

INTRODUCTION

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This special issue is the product of a Symposium held September 29-30, 2005, entitled, *The WTO at 10 and the Road to Hong Kong*. The Symposium was sponsored by the American Bar Association (ABA) Section of International Law and Practice (SILP), the Georgetown University Law Center, and the Carnegie Endowment for International Peace.

The purpose of the Symposium was to bring together experts on international trade issues from government, academia, the private sector, and international and non-governmental organizations to take stock of the world trading system ten years after the creation of the World Trade Organization (WTO) and four years into the Doha Development Agenda (DDA) Round of WTO negotiations. The Symposium was comprised of sixteen panel discussions, which examined the successes and failures of the WTO to date, including the ongoing DDA Round of negotiations and the operation of the WTO dispute settlement mechanism, as well as the opportunities and challenges ahead for the WTO system.

The Symposium was held just three months before the key WTO Ministerial Meeting in Hong Kong in December 2005. A key theme that emerged across panels at the Symposium was that the chances of a significant breakthrough in the negotiations before or at the Hong Kong meeting were slim, and that serious doubts existed about whether WTO Members would even be able to conclude the Round in the foreseeable future.

By September 2005, it was becoming clear that the primary stumbling block in the DDA negotiations was a fundamental three-way stalemate in the agriculture talks between the United States, the European Union, and key developing countries, led by Brazil and India. Based on their experience as observers of, and in some cases, participants in this WTO Round and previous WTO and GATT Rounds, the panelists at the Symposium were not optimistic that the impasse on agriculture could be overcome in a few months' time or that the Round could be concluded before U.S. trade promotion ("fast track") authority expires in June 2007. The speakers identified several reasons for the uncertain future of the Round.

First, the view was widely expressed that growing ambivalence and uncertainty about globalization and trade liberalization—in the United States, as well as in Europe and in many other countries, including developing countries—has weakened political support for major trade agreements. Skepticism about the benefits of trade liberalization has grown even among

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traditional stalwart supporters of increased trade, such as the farming community in the United States. Participants noted that key members of the European Community, such as France, have voiced clear opposition to additional cuts in agricultural support. Further, a number of commentators noted that, with Congress scheduled to renew the 2002 Farm Bill in 2007, and the European Union still implementing reforms to its Common Agricultural Policy, the political appetite for further restrictions on agricultural protections and support was not likely to increase in the near future.

Second, unlike previous multilateral trade rounds, commentators observed that the DDA Round was conceived with the explicitly stated goal of providing benefits to developing countries. This development agenda has raised expectations among developing countries that the Round will yield significant benefits for poorer countries, while also mitigating the potentially negative consequences of trade liberalization in those countries, such as "preference erosion" and threats to the livelihoods of vulnerable farming populations. For some advanced developing countries, it has also given rise to expectations that Doha will be a "free ride," in which they can secure major improvements in access to developed-country markets, while giving up little if anything in return. Such an outcome would be at odds with the principle of reciprocity which has been at the core of the GATT/WTO system.

Several speakers noted that many developing countries' economies were still reeling nine months after the expiration in January 2005 of the global system of textile and apparel quotas and China's subsequent growing domination of the industry. Further, participants observed that developing countries are apprehensive about making significant commitments in the area of agriculture because so much of their populations depend on subsistence farming for survival. Commentators cautioned that the expectations and sensitivities of developing countries concerning the Round are likely to present a significant challenge to WTO negotiators, as any future agreement will need to provide sufficient new benefits to satisfy the expectations of developing countries, while also ensuring that the liberalization commitments made by such countries are sufficient to win support in developed countries.

