “transparency” is perhaps the most opaque term in the trade policy lexicon, yet it has become so widespread that it could be called the buzzword of the trade specialists’ vocabulary. In the language of the World Trade Organization (WTO), “internal transparency” refers to the nature of the decision-making processes of the WTO itself while “external transparency” refers to the relationship between the WTO and non-governmental institutions such as businesses, unions, farmers, academics and non-governmental organizations (NGOs). While there is no established definition of the term, it does cover access to information as well as the nature of participation in the policy-making process.

The policy process of trade is usually conceived as a game played on two levels, involving negotiations among interest groups, or stakeholders, at the national level and negotiations among country representatives at the international level. The idea of the two-level game was formulated by Robert Putnam in a seminal article in 1988, as a theoretical approach to the interweaving of domestic and international policies. The concept stemmed from an analysis of the 1978 Bonn Summit which involved coordination producing a complex outcome linking domestic policies in the Summit countries to support jointly determined International economic strategies.

In trade policy, especially for United States and the European Union, one could plausibly argue that the negotiating strategies are largely determined by domestic constituents. Yet there has been almost no empirical research on the subject of the national process and its interrelationship
with the process at WTO headquarters in Geneva. Earlier analysis of the Uruguay Round of trade negotiations predated the section of the WTO that resulted\(^{[n]}\). The profound transformation of the multilateral trading system and other definitive changes in the political economy of trade policy since then makes the concept of the two-level game today far more complex than it was at the end of the 1980s. Indeed, given the spread of regional trade agreements (RTAs) the game often involves three levels, further increasing the complexity of the process.

Rather than tackle the conceptual and theoretical aspects of the complex arrangements, this paper focuses on the policy-making process at the national level and links that process to the systemic issue of the future of the WTO. The paper begins with a brief review of the changes in the trading system stemming from the Uruguay Round and their unintended consequences. The changing political economy of trade policy is then highlighted, including the prominence of new transnational actors who consistently and insistently demand more WTO transparency. Finally, the discussion turns to the issue of the domestic policy-making process and explores a proposal for enhancing WTO external transparency.
II. The Uruguay Round and its Aftermath

After twenty-five years in government, one lesson has proven most resilient: in all significant government policies the unintended consequences overwhelm the original policy objectives. The Uruguay Round is a particularly striking example of this dictum.

The Uruguay Round was the eighth negotiation under the auspices of the General Agreement on Tariffs and Trade (GATT), created in 1948 as part of the post-war international economic architecture. The primary mission of the GATT was to reduce or eliminate the border barriers which had been erected in the 1930s and contributed to the Great Depression and its disastrous consequences. The GATT reflected its origins in the postwar world in that it provided rules of engagement and a buffer for interaction between the international objective of sustained trade liberalization and the objectives of domestic policy, primarily the Keynesian Consensus of full employment and the creation of the welfare state.

Before the Uruguay Round, GATT worked very well. Tariffs and non-tariff barriers were significantly reduced and trade grew faster than output as each led the other. Most rounds were essentially managed by the United States and the European Community while the developing countries were largely ignored. Agriculture was virtually excluded from negotiations. The Transatlantic Alliance, aided by the Cold War’s constraint on trade frictions, was the effective manager of the international trading system.

The Uruguay Round was a watershed in the evolution of that system. For the first time agriculture was at the centre of the negotiations. The
European efforts to block the launch of the negotiations to avoid addressing the heavy subsidies and protection of their Common Agricultural Policy went on for half a decade. This foot-dragging also spawned a new single-interest coalition, the Australian-led ‘Cairns Group’, which included Southern countries from Latin America and Asia determined to ensure that liberalization of agricultural trade would not be relegated to the periphery by the Americans and the Europeans as it had always been in the past.

But even more important in the Uruguay Round’s transformation of the system was the role of a group of developing countries, tagged the ‘G10 hardliners’. This Group, not to be confused with the G10 group of countries in the IMF context, was led by Brazil and India. The G10 were bitterly opposed to the inclusion of so-called “new issues” — trade in services, intellectual property and investment — that were central to the American negotiating agenda.

Although the “new issues” vary one to another, negotiations on telecommunications or financial services differ from intellectual property rights, they do have one common or generic characteristic. They involve not the border barriers of the original GATT but domestic regulatory and legal systems embedded in the institutional infrastructure of the economy. The degree of intrusiveness into domestic sovereignty required in these areas bears little resemblance to the shallow integration of the GATT with its focus on border barriers and its buffers to safeguard domestic policy space. The WTO thus shifted from the GATT model of negative regulation, what governments must not do, to positive regulation or what governments must do.

