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Beiträge zum Transnationalen Wirtschaftsrecht

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The Doha Development Round:
Reintegrating Business Interests
into the Agenda
- WTO Negotiations from a
German Industry Perspective -

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**The Doha Development Round:
Reintegrating Business Interests into the Agenda**

WTO Negotiations from a German Industry Perspective

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A. Introduction

During the preparation of the Fourth WTO Ministerial Meeting in Doha, the world business community's support for starting a new round of trade negotiations was rather modest. While some position papers were drawn up and a few small business delegations even found their way to Geneva, the failure of Seattle and the comprehensive negotiation approach including potential rulemaking in areas such as the environment and social standards did not help to stir up much enthusiasm for a new round throughout the business community. Business leaders were left with the impression that officials and NGOs were becoming more and more engaged in international rulemaking for public goods under the umbrella of the WTO, while the concerns of business and the striving for enhanced world trade were somehow sidelined. Government officials on the other hand claim that by not taking a strong interest in the Doha Round negotiations, the majority of OECD manufacturing industries are giving protectionist sector-specific interests the chance to gain a disproportionate influence in the negotiations.¹

This article does not strive for an analytical explanation of the issues dealt with in the Doha negotiations. It rather positions the interests of one of the major G8 industries - the German industry - in the negotiations. Accepting the need for stronger business support of the Doha round the article makes the argument that if governments are asking for enhanced support they have to refrain from giving the impression that "trade-related" issues in the wider sense are at the core of negotiators' interest in the round. Furthermore, we are trying to make the point that business interests in developed and developing countries have much more in common than generally asserted. We think that one of the prerequisites for an open dialogue amongst the different interests in the Doha negotiations is transparency of positions and interests. This article tries to contribute to such an open debate.

B. Finding the Right Balance of Interests

There might be some truth in saying that while the overall support of most manufacturers has been flawed, sector-specific interests continued to be dominant in shaping the trade policy of major WTO members.² Although the manufacturers interested in opening up markets are in the majority, sectoral lobbies in the past successfully pushed their interests in the trade arena: the concept of multifunctionality for agriculture in the EU³ is the farm bill in the U.S., which steps up subsidies dramatically. Neither the EU nor the U.S. have been willing to agree on speeding up the liberalization of quotas for textiles and clothing.

¹ *Hoekman*, *World Trade Review* 1 (2002), 23 (24).

² See *Messerlin*, *Aussenwirtschaft* 57 (2002), 271 (276); *Messerlin* argues that EC protection is concentrated in certain sectors relating not only to tariffs but also non-tariff barriers.

³ On multifunctionality see *Moutsatsos*, in: Bilal/Pezaros (eds.), *Negotiating the Future of Agricultural Policies*, 29 (41 *et seq.*).

Protectionist sector-specific interests will continue to strongly influence the Doha negotiations. Therefore it is important to get the majority of businesses more engaged in the negotiations. Without broad-based support by the pro-market-liberalization business community, the Doha round lacks a crucial element for success.

But why is the majority of businesses not that interested when it comes to enhanced market access which saves money, offers new opportunities, and leads to increased international competition? The answer from our point of view is straightforward: business leaders can be convinced to become more engaged in the new round if their economic interests are taken into account more visibly. It is time to afford these interests more room in the public debate. As long as most seminars, conferences and media coverage focus on civil society issues, no one can expect businesses to become enthusiastic about the round. Thus, many businesses are concerned that the development round runs the risk of neglecting what is at the heart of the GATT/WTO system: facilitation of international trade, creation of income, jobs and promotion of welfare.

At the same time, it must be acknowledged that the interests of developing countries must not be neglected. Despite modest progress of market access strategies since Seattle, for instance through the “Everything but Arms” initiative of the EU, there remains – in the words of a WTO-study⁴ – a lot of unfinished business.⁵ In this context it should be kept in mind that not only North-South but also South-South trade must be tackled fully in the negotiation process. Not only when industrialized countries will finally open their textiles and agricultural markets to products from developing countries, but also when developing countries will stop hampering trade among themselves will the Doha Round live up to its central objective, which is to enhance the framework for improved integration of developing countries into world trade.

The fact that “trade-related” issues are at the center of public interest contributes to the impression on the part of business leaders that the new round is not about their concerns anymore. This is not a plea for limiting the round to tariff negotiations (“market access only agenda”). On the contrary, opening up markets and safeguarding effective market access requires much more than just lowering tariffs. In addition to the significant problem of non-tariff barriers in the age of ever increasing foreign direct investment and mergers and acquisitions with international impact, the WTO must adopt binding rules in the field of investment and competition policy. The WTO system must respond to the realities of today’s world economy, which is characterized by ever more cross-border integration.

