

Implementation Issues Again Off WTO Radar Screens?

CHAKRAVARTHI RAGHAVAN

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NOTE:

An earlier version of this paper first appeared as a two-part article in the *South-North Development Monitor (SUNS*, Nos. 5442 and 5443, 17 and 20 October 2003). Material for the paper is based on contemporaneous reports in past issues of *SUNS* and information provided by some of the main participants in the Like-Minded Group of countries who had taken up the implementation issues at the WTO.

1

Introduction

JUDGING by the many remarks of several protagonists, including at the October 2003 session of the United Nations Conference on Trade and Development's (UNCTAD) Trade and Development Board (where senior World Trade Organization (WTO) officials were conspicuous by their absence in the discussions on trade issues), there appears to be a danger that the 'implementation issues', inscribed on the WTO agenda at the insistence of developing countries, may once again be 'lost'.¹

The record of the 55-year history of the old General Agreement on Tariffs and Trade (GATT) and now the WTO shows that whenever developing countries raise any issues in any multilateral trade negotiations and get them onto the agenda, they remain on the agenda but are neither pursued nor responded to by the major developed countries or the secretariat leadership. And at the end of the talks, as soon as the major developed countries get their way, the negotiations are concluded and the pending issues of developing countries are shoved on to a new work programme.

While there are many reasons for the failure of the WTO's Fifth Ministerial Conference in Cancun, Mexico in September 2003, this accumulating feeling among developing countries, more so among the smaller, weaker and vulnerable economies, added up and contributed to their saying 'no' at Cancun.

The leadership at the WTO, the major developed countries reluctant to engage in good-faith negotiations (realizing that they may not be able to get their way easily) and some of US Trade Representative (USTR) Robert Zoellick's 'can-

do'countries appear to be engaged in burying key developing-country issues once again.

Prominent among these issues, pending at least since the birth of the WTO, are the 'implementation issues' and issues of 'special and differential treatment' (SDT).

Currently, the Chairman of the WTO General Council, Ambassador Carlos Perez del Castillo of Uruguay, and the WTO Director-General, Dr. Supachai Panitchpakdi, are holding consultations (in the same way and processes that are responsible for the problems of the WTO and the collapse of two of its Ministerial Conferences) with a view to resuming the talks that collapsed at Cancun.

The proceedings of the informal heads-of-delegation (HOD) meetings and the statements made there by Perez del Castillo and Supachai are at best approximations to what will be discussed in the informal 'underground' discussions and the linkages and 'prices' sought to be exacted by the major developed countries for the resumption of talks. All that seems clear is that the consultations will start with agriculture, and then deal with cotton, non-agricultural market access (NAMA) and the Singapore issues. There are still references to the 'development' issues on the agenda, but these are too vague.

Perez del Castillo, who has been giving press interviews, in particular to the Spanish media (but has not had a general press conference open to all the media, and not merely to those invited by the WTO media office), has indicated that he will hold these consultations on agriculture, cotton, NAMA and the Singapore issues.

In the way that these four items are being talked about together, including by other trade diplomats, there is an implication of sorts that in order to restart the talks, the developing countries have to pay a price, a 'blackmail price', for taking all the Singapore issues off the table.

Of equal, if not more, concern is that other important developing-country questions, in particular, the implementation issues (and, in a sense, its offshoot, the SDT questions), do not seem to figure at all; and it is not clear whether any of the developing-country envoys have asked Perez del Castillo about it.

Endnote

1. Since the writing and publication in the *South-North Development Monitor* (SUNS, No. 5442 and 5443) of the articles on which this paper is based, the remarks of the WTO Director-General Dr. Supachai Panitchpakdi at a 'research' conference of academics (mostly political scientists) in Geneva on 6 November (reported in the *South Bulletin*, No. 68, p. 15, col. 3) ought to be of some concern to developing countries and civil society. His entire speech (pp. 12-17 of that bulletin) raises wider questions (which lie beyond the scope of this paper) about the role of the WTO head vis-a-vis the collectivity of the membership (and not merely the dominant majors), the accountability of international civil servants and the limits of the 'freedom' that the WTO head and his senior officials exercise in presenting publicly their personal views on issues under negotiation among the members.

In the speech, Supachai referred to the implementation questions as one of his concerns in the aftermath of the Cancun Ministerial Conference – the others mentioned by him included special and differential treatment, the need for developing countries to be flexible and strike deals in the negotiations, and high tariffs in developing countries.