The inclusion of the new issues in the Uruguay Round was an American initiative and this policy agenda was largely driven by American multinational enterprises (MNEs) who were market leaders in the services and high technology sectors. These corporations made it clear to the government that without a fundamental rebalancing of the GATT they would not continue to support a multilateral approach to trade policy but would prefer a bilateral or regional focus. But they did not stop at lobbying the U.S. government; they organized business coalitions in support of services and intellectual property in Europe and Japan as well as some smaller OECD countries. The activism paid off and it is fair to say that American MNEs played a key, perhaps even the key, role in establishing the new global trading system.

By the early 1990s, two unrelated events ushered in a major change in the prevailing economic policy model. These events were the debt
crisis of the 1980s, which greatly increase the policy influence of the IMF and the World Bank, and the fall of the Berlin Wall. Economic reforms such deregulation, privatization, and liberalization were seen as essential elements for launching and sustaining growth. Economic regulatory reform is at the heart of the concept of trade in services, so even without the thrust from the Uruguay Round many developing countries began to see reform of key service sectors like telecommunications as essential building blocks for growth. The GATT became a means to further domestic reform.

Thus, well before the end of the Round the hard-line coalition had disappeared, and the coalitions of developing countries concentrated on liberalization of agriculture and textiles and clothing. Many undertook unilateral liberalization of tariffs and other trade barriers and by the conclusion of negotiations in December 1993 were among the strongest supporters of the negotiations they so adamantly opposed in the 1980s. A North-South 'Grand Bargain' was struck that was quite different from former GATT reciprocity: I'll open my market if you'll open yours. The implicit deal was the opening of OECD markets would be opened to agriculture and labor-intensive manufactured goods, especially textiles and clothing, in return for including of trade in services, intellectual property and (albeit to a lesser extent than originally demanded) investment in the policy framework and as virtually a last minute piece of the deal, a new institution - the WTO - was created with the strongest dispute settlement mechanism in the history of international law.

Since the WTO consisted of a "single undertaking" (to use the legal term) the deal was pretty much a take-it-or-leave-it proposition for the Southern countries and so they took it. However, it is safe to say, they did so without a full comprehension of the profoundly transformative implication of this new trading system - an incomprehension shared by the Northern negotiators as well.

The Northern end of the bargain consisted of limited progress in agriculture, with a commitment to go further in new negotiations in 2000; limited progress in textiles and clothing and a rather significant reduction in tariffs in goods in exchange for even deeper cuts by developing countries with most of the restrictions to be eliminated later rather than sooner. On the whole it did not represent great progress but it was not bad when compared to previous rounds centered on traditional market access issues. But this was a very different outcome than a GATT negotiation, as the Southern end of the bargain so amply demonstrates.
The essence of the South’s commitment — the inclusion of the new issues and the creation of a new institution — requires major upgrading and change in the institutional infrastructure of many or most Southern countries. These changes in governance will take time and cost money. Implementation thus involves considerable near-term investment often with uncertain medium-term benefits. Furthermore, the transition periods for implementation for developing countries were set arbitrarily, not based on any analysis or, indeed, on any awareness of this systemic problem. Technical assistance promised by the North was not provided although this appears to have been rectified in the new Doha Round of negotiations. There has been an increase in agricultural subsidies in the North and virtually no improvement in market access for textiles and clothing. And even when this does improve, with the elimination of quotas, under the infamous Multifibre Agreement (MFA), anti-dumping actions, the protectionist weapon of choice, will remain alive and well in the rich countries.

It is also important to note that the Uruguay Round Grand Bargain did not only include economic but also social regulation. In the OECD countries, social regulation (environment, food safety, labour, etc.) started in the late 1960s, driven in large part by environmental and consumer NGOs, and has been accelerating since then. Since the establishment of the WTO the most noteworthy and contentious disputes have concerned social regulatory issues, particularly food safety and the environment, which are very sensitive political issues in the OECD countries. That such sensitive issues arise as trade issues has emboldened the NGOs to attack the WTO for lack of transparency.