A further underlying theme of this article is that there is no contradiction between business’ demands for open markets and the challenge to better integrate developing countries – that is *enterprises* from developing countries – into the world economy. It is therefore appropriate that the new round focus especially on the market access con-

⁴ WTO, Market Access: Unfinished Business, 1.

⁵ The “Everything But Arms” initiative is not a complete success story. On the contrary, it did show that opening up markets for developing countries still faces fierce resistance if it implies increased international competition for domestic producers. As the long transitional periods for rice and sugar indicate, at the end of the day the EU policymakers did give in to this resistance. Moreover, there are still preferential rules of origin in place, which may prevent that least-developed countries can effectively use the nominally enhanced market access. Having addressed the EU, one must see that the U.S. did fail to offer anything similar to the least-developed countries so far.

cerns of developing countries. The ability of developing countries to implement WTO agreements must also be taken into consideration. Special phasing-in periods and stepped up capacity building are the right way forward.

The deadline of January 1, 2005, set up in the Doha Declaration for the end of negotiations is not only very ambitious but also useful in order to keep in mind that the world economy needs the boost generated by a further lowering of trade barriers. Any delay is costly in terms of both money and development. The following chapters will deal with the priority issues in the new round from the perspective of German business (with a focus on manufacturers), the support of the majority of pro-market-liberalization business being the missing ingredient for a successful new round.⁶ For companies, international trade is not an ideological or theoretical issue but a practical everyday challenge.

C. Enhanced Market Access for Industrial Goods

The two traditional market access issues are tariffs and non-tariff barriers (which for manufacturers are, above all, technical standards). Despite the substantial liberalization achieved on the tariff side throughout the last decades, there remains a lot to be done. This is also true for technical standards. But, as will be shown, there is a risk that liberalization in the Doha Round will focus on tariffs only.

I. Liberalization of Tariff Barriers

Industry statements on the new round frequently emphasize the large gap between industrialized and developing countries with regard to the level of tariffs.⁷ While the trade-weighted tariff burden on commercial and industrial goods in the industrialized countries decreased from 40 % to just under 4 % over the last 50 years, it still amounts to 40 % on average (bound tariffs) in developing countries as of today (example: average bound tariff rate of 60 % in India; 1.8 % in Switzerland).⁸ Even on a trade-weighted basis, post-Uruguay Round average industrial tariff bindings remained well above 25 % in several major developing countries. It must be said that developed countries' tariffs continue to show relatively important variations in rates and significant peaks, while developing-country tariffs are often either not bound or bound at relatively high levels. On balance, there are significant differences between the various industrial sectors. Generally, tariffs in the paper, paper pulp, metals, metal products, and electrical machinery and equipment industries are low. On the other hand, tariffs

⁶ German business might be regarded as representative of the interests of many industries of OECD economies. Its strong dependence on exports and its considerable investment activities shape German industry's inclination to favor further trade liberalization efforts. For an overview on German industry's position on the Doha Agenda, see <<http://www.bdi-online.de/>> and the BDI position paper "The DDA – A Roadmap for Success", September 2002; the European industry's position is available on the Internet: <<http://www.unice.org/content/default.asp?PageId=116>> (visited on June 3, 2003).

⁷ See *BDI*, Enhanced Market Access for Industrial Goods; *NAM*, Zero Tariff Coalition; *NFTC*, Proposal for the Elimination of Industrial Tariffs.

⁸ *WTO*, Market Access.

are still above average for agricultural products, textiles, clothing as well as leather and leather goods. In the course of the Uruguay Round, those tariffs that had been at already low levels were reduced further in percentage terms than higher tariff burdens, thus widening the gap even more. It is of great importance to stress right from the outset that industry not only in developed countries but also in developing countries will benefit from enhanced market access for industrial goods. This applies specifically because average tariff barriers in developing countries are higher than in industrialized nations.⁹ For example, it is estimated that about 40 % of developing countries' exports are sent to other developing countries, most of which are industrial products. In fact, 70 % of the tariffs paid by developing countries (\$ 57 billion annually) are paid to other developing countries. Taking into consideration that trade among developing countries is growing at a faster rate than North-South trade, a substantive across-the-board reduction in tariffs on industrial goods will be particularly beneficial to developing countries themselves.