He said: 'The second concern is with the so-called commitments and implementation. We have implementation of the agreements from the Uruguay Round as part of the negotiating position in this Round. And if we go on like this, we would have the implementation of the DDA (Doha Development Agenda) in the next Round, whatever it might be called, a Hong Kong Round let us say. Whether this would be something that we would have to repeatedly carry out, whether this is good for everyone, I doubt it. If you talked about the past Rounds and the lack of participation by the developing countries, fine, then we may need to do something about it. But I do not want the kind of implementation to be seen as if you go into a certain commitment – because then why do we go into an agreement? ... I know that there are implementation problems. But I know also that members are discussing whether they are really implementation problems or they are meant to be new negotiations. I want people to be clear because at the moment we are operating under a very difficult situation in which some of the developing countries have legitimate concerns with the implementation issues. But some advanced countries also have their legitimate concerns in that they fear that if we give this a routine treatment, then after a few years there will be a chance to open or unravel the whole agreement'

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History of Neglect

WITH the periodic, and sometimes frequent, change of trade envoys and policy-level officials in capitals, there is both a sense of *deja vu* and misunderstanding on the history of the implementation issues, as well as the implications of their being relegated to future work programmes or buried among the many items cluttering the agenda of the General Council.

Some new trade envoys and officials of some of the countries of the South, as well as some of the officials at the secretariats of international organizations, seem to be of the view that the implementation and SDT issues were just tactical issues raised to fend off the North's demands. Nothing can be farther from the facts of the past, however, and these facts refuse to go away.

It is thus worthwhile to understand the history of the implementation issues in the WTO, since the signing of the Agreement Establishing the WTO at Marrakesh in 1994, through 1995 when the WTO came into being, and then the first WTO Ministerial Conference at Singapore in 1996.

The Uruguay Round negotiations, which resulted in the establishment of the WTO (on 1 January 1995), were admittedly the most complex and far-reaching multilateral trade negotiations ever undertaken. These involved not merely traditional issues of cross-border trade but also a large number of issues of inter-state relationships in areas that went beyond trade into economic relations, and now reaching into social and cultural relations, where a dominant global view to benefit major corporations is sought to be forced on the rest of the world.

During the entire course of the Uruguay Round negotiations, many developing countries (whether their governments or parliaments, leave aside their businesses and the public and other stakeholders) – and even some in the developed countries – were unaware of the issues being negotiated and the implications of any agreements that may be evolved.

Many developing countries only became conscious of the enormity of the obligations undertaken by them soon after the WTO came into effect. Even at Marrakesh, they had not been fully aware; at that point of time, even some of the tariff negotiations between the majors and several developing countries, including the least developed countries, had not been held or completed.

Singapore Ministerial Conference

During the preparatory process for the First WTO Ministerial Conference (held in Singapore in December 1996), many developing countries highlighted the problems they were facing with regard to the different WTO agreements and in particular argued that, in respect of two major sectors of importance to them, namely, agriculture and textiles, there was hardly any liberalization.

They were first sought to be swept aside. With then European Union Trade Commissioner Sir Leon Brittan conveying to the Singaporean hosts and the WTO leaders, privately, that the price for ensuring the presence of ministers like him at Singapore was the possibility of discussing and including new issues (that later became the ‘Singapore issues’), and with the US wanting to bring in labour and environment questions into the WTO agenda, the implementation problems of the developing world might almost have disappeared in the waters around Singapore.

At the Singapore conference itself, the developing countries and their ministers raised the implementation issues in their speeches, often to near-empty halls, while the majors first cooked up their Information Technology Agreement and then got the Singapore Minister and the WTO Director-General to hold a series of ‘green room’ meetings which were never acknowledged, with many of the

ministers present at the WTO for the first time not even being aware of the meetings or where they were taking place. Sections of the media and the non-governmental organizations (NGOs) at the conference knew more than the generality of delegations. This was such that several of the developing-country delegations sent their officials to the NGO briefing sessions to learn about what was going on.

When it became clear that the implementation concerns raised by the developing countries could not be swept under the carpet, however, two paragraphs were included in the Singapore Ministerial Declaration. However, at least in retrospect, it is clear that while developing countries accepted this in good faith, the majors were guilty of bad-faith negotiations, since they had had no intention of abiding by their commitments in adopting the final declaration.