There were two significant unintended consequences of the Grand Bargain. One is a serious North-South divide in the WTO. While the South is hardly homogeneous in its views, there is a broad consensus that the U.S., EU, Japan and Canada (known in trade circles as the Quad) can no longer run the system. The asymmetry of the power in Uruguay Round must be ameliorated and never be repeated, and the Southern countries must play a far more proactive role in all WTO activities. The symbolic importance of words should not be underestimated. The fact that the outcome of the negotiations in Doha was not a trade negotiation but a “development agenda” is ample testimony of the new activist South. Many of these countries are far better organized and informed than in the past, in part because of the rise of democracy and the growing awareness of trade policy issues among the general public, political
institutions and the business community. This also reflects the role of NGOs created in developing countries during the 1990s to provide information ranging from technical research to policy strategy papers. Furthermore since the mid-1990s the Internet has accelerated the linkages of South NGOs with a number of Northern partners in both Europe and the U.S. These NGOs act together, in effect, as a “virtual secretariat” for formulating policy positions.

The other, and equally important, unintended consequence of the Uruguay Round has been the rise in profile of the MNEs, in part due to their role in the Round. The active role of the corporations made them a magnet for anti-trade advocates and made the WTO a magnet for what has come to be called anti-corporate globalization.

Indeed, for the more paranoid, the Round was simply a conspiratorial collusion between American corporations and the U.S. government. This sentiment is evident to see from “the battle of Seattle” or the demonstrations at meetings in Washington or Prague or Genoa or Quebec City. It is also evident in specific cases such as the attack on biotechnology in agriculture, first aimed at Monsanto. But the most significant recent example concerns the pharmaceutical industry and the AIDS crisis in Africa.

As a result of a well-orchestrated campaign led by Oxfam and Médecins sans Frontières, efforts by pharmaceutical companies to protect patents gave way to agreements to provide critical medicines cheaply to afflicted countries. The pharmaceutical companies withdrew a lawsuit against South Africa; the U.S. abandoned a dispute against Brazil; and the Doha declaration included a remarkable political statement concerning intellectual property and health emergencies. But the impact of NGOs on the WTO goes well beyond the mobilization of protests at meetings or the capture of the moral high ground on poverty and disease. Less visible, but over the longer run probably more significant, is their insistent demand for more transparency.
III. Transparency and Participation

There are, broadly speaking, three main requests in the NGOs demand for external transparency: more access to WTO documents; more participation in WTO activities such as committee and Ministerial meetings; and the right to observer status and to present amicus curiae briefs before dispute settlement panels and the Appellate Board. Of these three the WTO has made considerable progress in providing information speedily and effectively on its website, through informal secretariat briefings and has engaged civil society groups in symposia and, in the case of the Committee on Trade and the Environment, in direct discussions. In the other two areas, a North-South split is evident. Proposals such as opening up the Trade Policy Review by web cast have been opposed by the South. Far more contentious has been the request to open up the dispute settlement mechanisms to amicus briefs. These demands have been strongly rejected by many Southern Governments and their NGOs who regard the evidentiary-intensive and increasingly legalistic system as already biased.16

Curiously, the issue of transparency and the participation at the national level has only recently been raised. The Joint NGO “Open Letter on Institutional Reforms in the WTO” sent to members in October 2001 (just before Doha) includes the “development of guidelines for national consultation with relevant stakeholders” among a number of other proposals. Since reform issues were not on the agenda in Doha, there was no response to this proposal. A similar silence greeted U.S. efforts, after the Seattle debacle, to discuss national policy processes in the WTO.
Yet the WTO may be an outlier in this area, as other institutions in
the rapidly evolving international policy environment are moving in this
direction. A review of developments in the OECD, and in international
environmental and human rights law will serve to illustrate the point.

OECD: Transparency, Trade, Environment and Development
In 1993, the OECD Joint Working Party on Trade and Environment pro-
posed that Transparency and Consultation be established as a principle
of policymaking in this domain. The proposal was adopted by Ministers
as the initiative to undertake case studies of member governments' con-
sultative mechanisms and practices. These case studies were pub-
lished in 1999 and 2000. They not only revealed a wide diversity among
the countries reflecting, inter alia, culture, history, and legal systems, but
also underscored the importance of "capacity," analytic and financial
resources as a factor in determining the nature of the process.

In July 2001, the OECD directorate responsible for research in public
management published a Policy Brief outlining a number of principles
for good governance. The title of the brief was Engaging Citizens in
Policy-Making: Information, Consultation and Public Participation. The lead
paragraph provides the rationale for the initiative:
"Strengthening relations with citizens is a sound investment in better
policy making and a core element of good governance. It allows gov-
ernments to tap new sources of policy-relevant ideas, information and
resources when making decisions. Equally important, it contributes to
building public trust in government, raising the quality of democracy and
strengthening civic capacity. Such efforts help strengthen representative
democracy in which parliaments play a central role."