Affecting primarily the market access interests of developing countries, tariff escalation remains an enduring feature of most tariff regimes: tariffs become more burdensome as goods undergo further processing. This protects upstream industries in relation to primary production of metals, minerals, fibers, fish and agricultural products.¹⁰ The core criticism of industrialized countries focuses on the discrepancies between tariff bindings and applied rates in a number of developing and newly-industrialized countries. Not only that some of these countries have agreed to only a few tariff bindings. Many tariff bindings are also set at levels that exceed actual tariffs in individual countries by up to 30%. These countries can thus increase their tariffs arbitrarily at any time, which creates uncertainties in international trade.

Concluding the Fourth WTO Ministerial Conference in Doha, the ministerial declaration resulted in a mandate for market access negotiations on industrial goods:

“We agree to negotiations which shall aim, by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. Product coverage shall be comprehensive and without a priori exclusions ...”¹¹

Accordingly, negotiations on comprehensive tariff reductions are planned for the new negotiating round, comprising in particular negotiations on reducing or, if possible, eliminating tariffs. The reductions of tariff peaks, high tariff rates and the problem of tariff escalation are specifically mentioned. It is also envisaged to reduce or eliminate non-tariff trade barriers. It is important to point to the fact that all product categories are envisaged to be covered.

In the negotiations on reducing industrial tariffs, WTO member countries must, in a first step, resolve the question of the modalities of such tariff reductions. The GATT gives member countries substantial flexibility with respect to how tariffs are

⁹ *Hoekman*, World Trade Review 1 (2002), 23 (26).

¹⁰ WTO, Market Access.

¹¹ WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, para. 16.

lowered.¹² In the Uruguay-Round, the United States advocated the adoption of a request-and-offer approach, while the EC, Canada and Switzerland favored a formula approach. In the procedures adopted in January 1990, it was agreed that members would submit proposals for the reduction, elimination and binding of tariffs on a line-by-line basis. This implied that it was left to each participant to determine the manner in which the overall target of reduction would be reached.¹³ In the end, an overall target for reduction by one third with respect to industrial tariffs was reached by all developed countries. Today, the EU is still in favor of reducing all industrial tariffs on the basis of a general formula.¹⁴ The United States, on the other hand, would like to see sector-specific negotiations¹⁵, while this position has been modified lately.¹⁶

In the Geneva WTO negotiation group on market access a debate on different approaches for working out a general tariff reduction formula has started. At the core of these considerations is the desire to markedly reduce peak tariffs, as called for in the Doha mandate. Prior to the Ministerial in Seattle, the EU Commission had proposed to use the so-called band model as a general tariff reduction formula. According to this model, three bands would be created within which tariff levels would have to be lowered across all industrial sectors.¹⁷ Other formulae are being discussed, for example the so-called Swiss formula¹⁸ or simply cutting all existing tariffs by 50 %.¹⁹

The decision of the Ministerial conference to make the reduction of industrial tariffs a core issue in the new round of negotiations can only be welcomed from an industry perspective. In the interest of a community of manufactures primarily seeking export opportunities to emerging markets such as CEE countries and Asian and Latin American countries, German industry expects that priority be given first and foremost to lowering prohibitive tariffs that still exist in many developing and newly-industrialized export countries. The further reduction of tariff peaks mentioned in the ministerial declaration must be an essential priority issue for the upcoming negotiations. Most sectors of German industry would favor an elimination of nuisance tariffs (rates below 3%) altogether. The administrative costs incurred on the part of the authorities and industry usually exceed the benefits of collecting the tariffs. However, some sectors still have a protection interest and would not agree to an across-the-board elimination of nuisance tariffs.

¹² Article XXVIII bis, para.2(a) of the GATT states: "Negotiations under this Article may be carried out on a selective product-by-product basis or by the application of such multilateral procedures as may be accepted by the contracting parties concerned."

¹³ See *Hoda*, Tariff Negotiations and Renegotiations under the GATT and the WTO Procedures and Practices, 35.

¹⁴ Communication from the EC, 20 June 2002, TN/MA/W/1, 3.

¹⁵ The National Association of Manufacturers (NAM) is forcefully calling on the U.S. government to speak in favor of this approach. See *NAM*, Zero Tariff Coalition, 2002.

¹⁶ Communication from the US, 5 December 2002, TN/MA/W/18,

¹⁷ All tariffs below 3% would be reduced to 0%; all tariffs between 5%-10% would be lowered to at least 5%; all tariffs between 12%-18% would be lowered to at least 12%, and all tariffs above 20% would be lowered to at least 20%.