These paragraphs were:

Paragraph 10: ‘We attach high priority to full and effective implementation of the WTO Agreement in a manner consistent with the goal of trade liberalization. Implementation thus far has been generally satisfactory, although some Members have expressed dissatisfaction with certain aspects. It is clear that further effort in this area is required, as indicated by the relevant WTO bodies in their reports ...’

Paragraph 13: ‘... We acknowledge the fact that developing country Members have undertaken significant new commitments, both substantive and procedural, and we recognize the range and complexity of the efforts that they are making to comply with them ...’

At media conferences at the end of the Singapore meeting, the majors, the WTO Director-General and the Singapore Conference Chairman sought to create the impression, in what they said and did not say, that the ministers had addressed the implementation concerns, and that was that.

However, the issues did not disappear, and with the gradual implementation of the details of the set of WTO agreements, the problems, concerns and disappointments of the developing world became clearer and came to the fore.

Geneva Ministerial Conference

During the preparatory process for the Second WTO Ministerial Conference (held in Geneva in May 1998), the developing countries repeatedly highlighted these implementation-related concerns. They were asked to clarify what exactly their concerns were. The developing countries pointed out that their concerns relating to ‘implementation’ fell under three categories: (1) non-realization of anticipated benefits from some of the WTO agreements (e.g., Agreement on Agriculture and Agreement on Textiles and Clothing); (2) obvious imbalances and asymmetries in some of the agreements (e.g., Anti-dumping Agreement, Agreement on Subsidies and Countervailing Measures, and the TRIPS Agreement); and (3) the non-operational and non-binding nature of the SDT provisions contained in various agreements.

The Geneva Ministerial Declaration, as a result, provided for evaluation of the implementation of individual agreements. However, at the end of the meeting and in press conferences, the issue was sought to be belittled and dismissed. The then US Trade Representative Charlene Barshefsky, who took over the chair of the following Ministerial Conference which was to be held in Seattle, responded to a question with the casual remark ‘You implement your obligations and we will implement ours.’ But the derisive way this was received by some of the developing-country media and even some of the ambassadors who were sitting at the back of the press conference showed, for those who had the ‘eyes’ to see and ‘ears’ to hear, that it would not disappear so easily.

In paragraph 8 of the Geneva Declaration, it is stated: ‘... When we meet at the Third Session [i.e., at the Seattle Ministerial Conference] we shall further pursue our evaluation of the implementation of individual agreements and the realization of their objectives. Such evaluation would cover, *inter alia*, the problems encountered in implementation and the consequent impact on the trade

and development prospects of Members ...’ However, this evaluation was never undertaken.

Paragraph 9 of the Declaration, while establishing a preparatory process for the next Ministerial Conference, lists various elements of the future work programme of the General Council. The first element relates to the ‘issues, including those brought forward by Members, relating to implementation of existing agreements and decisions.’

The second element relates to mandated negotiations under the existing agreements and the third element relates to mandated reviews etc. under the existing agreements. The other elements of the work programme relate to other possible future work on the basis of the work programme initiated at Singapore, follow-up to high-level meetings on least developed countries (LDCs) and other matters proposed and agreed to by members concerning their multilateral trade relations.

The Geneva Ministerial Declaration thus in fact lists implementation-related issues and concerns as the first item of the work programme.

Seattle Ministerial Conference

The preparatory process for the Third Ministerial Conference (Seattle, November-December 1999) commenced during September 1998. In the first phase of the preparatory process, developing countries made statements highlighting the implementation-related issues and concerns. The response of the European Communities (EC, the official name by which the EU is known in the WTO) was that all these concerns could be looked into in the context of a wider round of negotiations. The US took the stand that addressing implementation-related issues and concerns would result in a change in the balance of rights and obligations arrived at during the Uruguay Round negotiations. Both delegations implied that to redress the implementation issues and concerns, developing countries had to ‘negotiate’ and pay a price.

The developing countries pointed out that they were not seeking to rewrite the Uruguay Round agreements and that they were only demanding the removal of inequities and imbalances inherent in some of the existing agreements and also that in sectors like textiles and agriculture there should be meaningful liberalization by developed countries. They pointed out that they could not be expected to pay an additional price for removing imbalances and inequities in the existing agreements and for realizing the benefits promised to them in some other agreements. Their position was that they had already paid an enormous price in the Uruguay Round negotiations without getting commensurate benefits.