The goal of building public trust and enhancing the credibility of
governments was especially significant in catalyzing the OECD initiative
and of particular relevance in the trade policy domain. The current anti-
globalization movement reflects trend underway since the mid-1970s in
all OECD countries towards a clear, marked decline in confidence
in government and all political institutions. (While in the events
of September 11, 2001 radically reversed this trend in the United States,
it is not clear how this will affect international economic policy). There
is less data on this phenomenon in non-OECD countries, but anecdotal
evidence suggests that such alienation is growing in many Southern
countries and in Central and Eastern Europe.

There are many different views on the reasons for this worrisome
phenomenon and different factors are no doubt operative in different countries. But the response, in the OECD and elsewhere, have been to foster "ownership" of the policy process by increasing information, consultation, and active participation by a wider range of stakeholders. As the case studies and other OECD research demonstrate, while information access has generally increased over the past decade, there are great differences in consultation and "active participation and efforts to engage citizens in policy-making, are rare, and confined to a very few OECD countries."22

The OECD Policy Brief then sets out a number of policy suggestions and a set of ten guiding principles for OECD governments to engage citizens in policy-making.23 While these principles are not binding on OECD governments, their adoption by Ministers is not without significance as such guidance is considered a form of "soft law." It should also be noted that the initiative by the Trade and Environment Working Group was carried over to the Development Aid Committee (DAC) and resulted in proposals that "participatory development and good governance" principle should be built into all country-based foreign aid systems.24 Again, this is not binding but is none the less highly significant in underlining the importance of "ownership," as is now embodied in policy and practice at the World Bank.25 Policy spillover is perhaps not surprising, but it has not yet affected the WTO.

The Aarhus Convention
On June 25, 1998, in the Danish city of Aarhus, the United Nations Economic Commission for Europe adopted the "Conventioa n on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters." This took place at the Fourth Ministerial Conference of the "Environment for Europe" process. It entered into force on October 30, 2001 with 40 signatories including members of the Economic Commission for Europe as well as states with consultative status with the Commission, mainly in central and eastern Europe and the European Community.

The Aarhus agreement is built on Principle 10 of the Rio Conference on Environment and Development which underlined the importance of a participatory process in formulating and implementing environmental policy at the national level.26 The idea of transparency and participation is deeply rooted in the environmental movement and policy domain, both domestically and internationally because, as a number of inter-
national environmental law experts have pointed out, non-state actors frequently have more and better information than governments. These actors include private firms and various and diverse NGOs all of which have stakes (albeit often competing) in outcomes either as objects or beneficiaries of regulation.\textsuperscript{57}

But Aarhus is quite radical both in its content and its possible implications for international law. The Convention is built on three pillars: access to information, participation, and access to domestic courts. It spells out in detail what each of these rights includes. It recognizes that forms of participation must be adapted to different legal and institutional systems and that they are dynamic and should and will evolve over time. Its intent is to identify basic elements a participatory process. The Convention also includes the need for follow-up monitoring of implementation measures, which should be transparent. And to ensure transparency, the public is granted access to judicial review procedures when their rights to information and participation have been breached.

Kofi Annan, the U.N. Secretary-General, described the Convention as “the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations” and “a remarkable step forward in the development of international law”. He further stated (in an oblique reference to the North-South divide) that “environmental rights are not a luxury reserved for rich countries” and called on the international community to use “the World Summit on Sustainable Development to strengthen our commitment to environmental rights” not only in Europe but throughout the world.\textsuperscript{58}

The implications of these agreements for international law are significant since there will no doubt be an effort by the proponents of transparency and participation to extend the Aarhus principles to international environmental law. The Aarhus agreement also includes a reference to human rights in the preamble and in some other provisions,\textsuperscript{59} which may open the way to a rights-based approach in the environmental domain.

\textbf{Human Rights and Participatory Democracy}

The push to include human rights in the WTO is linked to the ongoing, and often heated, debate on customary international law. In international law, the status of a rule is determined by its source. International conventions (such as Aarhus) are often described as “hard law”, with rules and enforcement agreed upon by and applicable only to participa-
tory members. Customary law relates to obligations established from “a general and consistent practice of states, followed by them out of a sense of legal obligation” and binds all states.197

There is considerable disagreement over whether, and which, human rights have status as custom. Likewise, the proposal that human rights should prevail over international trade law — override those WTO rules which are alleged to violate basic human rights — has generated a storm of controversy.198