Third, many participants noted that, also in contrast to previous Rounds, the U.S. business community does not yet appear to have mobilized as fully in support of the DDA Round, largely because of companies' uncertainty about whether an ambitious outcome to the negotiations can be realized. As a result of the stalemate on agriculture, there has been little to no progress in other areas of the negotiations of critical importance to the U.S. business community, such as services and "non-agriculture market access" (known as "NAMA"). (In fact, many commentators have noted the irony that the negotiators chose to name the sector that accounts for the vast majority of world trade not in the affirmative, as "manufactured and other products," but in the negative as "non-agriculture.") It was pointed out that, without a clearer idea of the likely gains for U.S. businesses,

farmers, and working people, it is difficult to mobilize the business community to build U.S. political support.

Another challenge to the WTO system that received significant attention at the Symposium was the increasing strain on the WTO dispute settlement system. The panelists asserted that as WTO negotiations have faltered, the dispute settlement system has become not only the primary mechanism—but the *only* viable mechanism—to resolve differences that arise under the WTO agreements.

Reliance on the dispute settlement system presents several difficulties, commenters noted. Dispute settlement may not be the most appropriate venue for addressing complex or systemic issues. Further, WTO Members' reliance on dispute settlement itself can undermine the incentive to negotiate on certain issues, as Members believe they can obtain resolution of their priority issues outside of the negotiations.

WTO panels and the Appellate Body also have struggled to interpret the many inherent ambiguities in the existing WTO agreements. This problem has been exacerbated by the increasing length and complexity of modern WTO negotiating rounds and legal texts. Given the lack of progress in the Doha negotiations and tendency by many governments to hoard potential bargaining chips, WTO negotiators have been unable to play a “legislative” role by updating and clarifying the agreements when serious issues arise.

Several panelists raised concerns that WTO dispute settlement decisions have reflected inappropriate judicial activism, as panels and the Appellate Body have engaged in “gap-filling” to resolve what were, in many cases, purposefully negotiated ambiguities in the agreements. Indeed, some commenters observed that there was even a tendency in a number of cases to rewrite black-letter WTO agreement text where there was no ambiguity. Some speakers cited an apparent bias of the dispute settlement system in favor of complainants, particularly in disputes involving trade remedies. These speakers questioned whether the WTO dispute settlement system appropriately protects the interests that the United States and other nations agreed to protect in the Uruguay Round, particularly with respect to important trade remedies, where the United States believed it had negotiated a more deferential standard of review in the Uruguay Round. Further, several speakers questioned whether WTO dispute settlement panels and the Appellate Body have provided appropriate deference to decisions made by domestic regulatory authorities. These speakers argued that the WTO should pay greater respect to measures that often reflect deep-seated societal beliefs. These speakers argued that WTO panels and the Appellate Body should not “add to or diminish” the rights or obligations of the WTO Members, as provided in Articles 3:2 and 19:2 of the Dispute Settlement Understanding.

Finally, there was considerable discussion as to whether China has failed to live up to its WTO obligations. A number of commentators expressed the view that China's unfair trading practices, such as its currency manipulation, failure to enforce intellectual property rights, and governmental subsidies, have undermined the ability of U.S. companies to compete against Chinese firms in the global

marketplace, even as others argued that China's growth has presented significant new opportunities for multinational companies and investors. Several speakers expressed support for a more aggressive approach in the WTO towards China, and asserted that existing mechanisms for addressing China's trading practices, such as the WTO Transitional Review Mechanism and the U.S. Treasury report on currency manipulation, have not been effective.

We close with a few thoughts about the future. The speakers at the conference accurately predicted that the then-upcoming Hong Kong Ministerial in December 2005 would fail to produce meaningful progress on agriculture or a credible framework for a final WTO package. Despite repeated attempts by the WTO to set new deadlines for progress on agricultural "modalities," the talks have remained stalemated.

As this issue goes to press in the spring of 2007, it is now increasingly clear that it would be essentially impossible for the Doha Round to be completed under the President's existing grant of trade promotion ("fast track") authority, which expires on June 30, 2007. As a result, some experts have speculated that the Doha Round could be postponed until after the next U.S. presidential elections in 2008, or until 2013, when the European Union will reach the mid-point of its current package of reforms to the Common Agricultural Policy. Some trade experts predict a wave of new dispute settlement challenges, as WTO Members seek to obtain through legal briefs and clever lawyering what they could not negotiate in the Uruguay Round Agreements or in the Doha Round talks. Others argue that the future now rests with free trade agreements (FTAs), and that the United States, EU, Japan, ASEAN, and China will now embark on a host of preferential FTA arrangements across Europe, Africa, Latin America, Asia and the Pacific Basin.