However, both the EC and the US continued to maintain their rigid stand. In the second phase of the preparatory process, developing countries were asked to give written proposals with regard to the implementation issues and concerns, and this was done. In the third phase of the preparatory process, developing countries were asked to summarize their proposals in the form of key sentences, and this too was done.

There was pressure on the then Chairman of the General Council, Ambassador Ali Mchumo of Tanzania, not to include any reference to implementation-related issues and concerns in the draft Seattle Ministerial Declaration. In fact there is some evidence to suggest that when Mchumo included some references in the draft he put forward on his own responsibility, these got removed from the text that was issued. It is not very clear how this was done. However, a revision of the draft Ministerial text was quickly brought out by the Chairman on 20 October 1999 in which all the implementation-related issues and concerns were given in bullet form with an indication that there was no consensus on these proposals.

During the Seattle Ministerial Conference itself, the developing-country members sought a meaningful resolution of the implementation issues and concerns raised by them. The conference, however, broke up in disarray and no Ministerial Declaration was finally issued. It has been sought to be made out that the

collapse was due to street protests. While this may have contributed to the atmosphere inside, the failure was due to internal causes – a lesson that was not learnt at Cancun either.

During the Seattle conference, the majors tried to promote their agendas and roll them into a new round of negotiations; several limited consultations and ‘green room’ meetings were held (from which most of the membership were excluded) towards this end. The conference was so conducted that it was difficult to make out when Barshefsky was functioning as the chair of the conference and when she was functioning as USTR and leader of the US delegation.

It was in this situation that on the final day of the conference, a large number of the smaller countries, excluded from decisions that would create new obligations for them and not knowing what was being done behind their backs, decided to call a halt. It was this, and the certainty that they would say ‘no’, that resulted in the meeting coming to an end without even a formal decision to end it. (The statement of the conference chair was not officially available for days from the WTO, with some unbelievable specious explanations given for the delay – as the US and the WTO head tried to see whether something could be put out as a decision but then thought the better of it.)

3

‘Bad-Faith’ Tactics

AFTER Seattle, the implementation issues came up again during the preparatory process for the Fourth Ministerial Conference (held in Doha in November 2001). During the preparatory process, developing countries once again pressed for resolution of these issues. The General Council decided on 3 May 2000 to assess the existing difficulties, identify ways needed to resolve them and take decisions for appropriate action no later than the Doha Ministerial. Notwithstanding this decision, the US and EC were in no mood to find meaningful solutions to the implementation-related issues and concerns and therefore the progress was slow and tortuous.

On 24 July 2001, the then Chairman of the General Council, Stuart Harbinson of Hong Kong China, gave a report to the Council in which he indicated, *inter alia*, that progress at that stage in achieving concrete results had not been as rapid as might have been hoped and that the proposal submitted by a group of six countries was likely to energize the process. On 26 September 2001, the Chairman submitted a draft decision on implementation-related issues and concerns for the consideration of the membership. Both the US and the EC refused to agree to this draft.

In September 2001, within a few days of the 11 September terrorist attacks on New York and the Pentagon, the US Trade Representative and the EU Trade Commissioner quickly joined hands to exploit the international atmosphere to launch a new round of trade negotiations at Doha.

Amid this background, early in October 2001, it became clear to the developing countries that in spite of the General Council decision of 3 May 2000, there would be at best a resolution of only some of the implementation issues at the Doha Ministerial Conference. At the same time, it also became clear that negotiations would be launched at Doha on a number of subjects, mandated or otherwise. The developing countries were deeply concerned about the fate of a large number of implementation issues on which there had been no progress at all. They were anxious that no implementation issue should go off the table. Therefore, in spite of their earlier stand for about three years that implementation issues should be resolved without their having to pay a further price by negotiating these issues, they reluctantly agreed to a formula under which all outstanding implementation issues and concerns would be negotiated as part of the ‘single undertaking’.

On 27 October 2001, the Chairman of the General Council brought out a draft decision on implementation-related issues and concerns and also a compilation of outstanding implementation issues (document number JOB(01)/152/Rev.1) raised by members. At about the same time, consensus was reached on the paragraph relating to implementation in the draft Doha Ministerial Declaration (this was to appear as paragraph 12 in the final Doha Ministerial Declaration). This paragraph (which has the heading ‘Implementation-related issues and concerns’) reads:

‘We attach the utmost importance to the implementation-related issues and concerns raised by members and are determined to find appropriate solutions to them. In this connection, and having regard to the General Council Decisions of 3 May and 15 December 2000, we further adopt the Decision on Implementation-Related Issues and Concerns in document WT/MIN(01)/17 to address a number of implementation problems faced by members. We agree that *negotiations* (emphasis added) on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this declara-

tion, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action.’