Some legal experts argued that the Preamble of the WTO Agreement, which refers to sustainable development and the need for the poorest countries to develop and grow, advances states values that could be interpreted as basic human rights.199 The ruling of the WTO Appellate Body in an environment trade dispute involving shrimp and protection of sea turtle, cited the Preamble in its decision. By interpreting the term “exhaustible natural resources” to include endangered species because of the evolution of international environmental law in recent years200 it expanded the scope of existing rules. It is possible that a further dispute over services, especially related to health or education or water, could provide a further push that opens the door to human rights interpretations of the Preamble. NGOs opposed to liberalization and privatization of public services, both in rich and poor countries, see this as a rallying point. A “manifesto” entitled “Stop the GATS ATTACK now!” has garnered support from a diverse mix of NGOs — including, not surprisingly, public service unions — from over 50 countries around the world.201

The legal route to inserting human rights into the WTO was given a leg up by another decision of a dispute settlement panel concerning American trade law. The Panel’s decision included the statement that “it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places” and thus “the multilateral trading system is, per force, composed not only of the States but also, indeed mostly, of individual economic operators”.202 This is a rather astonishing conclusion and it has certainly attracted the attention of WTO-watchers in the legal community.

Less clear is that member governments are paying attention. As one prominent legal expert noted: “I would venture to guess that if this
particular proposition were put to a vote in the General Council of the WTO, it would be rejected by governments who want to preserve the WTO as a cozy club of trade bureaucrats. In accordance with the WTO procedures, however, it was automatically adopted by the WTO Dispute Settlement Body. Thus, this cutting-edge decision will influence future WTO panelists and the invisible college of international law in the years ahead.*\textsuperscript{172}

Among the individual rights of interest to this "invisible college" are certainly the right of public participation in policymaking as, for example, specified in the Aarhus Convention. Indeed an entire school of international law based on "interactional theory" points out that "law is persuasive when it is perceived as legitimate by most actors" and legitimacy rests on inclusive processes (which) reinforce the commitments of participants in the system to the substantive outcomes achieved by implicating participants in their generation.*\textsuperscript{173} This sounds very much like the OECD approach, that norms generated through inclusive processes of decision-making enhance governmental legitimacy and enjoy a greater degree of compliance. This is part of an expanding climate of ideas – what might be called "norm spillover" from which the WTO is unlikely to be immune.

One of the strongest advocates of human rights as the basis for the WTO is Ernst-Ulrich Petersmann who, however, rejects the reasoning discussed above that WTO law is based on a "principle of indirect effect" whereby individual rights are achieved "indirectly". Rather, as human rights law suggests, WTO guarantees of "freedom" and "property rights" should be "presumed to protect individual rights of citizens" directly\textsuperscript{276}. Petersmann is not alone in his view. Raj Bhala, in his trade law textbook, asserts that "If the GATT/WTO regime is a just one in the sense that Kant or his modern-day disciples who defend liberal democratic theory, then the central focus of this regime must be on the protection and service of the individual".*\textsuperscript{275}

So the "invisible college" is active and also training a new cohort likely to be equally so. I would predict that if the legal route to inserting human rights law is chosen, the results will be profoundly traumatic for the WTO. Such a pervasive and open-ended transformation of the present system, determined by a panel or an appellate board, would be rejected by most if not all members and generate a furious backlash against the "crown jewel" of the WTO, the dispute settlement mechanism. The issue of the WTO and human rights should be debated and
decided by member governments and thus any change to the rules should be legislated not litigated. But, that debate on human rights (or indeed, other fundamental issues such as the definition of domestic policy space to be safeguarded by the multilateral system) has not taken place and, since there is no policy forum in which to launch it, is unlikely to do so anytime soon. But since that raises the questions of internal reform beyond the scope of this paper, it is important to return to the main topic of external transparency and the participatory process at the national level.
IV. WTO: "Legislate" don't Litigate

The word "legislate" is presented in inverted commas because addressing present challenges need not involve a change in the formal rules of the WTO, which is a most difficult and lengthy proposition. Much more efficient would be an informal, voluntary initiative to incorporate discussion of the national trade policy-making processes into the WTO under the broad rubric of transparency, a pillar of the GATT/WTO system from its origins. As discussed above, there is a growing consensus among legal and policy-analytic communities and a number of inter-governmental institutions that participatory processes improve policy outcomes and enhance the legitimacy of policy and compliance with norms and laws. But, most importantly, if this "legislative" route is taken, the legalistic route will be the only game in town. Then one way or another, human rights per se or customary international environmental law will seep into the system with the serious repercussions described above.