¹⁸ Final tariff rate = (starting tariff rate x 14) : (starting tariff rate + 14). Consequently, a tariff rate of 5% would be reduced to 3.7% (reduction by 26%), while a high tariff rate of 50% would be lowered to 10.9% (reduction by 78%).

¹⁹ *Panagariya*, in: Hoekman *et al.* (eds.), Development, Trade and the WTO, 535 (537).

In many developing countries, the majority of bound tariff rates remains considerably higher than currently applied MFN rates. This discrepancy has to be tackled. With regard to the tariff rates of developing countries, negotiated tariff bindings should correspond to the tariff rates that are actually applied and should not be fixed above the actually applied tariffs. The preferred route would be to base negotiations not on the bound but the actually applied tariff rates. At least on the applied rates, a standstill commitment should be concluded at the outset of the negotiations.²⁰

A general tariff reduction formula should first lead to cross-sector negotiations. In this context, all formulae can be supported as long as they lead to an effective reduction of tariff peaks. A general tariff reduction formula would facilitate the negotiations and would lead to a higher level of welfare effects than sector-specific negotiations.²¹ Given the complex membership structure of the present WTO, a request-offer-approach seems to be difficult to handle in practice. A general formula must meet certain requirements:

The objective should be to arrive at marked reductions of peak tariff rates to a maximum of 15% so as to narrow the gap between EU rates and the tariffs of important trading partners. This scenario points to the weaknesses of the band model described above. A still permissible peak tariff rate of 20% remains prohibitive for sectors that are in vigorous competition with each other on an international level. A disproportionate reduction of peak tariff rates would meet the demand of developing countries for reducing tariff rate escalation.

However, U.S. manufactures strongly argue in favor of a “zero-for-zero” modality for negotiating non-agricultural market access²² now supported by the UStR Proposal.²³ Trade negotiation history shows that the modality question can be resolved rather pragmatically.²⁴ If it is not feasible to compromise on a general formula for tariff reduction, sector-specific negotiations should remain possible as long as a critical mass of countries is participating. Finally, efforts must continue to simplify and harmonize customs tariff structures of WTO member states. This should be accomplished by reducing the subheadings to six digits, as stipulated in the Harmonized System.²⁵

II. Technical Barriers to Trade

Whereas objectives with regard to tariffs are explicitly stated in the Doha Declaration, the important area of non-tariff barriers is at risk of being left out of substantive negotiations. It ranks among those issues that might be left behind due to the above-mentioned focus on the new developmental issues. The situation is aggravated by the

²⁰ The National Foreign Trade Council (NFTC) proposes a standstill on applied rates during negotiations. See *NFTC*, Proposal for the Elimination of Industrial Tariffs.

²¹ *Panagariya*, in: Hoekman *et al.* (eds.), *Development, Trade and the WTO*, 535 (539).

²² *NAM*, Zero Tariff Coalition, 2002, available on the Internet: <www.nam.org> (visited on June 3, 2003).

²³ Communication from the United States, 5 December 2002, TN/MA/W/18.

²⁴ For a survey see *Hoda*, *Tariff Negotiations and Renegotiations under the GATT and the WTO Procedures and Practices*, 26 *et seq.*

²⁵ Of course, there should be room for exceptions for special purposes such as tariff rate quotas or antidumping measures.

fact that one important WTO member is unwilling to enter meaningful discussions on this topic.

The Doha Declaration mentions non-tariff barriers, but remains rather vague:

“We agree to negotiations which shall aim, ..., to reduce or as appropriate eliminate... non-tariff barriers, in particular on products of export interest to developing countries.”²⁶

Unfortunately, there is no explicit reference to the Agreement on Technical Barriers to Trade (TBT). Apart from focusing on the interests of developing countries, no concrete objectives are defined. This weak language in the Doha Declaration does not at all reflect the economic importance that technical standards have for world trade. For many companies, technical barriers, above all standards, are a much higher market access burden than tariffs. Costs linked to standards can amount to 10 % and more of overall product costs.²⁷ They are of particular interest for, e.g., the electronics and machinery industry.

The TBT Agreement²⁸ is the basic trade policy framework in this field. Since it entered into force in 1995, the TBT Agreement proved to have significant weaknesses and loopholes which should be addressed in the new round.