Negotiations under the Single Undertaking

By this paragraph, in the first sentence, the commitment to finding solutions to all implementation-related issues is reiterated. The second sentence refers to the adoption of a decision relating to some of the implementation-related issues (WT/MIN(01)/17). The rest of the paragraph, i.e., the third and the fourth sentences, refers to the manner in which the outstanding implementation issues (listed in document JOB(01)/152/Rev.1 dated 27 October 2001) are to be dealt with. The operative portion here is that ‘*negotiations*’ on outstanding implementation issues shall be an integral part of the work programme being established.

And the Vienna Law of Treaties, a codification of customary public law in the international arena, often cited by the WTO dispute settlement panels and the Appellate Body, requires ‘good faith’ in negotiations. And even the WTO cannot claim it could ignore this.

The second element to be borne in mind is that agreements reached at an early stage shall be dealt with in accordance with paragraph 47 of the Doha Ministerial Declaration. That paragraph provides that, except for negotiations on the Dispute Settlement Understanding, the conduct, conclusion and entry into force of all other negotiations shall be treated as a part of the single undertaking. Paragraph 47 also provides for an early harvest wherever it is possible.

The fourth sentence of paragraph 12 deals with the forum in which outstanding implementation issues will be addressed. It is provided that where a specific negotiating mandate is provided for in the declaration (e.g., on anti-dumping, subsidies, agriculture, etc.), the relevant outstanding implementation issue will

be addressed under that mandate. Other outstanding implementation issues are to be addressed in the relevant WTO bodies, which shall report to the Trade Negotiations Committee (TNC).

It is absolutely clear from the structure and language of paragraph 12 of the declaration that all outstanding implementation issues will be ‘negotiated’ as a part of the single undertaking. This is further reinforced by the fact that even those outstanding implementation issues which are not covered by a specific negotiating mandate will be finally dealt with by the Trade Negotiations Committee.

According to former Indian ambassador to the WTO, Mr. S. Narayanan, the then Chairman of the General Council Harbinson (who is now chef de cabinet to the WTO Director-General Supachai) had categorically stated that the draft (which became the final declaration as well) provided for negotiations on outstanding implementation issues, and that the report of the bodies which would be considering those outstanding implementation issues not covered by a specific negotiating mandate would be to the Trade Negotiations Committee. Several other trade envoys consulted by the *South-North Development Monitor (SUNS)* said that it was also their clear understanding that all outstanding implementation issues would be negotiated as part of the single undertaking.

In fact, the sentence in paragraph 18 of the Doha Ministerial Declaration stating that issues relating to the extension of the protection of geographical indications to products other than wines and spirits will be addressed in the WTO’s Council for TRIPS pursuant to paragraph 12 of the declaration, was clearly understood and hailed by all the delegations pressing for negotiations on this matter as providing for the negotiations that they were demanding and that these negotiations would be part of the single undertaking.

Many developing-country delegations had one concern regarding the language of paragraph 12, however. Paragraph 12 referred to the Decision on Implementation-Related Issues and Concerns in WT/MIN(01)/17 and also provided for a

mechanism to deal with the outstanding implementation issues listed in JOB(01)/152/Rev.1. These delegations had reconciled themselves to ‘negotiating’ the outstanding implementation issues as provided in paragraph 12. However, they were concerned that most of the decisions adopted in document WT/MIN(01)/17 were not final solutions and in most cases involved referring the matter to different WTO bodies, e.g., SDT issues to the Committee on Trade and Development, Article 15 of the Anti-dumping Agreement to the Committee on Anti-dumping Practices, etc. The developing-country delegations were wondering what would happen if the relevant bodies did not find final solutions to these issues within the time frame provided.

They were apprehensive that since these issues were not formally in the compilation of outstanding implementation issues in JOB(01)/152/Rev.1 (these issues having been optically treated as issues on which decisions had already been taken), they may fall off the table without any final effective solution. Many developing-country delegations raised this concern with the then Council Chairman. Narayanan recollects that the Chairman promised to handle this concern in a meaningful way so that issues referred to different WTO bodies also became part of negotiations in case the bodies concerned failed to find meaningful solutions for these issues within the time frame provided.