If the legalistic route is to be avoided progress must be made on the legislative route. In thinking how this must be done it is helpful to briefly review the state of play in the relationship with the trade policy stakeholders including the NGOs. At the April 1994 Ministerial Meeting in Marrakesh which concluded the Uruguay Round Article V of the Agreement stated: "The General Council may make appropriate arrangements for consultation and co-operation with non-governmental organisations concerned with matters related to those of the WTO". In order to clarify the precise legal meaning of this broad directive the General Council on July 18, 1996 spelled out a set of guidelines covering transparency in-
cluding release of documents, ad hoc informal contracts with NGOs, etc. Guideline 6 is most pertinent in the context of this present discussion:

"Members have pointed to the special character of the WTO, which is both a legally binding inter-governmental treaty of rights and obligations among its Members and a forum for negotiation. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and co-operation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making."

Nothing happened with respect to the admonition to focus on the national level until after the Seattle debacle. At a meeting of the General Council in July 2000, which included a discussion on external transparency (under the agenda item "other business"), the Chairman suggested that members might make written contributions on the subject after making informal consultations. The matter was controversial as there was strong opposition to placing the issue on a formal agenda but the Chairman raised it under "Other Business" since some delegations wanted to discuss external transparency and "be believed it would be difficult to continuously postpone even an informal discussion". After discussion among the supporters and opponents of informal discussions, the meeting was adjourned.

On October 13, 2000 the U.S. made a submission to the General Council’s Informal Consultations on External Transparency. After noting that the 1996 Guidelines suggested the consultations should take place at the national level and briefly reviewing U.S. processes in this respect, the American delegation proposed that since all members "could benefit from an exchange of information on national experiences and approaches... members be invited to provide information on their respective approaches to providing their public with information and opportunity for input on developments in the trading system". Seven other countries made submissions with suggestions to extend WTO information access and engage in more discussion with NGOs and other bodies, especially Parliaments.

On November 9, 2000 an Informal General Council meeting was convened to discuss external transparency. Delegates were in favour of holding discussions on external transparency and agreed that govern-
ments should inform their citizens about the WTO and its activities. That was as far as things got.18

The same countries opposed to increasing transparency at the WTO level (mostly developing countries), were also opposed to discussing the policy process at the national level. They did not want the more powerful well-financed Northern NGOs to get another bite of the policy apple. But certainly the issue merits discussion. For those countries that reject even an informal discussion of their domestic policy processes, it is important to spell out the benefits of such a project.

First and foremost it is important to note that a discussion of national policy processes would be simply that: a means for informing other countries about one’s own practices and learning about theirs. There is clearly no one-size-fits-all model but rather considerable diversity related to history, culture, legal institutions, level of development and so on. A pilot project in cooperation with the Washington-based Inter-American Dialogue and the Inter-American Development Bank revealed very significant differences among the eight countries surveyed: Argentina, Brazil, Canada, Chile, Colombia, Mexico, United States, and Uruguay. Of these only Canada and the United States have established institutional arrangements involving both legislative bodies and a wide range of interested parties or stakeholders including business, farmers, unions, NGOs and academics. This is not surprising since the OECD studies showed that participatory processes were rare in member countries. And a 1996 study by the Swiss Coalition of Development Organizations showed that of 30 countries surveyed (both developed and developing), only 3 had formal mechanisms for consultation (Canada, U.S. and Switzerland).19

Although there is a North-South dichotomy, there are also significant differences between Canada and the U.S. because of differences in basic governance, i.e. a parliamentary versus a presidential system. The Latin countries are by no means homogeneous and in some, an evolutionary process was underway partly in response to changes in trade policy such as the Mercosur regional trade arrangement. The discussion which these papers evoked at a meeting of authors and others last June provided ample evidence of how much can be learned about this important subject even by close neighbors. This pilot is intended to be expanded into a longer-term project to encourage governments to consider basic norms that could be agreed to enhance the legitimacy and sustainability of trade liberalization. The policy process should be evolutionary, reflecting systemic changes (such as the transformation from GATT to the WTO) as well as changes in the
policy environment like an increase in protectionist actions or an economic slowdown. Trade policy, even in the best of times involves change and change produces winners and losers. A participatory consulting process allows governments to inform stakeholders on a continuing basis of evolution of the policy while they may not always like what they hear, they will be less likely to reject the entire regime. Moreover, by sharing information on national processes stakeholders in many countries without adequate technical or financial resources, like small and medium enterprises (SMEs), gain useful information on market opportunities or other issues of interest. In a number of countries, it should be noted that lack of technical and financial resources for many stakeholders and also for some government ministries and parliaments was a major factor affecting the nature of the process.