What might be the overall objective? The ideal situation can be described easily: in a world of perfectly liberalized international trade, internationally agreed standards would be adopted by all countries. Thus, companies would need to design their products in line with only one set of global standards. It is also desirable that conformity assessments carried out in one place would be sufficient as proof of conformity everywhere. This situation would come close to what is already a reality in the internal market of the European Union. Due to this positive experience, German companies can define a precise objective of what would be desirable on a worldwide scale. Of course, we are far from EC-like internal market conditions among WTO members. In reality, it must be accepted that to some extent there must be room for national standards, if there actually are specific circumstances – for instance climate – which make deviating from international standards a reasonable option. However, the reality is that those deviations are more than just exceptions. In addition to international standards set up by organizations such as ISO and IEC, many countries exaggerate the definition of their own national requirements.

For exporting companies, the deviation of national from international standards means that they have to design their products in line with the specific requirements of that export market. This can be very costly. Since exports to a specific single market very often represent only a fraction of the overall business of a company, it is frequently decided not to serve certain markets entirely if products must be designed to meet specific technical regulations in order to be eligible for these markets. This is aggravated by the fact that conformity assessments often impose additional problems.

²⁶ WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, para. 16.

²⁷ *OECD, An Assessment of the Costs for International Trade in Meeting Regulatory Requirements*. The relevance of standards for developing countries is also highlighted in *Schwamm*, ISO-Bulletin September 2002, 3 *et seq.*

²⁸ The SPS Agreement, which is of vital concern for the food and beverage industry, is not discussed here. For a comprehensive overview of the TBT Agreement see *Tietje, Übereinkommen über technische Handelshemmnisse* in: Prieß/Berrisch (eds.), *WTO-Handbuch* (forthcoming).

Most of the time, agencies authorized to certify that a product is in line with the technical requirements are located abroad. This renders the procedures complicated, costly and time-consuming, since they are very often not carried out in a commonly used language. Diverging national standards are particularly detrimental to small and medium-sized companies. Their capacity to redesign products to meet the standards of export markets is limited. Moreover, the costs for construction and conformity assessments are overhead expenses. This means that their burdensome effect decreases as production and trade volumes increase. Therefore, large multinational companies can cope much better with these requirements. Since the German economy and its exports are to a large extent driven by SMEs, technical barriers to trade are particularly important for the German business community. But it must be kept in mind that in addition to the companies from industrialized countries, exporting companies of developing and emerging markets face the same problems. Adhering to international standards would also make their life easier.²⁹

Given this awkward situation, the so-called “Mutual Recognition Agreements” (MRA, as for instance set up between the EU and the U.S.) spell relief.³⁰ The term MRA may be misleading, however, since these agreements do not provide for the mutual recognition of national standards but merely the possibility of letting conformity assessments be carried out by local agencies. Thus, the advantage an MRA can provide means that a company can have certificates issued by a domestic agency instead of entering into long-distance procedures dealing with a foreign body.

How can the TBT Agreement improve the situation? It begins with something very basic, namely the definition of the term “international standard”. Article 2.4 of the Agreement stipulates that

“where technical regulations are required and relevant international standards exist or their completion is imminent, members shall use them or their relevant parts as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.”

If this provision were to be implemented in line with its objective, which is to avoid unnecessary burdens for trade, many of the described problems could be overcome. But there is a long standing controversy among WTO members as regards the definition of what constitutes an “international standard”. Whereas most WTO members argue that these are standards set up by an international body, such as ISO, a minority, lead by the US, considers national standards used internationally to be “international standards”. Taken to the extreme, this would mean that a national standard of country A which is adopted by country B as its own national standard would

²⁹ The perspective of developing countries has been analyzed in *Wilson, Technical Barriers to Trade and Standards: Challenges and Opportunities for Developing Countries*.

³⁰ Although MRAs are a rather small step in the right direction, their implementation can prove very difficult, since certifying agencies are asked to give up their monopoly to test conformity. Thus, the implementation of the transatlantic MRA is still not assured. It is also noteworthy, that MRAs are discriminatory, since they establish preferential conditions for companies established within the MRA area. Therefore they may at best be seen as a second-best solution and cannot substitute the strengthening of the multilateral rules or the use of international standards.

would internationalize a national standard within the meaning of the TBT Agreement. This literal interpretation may be in line with the interpretation rules adopted by the Appellate Body.³¹ The purpose of the TBT Agreement, however, is to facilitate the conduct of international trade and to improve efficiency of production.³² This can best be achieved by standards that are adopted worldwide, not through any international competition of diverse standards. Therefore, a literal interpretation of the word “international” does not result in accomplishing the objective of the agreement.