During the Doha Ministerial Conference, the Indian delegation repeated this particular concern of developing countries to the Swiss Minister for Trade and Economy, who had been given the responsibility to look into the implementation issues at Doha. [The Swiss Minister was being assisted by officials of the Swiss delegation at Geneva, and they understood the point being made that it would be absurd to let issues in respect of which optically decisions were being taken in the Ministerial Conference (without substantive resolution) go off the table while other outstanding implementation issues were being made part of the single-undertaking negotiations.] In order to meet this concern, and since it was not considered politically wise to change the draft declaration itself, the Chairman of the Ministerial Conference, in the statement made while adopting the Decision on Implementation-Related Issues and Concerns, stated as follows:

‘Finally I should like to propose that the Ministerial Conference adopt the draft Decision on Implementation-Related Issues and Concerns ...

‘With regard to the outstanding implementation issues, I would like to recall the cover letter of 5 November 2001, sent to me by the Chairman of the General Council and the Director-General, which accompanied the draft decision on implementation. It states that the draft decision proposes immediate action on a number of implementation issues, and provides that remaining issues, which include those referred to WTO bodies as well as those listed in their completion (probably a typing mistake for the word “compilation”) will be addressed in the course of the future work programme in accordance with paragraph 12 of the draft ministerial declaration.’

The Chairman’s statement thus indicates that remaining issues, which include those referred to WTO bodies (in terms of WT/MIN(01)/17) as well as those listed in the compilation (JOB(01)/152/Rev.1), will be addressed in terms of paragraph 12 of the Ministerial Declaration. A number of issues have been referred to subordinate bodies through the Decision on Implementation-Related Issues and Concerns. Thus it is clear that those issues which are referred to different WTO bodies on the basis of the Decision and which do not get resolved within the time frame provided for, have to become part of the negotiating package in terms of paragraph 12 of the declaration, in addition to the issues listed in the compilation of outstanding implementation issues in JOB(01)/152/Rev.1.

In view of this, the implication of paragraph 12 read with the Chairman’s statement is that the outstanding issues listed in the compilation (JOB(01)/152/Rev.1), as well as issues which do not get finally resolved by the relevant WTO bodies to which they have been referred on the basis of the Decision, have to become part of the negotiating package and part of the single undertaking.

Undermining the Doha Mandate

It appears that the efforts of the US and some other members during the post-Doha process have been to undermine the mandate of paragraph 12 of the Doha Declaration. Their main concern appears to be to prevent negotiations on geographical indications for products other than wines and spirits. However, their attempt to subvert a Ministerial mandate on an important subject like implementation, which has been hanging fire for more than four years now, should not be allowed to go unchallenged. The implication of their stand is that developing countries cannot find solutions to their implementation issues and concerns either as self-standing issues or as negotiating issues. Developing countries had been told for more than four years that they had to ‘negotiate’ the implementation issues and concerns and now, two years after agreeing to negotiate these issues, they are told that these issues cannot be negotiated either.

Viewed against this background, the language relating to implementation contained in the first draft of the Cancun Ministerial text, put out by the Chairman of the General Council Perez del Castillo, was extremely unfair to developing countries. This is a sad commentary on the General Council Chair, who comes from a developing country, and the WTO head (Dr. Supachai), who would not have got this job but for the fight put up by developing countries in 1999.

The language used in that first draft – JOB(03)/150 of 18 July 2003 – is a complete negation of the Doha mandate. The second draft – JOB(03)/150/Rev.1 of 24 August 2003 – put out by the Chairman of the General Council is perhaps an improvement. However, the second draft in its present form could still be used by some delegations to rewrite the Doha mandate.

The first problem is that the section on implementation in the second draft provides that ‘The General Council shall review progress and take any appropriate action no later than [...]’ In the Doha mandate the authority was entirely with the TNC, whereas the General Council Chairman’s draft, while reaffirming the Doha mandate, creates confusion by asking the General Council to review the progress.

The second problem is that this text, by also requesting the Director-General to continue his consultations on the subject of geographical indications for products other than wines and spirits, weakens the Doha mandate. The Director-General's consulting on a subject matter with a view to facilitating consensus has become a routine process in the WTO. If that be so – anyone denying it would invalidate all that has been happening so far – there surely is no need for any reference in a Ministerial Declaration to the Director-General's consultation on a particular subject.