While there are undoubtedly benefits accruing from a more participatory policy process, there are also costs. This is certainly one reason many countries are wary of the project. There are costs for governments in terms of time, expertise, and financial resources. For the wily statesman secrecy is considered essential, especially as the negotiations move to closure and a participatory process is useful only as an opportunity for co-option. Stakeholders face significant differences in resources. Since business lobbies are better equipped than other groups an insider-outsider mentality can develop that the media are always happy to highlight. Or some stakeholders engaged in the process develop unrealistic expectations and are frustrated when all their demands are, inevitably, not delivered.

All these issues arose in the Western Hemisphere country studies and the discussion repeatedly made clear that there were no magic solutions to these problems. The policy process is complex and messy. Processes have to remain in a condition of continuing evolution, and as in the case in all incremental innovations, learning by doing and benchmarking best practices are essential. The bottom line in all this deserves stressing: that it is the role of government to make policy; transparency and participation are not a replacement for governmental responsibility.

In the WTO context, weighing costs and benefits thus rests on the judgement of each member country. The arguments presented here suggest that there are likely to be significant systemic costs from doing nothing and these should be considered by members when rejecting any WTO initiative. The erosion of the multilateral system will impact the weaker more than the stronger because the alternative to a rules-based system is one based on power.
V. Transparency and the TPRM

How might a WTO external transparency initiative be launched? As noted earlier, transparency was one of the founding principles of the postwar trading system. Article 36 of the Havana Charter for the International Trade Organization became Article 10 of the GATT, which survived the death of the ITO. The article was entitled “Publication and Administration of Trade Regulations — Advance Notice of Restrictive Regulations” and was borrowed from the 1946 U.S. Administrative Procedures Act (APA). The APA exemplified a new legal terrain connected to the expanding role of government initiated by the New Deal. Administrative law is no substantive but procedural, establishing norms to control what bureaucrats do and how they do it. While all Western countries developed administrative law regimes because of the expanded role of governments, the APA was different from those in other common law or codified continental systems because of its greater emphasis on notice-and-comment for administrative rules, freedom of information laws and greater reliance on judicial review of the rulemaking activities of agencies or departments — that is, high levels of transparency. Embedded in the GATT in Article 10, transparency was greatly expanded in the WTO with the inclusion of services, and trade related investment procedures (TRIPS) and the word finally appears in the TRIPS agreement as a heading in Article 63.

In the U.S. the evolution of administrative law expanded the participatory role of stakeholders partly in response to the increase in regulation beginning in the 1970s and to the growing literature on the dangers of
Many economists and legal scholars argued that the best antidote to the capture of regulatory agencies by those they regulate was to broaden the spectrum of interests whose voices should be heard before rules are laid down. For the most part, this is not reflected in the WTO which focuses on the rights and responsibilities of governments not stakeholders. There are, however, some exceptions, such as the Subsidies and Countervail Measures Agreement which includes the rights of “interested parties” other than those of Member governments. Consumer groups are named specifically as they are in the Dumping Agreement. In the Safeguard Agreement there is a specific obligation for the importing country to carry out an investigation which includes “public interest hearings” which could include any interest group. Similar provisions are in TRIPS and Article VI of General Agreement on Trade in Services on Domestic Regulation. Although these examples do provide some procedural participatory rights, for the most part the WTO rules situate the determination of the policy process in the domestic arena of the member governments. So WTO external transparency begins at home — with one major exception, the Trade Policy Review Mechanism (TPRM).

The TPRM was based on a recommendation of the Functioning of the GATT System negotiating group in the Uruguay Round. It was designed to enhance the effectiveness of the domestic policy-making process through informed public understanding.”

“Domestic Transparency Members recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both Members’ economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member’s legal and political systems.”

In order to underline that the TPRM is voluntary and flexible in subject matter, the declaration of Objectives states that “it is not intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures or to impose new policy commitments on Members.”