Such speculation provides useful fodder for trade conferences, academic articles, and editorial pages, but the reality may be somewhat more harsh. The failure of the WTO talks would likely be a major blow for many developing countries, even if some of them do not appear to share that view at this time. Even at a time when many are reevaluating the merits of globalization, there is still widespread agreement that trade liberalization, if structured correctly, is a necessary condition for development and sustained economic growth.

The idea that FTAs alone offer a genuine substitute for an open, rules-based global trading system appears equally implausible. Many FTAs do not represent genuine trade liberalization but instead a thinly disguised set of trade preferences. (And, many view the lax enforcement of Article XXIV of the GATT 1994 as a major substantive, institutional, and tactical blunder.) Such FTAs are characterized by high-sounding opening principles, but are shot full of exceptions—or virtual exceptions—for many sensitive products. A proliferation of such FTAs, driven by the United States, EU, Japan, and other powerful economic players, would exacerbate barriers to many developing countries, particularly less favored ones that stand to lose access because of preferences granted to their competitors.

Finally, the idea that the WTO dispute settlement mechanism offers a plausible alternative to multilateral negotiations appears naive. The GATT/WTO mechanism for resolving and enforcing disputes was a breakthrough in international law. But the WTO system, like any legal system, relies in the end on the perceived legitimacy of the WTO's processes and a core commitment by key WTO Members to an open rules-based global trading system. If the WTO were to evolve into another UNCTAD (United Nations Conference on Trade and Development), characterized by strident North-South ideological debates, its legitimacy can only erode, leaving less reason for the United States, EU, and other powerful Members to adhere to legal rulings. Unless WTO panels and the Appellate Body are able to construct a firm foundation based on competence, legitimacy, and respect, the WTO dispute settlement system is unlikely to win the sustained confidence of the broad swath of the WTO's membership.

Despite its manifest flaws, the GATT/WTO negotiating process offers an established mechanism for galvanizing all WTO Members to confront barriers to trade and for addressing the full range of issues that are inherent in worldwide trade liberalization. Until someone comes up with something better—a mechanism that actually works in practice, not just in theory or in academic textbooks—Doha remains the best hope for real trade liberalization, serious agricultural reform, creation of a more level playing field in the manufactured product and services sectors, and future opportunities for the world's poor.

The Symposium was organized by six individuals: Tim Reif, Staff Director for the Trade Subcommittee of the Ways and Means Committee; Warren Maruyama, Partner at Hogan and Hartson, LLP; Mike Castellano, Counsel and Senior Policy Advisor for Senate Majority Leader Harry Reid; Viji Rangaswami, Associate at the Carnegie Endowment for International Peace; Julie Herwig, Assistant Vice President for Legislative Affairs at New York Life; and Shubha Sastry, Attorney at Hogan and Hartson. The Symposium organizers would like to thank all of the panelists who provided their valuable time and insights; to Jessica Elliot and Laura Quartuccio at the ABA-SILP, who provided significant logistical support and made the Symposium a reality; to the Georgetown University Law Center for hosting the Symposium; to the rapporteurs, Caroline Cooper, Kate Vyborny, Melanie Frank, Jonathan Stoel, Lauren Fredendall, Gabriela Carais-Green, Alicia Cate, and Shubha Sastry, who prepared summaries of the panel discussions; to the editors and staff of the *Arizona Journal of International and Comparative Law* for preparing this volume for publication; and to David Gantz, the Samuel L. Feghtly Professor of Law at the Rogers College of Law, University of Arizona, who offered constant wise counsel in the preparation of this volume.