The reference to consultation by the Director-General in this draft should be viewed against the backdrop of the categorical sentence contained in paragraph 18 of the Doha Declaration. The obvious implication of the Doha text is that there will be negotiations on geographical indications for products other than wines and spirits as a part of the single undertaking. The draft Cancun text weakens this commitment by asking the Director-General to continue his consultations on the matter.

There is also an optical problem with the draft Cancun text. Implementation had been dealt with in the Geneva Ministerial Declaration (paragraph 9) as the first item under the future work programme. Again, in the Doha Declaration, implementation had been the first item to be covered under the work programme. Now in the draft Cancun text, however, there was a subtle attempt to downgrade the importance attached to implementation by bringing up the subject only after covering a number of other subjects. This goes against the spirit of decisions adopted by the General Council and also the Doha Declaration giving highest priority to meaningful resolution of the implementation-related issues and concerns.

Given that no Ministerial Declaration was finally adopted at Cancun, however, the draft declaration relating to implementation put out by the Chairman of the General Council (on his own responsibility) is no longer relevant and is just a piece of paper without any status.

In the concluding Ministerial Statement at Cancun, there is a reaffirmation of the Doha Declaration and there is a commitment to implementing it fully.

4

Position of Developing Countries

IT is clear that if developing countries are really serious about the assurances they have been providing to their parliaments and the public and stakeholders back home on how they were persisting with the implementation issues, they have to ensure *now*, in the post-Cancun period, that there is no attempt to dilute the Doha mandate on implementation. They need to insist that negotiations should commence straight away on all the outstanding implementation issues (whether pending with subordinate bodies or listed in the compilation of outstanding implementation issues) as part of the single undertaking.

The paragraph on implementation in the draft Cancun text presented by the Chairman of the General Council *ab initio* lacked any status (despite claims of some inherent authority that is not based on any rule of the WTO). And, since it had not been authorized by the membership before Cancun, it has even less status now.

After Cancun, a number of developing-country delegations in Geneva, at UNCTAD, and their ministers back home have made remarks that the WTO and its talks can no longer ignore civil society. If developing countries do not take a stand now against attempts to move away from the mandate of paragraph 12 of the Doha Declaration as supplemented by the Cancun Ministerial Statement, however, they will be exposed by civil society activists in their own countries and elsewhere.

They need to take a clear position that if the implementation issues and concerns cannot be resolved (either as self-standing issues or as a part of the nego-

tiating package), the only option available to them would be to refuse to undertake any commitments in future on any subject in the WTO since they will not be able to change these commitments even if their countries face insurmountable difficulties as a result or even if the commitments are extremely inequitable. In any event, national parliaments and stakeholders and even activist judiciaries will intervene in response to public interest litigations, since the WTO is trying to impinge even on judicial remits in countries.

The net outcome may well be that a ruleless, procedureless and thus lawless WTO will become consigned to the dustbin of history – an outcome not to be looked forward to, though it may at some stage be viewed by the public as still being better than the iniquitous and unjust system that the WTO now is.

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IMPLEMENTATION ISSUES AGAIN OFF WTO RADAR SCREENS?

Inherent inequities in the set of international trade rules administered by the World Trade Organization (WTO) and the manner in which they have been put into effect have long impacted adversely on developing countries. Yet these 'implementation issues' have consistently been sidelined as the major developed countries set about pursuing their own negotiating agendas instead in the WTO.

This paper documents how the implementation issues have – or, more frequently, have not – been dealt with in the multilateral trading system since the WTO's inception in 1995. Despite this history of neglect, the subject remains an integral element of the WTO work programme, the author asserts, basing his contention on relevant documents adopted by the WTO's highest decision-making organ, the Ministerial Conference. Consequently, he urges the developing countries to guard against attempts at once again disregarding the implementation issues and to insist that negotiations commence immediately to resolve these longstanding concerns.

CHAKRAVARTHI RAGHAVAN *has been the Chief Editor of the South-North Development Monitor (SUNS), a daily bulletin specializing in trade and development issues, since its establishment in 1980. He is also Editor of the fortnightly Third World Economics. He is the author of Recolonization: GATT, the Uruguay Round and the Third World; The New Issues and Developing Countries; The World Trade Organization and its Dispute Settlement System: Tilting the Balance Against the South; Developing Countries and Services Trade: Chasing a Black Cat in a Dark Room, Blindfolded, and numerous papers and articles on trade, development and other issues.*

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