The TPRM’s origins and objectives clearly embrace the policy-making process and thus seems the logical venue for launching this project — on
VI. Post Script on the Cancun Ministerial

On September 10-14, 2003, the ministers met in Cancun, Mexico to discuss progress in negotiations under the Doha development agenda. In first reflection, the news from Cancun invoked a strong sense of déjà vu, recalling events of the Uruguay Round. Like the Montreal meeting of 1998, Cancun was a mid-term Ministerial meeting, the successful conclusion of which hinged on an agricultural agreement. On the final day, weary-eyed negotiators awaited the results of an all night negotiating session between EC and US warriors, who arrived to announce that, unfortunately, no agreement had been reached and it was time to tidy up the other agenda items and finish the communiqué. A group of Latin American countries headed by Brazil refused to proceed on this basis: no agriculture, no agreement on anything. It was a moment of shock (and maybe awe for some) but the setback was handled with great finesse. It was announced that the meeting was adjourned and would be reconvened shortly in Geneva. No big headlines ensued.

The sense of déjà vu ended there because the events at Cancun confirmed a continuing shift in the political economy of trade policy-making that may well represent a fundamental reorientation of the players and the game. The drivers of the change are lingering Southern hostility to the sort of trade-offs that produced success in the Uruguay Round, one of the unintended consequences of the Round, and the marked increase in the numbers and activities of NGOs in the South. Now no longer outsiders, they are working inside the process to assist developing countries with political and technical aspects of trade policy.
How fundamental all this remains to be seen, but there is no denying the expanded role of NGOs. It is claimed that African civil society played a crucial role in the Ministerial rejection of compromise on the so-called "Singapore issues"—investment, competition policy, transparency in government procurement and trade facilitation—which, in effect, shut down the meeting. Certainly the loud cheers of joy from many NGOs at the collapse of the talks were not exactly a hopeful sign.

Equally clear is the emergence of a Southern coalition in agriculture, the most serious area of policy conflict in Cancun. A draft proposal of the US and EU had the effect of polarizing the debate into a North-South struggle on the other side of which was a new Southern Coalition led by Brazil. This coalition, the G-21, included Brazil, India, China and a group of Southern countries with varying views on economic policy. While it seemed an unlikely grouping, it did not collapse under pressure at Cancun and, if it persists, would present a very significant challenge to the US and EU in agriculture. Since the end of the Cancun meeting, US pressure has successfully peeled a number of G-21 countries away from the coalition. But even at that, it is interesting to note that Brazil, India, China and South Africa are in talks on a new southern region trade agreement and have met with the EC Trade Commissioner. A shift of power to the South, buttressed by a growing NGO infrastructure, could have major consequences for the multilateral system and for the Free Trade Agreement for the Americas.

Implications of Cancun

All that can be said with certainty about the collapse at Cancun is that the resulting delay in completing a Doha Round agreement is not helpful. Delay damages the smaller, poorer countries the most. They have no alternative to a multilateral agreement which is their only hope for progress on agricultural reform, on special treatment for the least developed countries or, more importantly, on strengthening coordination between technical assistance on trade and development assistance which is crucially important for increasing their capacity to export and benefit from liberalization.

Delay also raises the political stakes in the United States where the 2004 US election is unlikely to provide a propitious environment for trade liberalization. Protectionism seems to be on the rise among both Republican and Democratic congressional members and the post-War
and Cold War logic upon which the multilateral system is based may no longer hold sway. If the result is greater reliance on bilateral and regional trading agreements and blocs, fragmentation of the global system would reduce the importance of the WTO as a forum for debate and dispute resolution.

Of course, it is possible that the negotiations, even if delayed will produce a reasonable agreement as has happened before. Estimates by various economists of the impact of agricultural reform and reduced barriers to South-South trade suggest a significant improvement in growth and reduction in poverty would result. But that happy outcome will not be easily achieved. It will require a significant shift of political sentiment in most countries, especially the most powerful, and institutional reform of the WTO itself.
Footnotes


(12) PUMA, op.cit., p. 3.

(13) Ibid., p. 5.


(15) See Poverty Net, Poverty Reduction Strategies and PRSPs, http://www.worldbank.org/poverty/strategies/prsps.htm for information. The Poverty Reduction Strategy approach was adopted in 1999 and involves countries preparing strategy papers (PRSPs) which, inter alia, would involve participatory consultations.


(22) Howse and Muthua, op. cit., pp. 9-11.


(25) To "sign on" (or see the manifest and supporting NGOs) send an e-mail to polaris@interacton.net.


(29) Petermann, op. cit., p.33.


(31) The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal End, p. 9.


(33) WTO, General Council, 17 and 19 July 2000, Minutes of Meeting, WT/GC/ M/57, p. 40.


(35) External Transparency Informal General Council 9 Nov. 2000. Sent to author in response to request for information to prepare this Chapter.


[40] See Romerla, op. cit., p. 577 and the references to George Stigler, Richard Posner and Ralph Nader.


[44] IBID.


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