Although Annex 1 of the TBT Agreement states “terms and their definition” it does not explicitly define the term “international standard”.³³ Recently, the WTO dispute settlement mechanism did close this gap. The first TBT case did not only confirm that a certain provision of the Codex Alimentarius was the relevant international standard to be applied,³⁴ but did also result in a definition of international standards. The panel found that “international standards are standards that are developed by international bodies”.³⁵ It lies in the nature of the WTO, that this does not have automatic consequences. One more case would be needed to explicitly demonstrate that the standardization system of a specific WTO member is not in compliance with the TBT Agreement. Legally this is viable but a political solution would be still preferable, since reforming national standardization systems would be a politically and economically very difficult task.

Initially, the extension of the general dispute settlement mechanism to the TBT Agreement was celebrated as a breakthrough. But experience with the TBT Agreement shows that it would be beneficial to have an additional dispute-resolving mechanism below the level of the normal DSU procedure. Under such a mechanism, countries which deviate from international standards could be asked to explain in detail why they think the international standards are inappropriate for their national needs. This would encourage a reassessment of the need for national standards and a broader adoption of international standards. The sheer volume of technical regulations would render such a low-profile procedure useful. It could operate without the immense procedural requirements of the ordinary dispute settlement mechanism.

When describing the situation with regard to technical barriers to trade, the picture would be incomplete if the role played by the government of the United States would not be mentioned. Not only does the U.S. administration not see any need to strengthen the use of international standards as defined by the relevant international organizations, but it is actively counteracting such developments. In the U.S., there are several hundred private standard-setting organizations. Standard-setting and certi-

³¹ In fact, the Appellate Body adheres to the Vienna Convention on the Law of Treaties, particularly to Article 31.1 which states that the interpretation should follow “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The Appellate Body refers mainly to the “ordinary meaning of the terms” and much less to the “context” or “purpose”.

³² Preamble of the TBT.

³³ Annex 1 refers to ISO/IEC definitions concerning standardization. Paragraph 2 defines “standard”, paragraph 4 defines “international body” but there is no synthesis of these two definitions.

³⁴ WTO, *European Communities – Trade Description of Sardines*, Report of the Appellate Body of 26 September 2002, WT/DS231/AB/R, paras. 217 *et seq.*

³⁵ WTO, *European Communities – Trade Description of Sardines*, Report of the Panel of 29 May 2002, WT/DS231/R, para. 7.63. This results in conjunction with Annex 1 paragraph 4 in a quite clear definition.

fication is their business. Hence, their economic interest is to sell their own standards and to certify compliance. U.S. reluctance to adhere to standards set up by independent international institutions can thus be traced to these commercial interests. The fact that U.S. business is geared to comply with national standards hampers U.S. exports. In this situation, two constellations are possible: either U.S. manufacturers strive for the adoption of international standards or something like an alliance between national standard-setting bodies and manufacturers is formed which would seek to convince other countries to adopt U.S. product requirements. The latter scenario is the reality. The U.S. administration supports these efforts and considers the export of U.S. standards as some kind of overall export promotion strategy.³⁶ This will make the opening of the TBT Agreement very difficult. But given the sheer size of the problem, it is definitely worthwhile to try to achieve progress in this area. Thus, the negotiating group on market access should give the issue of technical barriers to trade serious consideration.

III. Trade Facilitation

Enhancing the facilitation of trade by reducing “red tape” remains another important market access priority of the current trade round. Customs-related transaction costs can account for up to 10 % of a shipment’s value in some countries.³⁷ There are numerous provisions regarding the facilitation of trade throughout the Uruguay-Round agreements, but there exists no coherent approach that would combine the various aspects, thus giving the topic a more prominent role. Statements by the business community regarding this issue often define trade facilitation rather narrowly as simplification, harmonization and computerization of customs rules.³⁸ Other statements support a more comprehensive approach including: customs processes; activities of other agencies that intervene at or near borders and affect international trade transactions; constraints, regulatory or otherwise, on the efficiency and effectiveness of ancillary services to trade, including banking and insurance, brokerage and agency services; communications, infrastructures and commercial practices for the negotiation of contracts etc.³⁹ By and large, trade facilitation should be defined as involving the reduction of all transaction costs associated with the enforcement, regulation, and administration of trade policies.⁴⁰

With modalities to be determined at the 2003 Ministerial Conference in Cancun, the Doha Ministerial Declaration contains a commitment to launch negotiations on this topic, referring to a more narrow definition of trade facilitation:

³⁶ The usefulness of international standards from the perspective of a German manufacturer is shown by *Gürtler*, DIN-Mitteilungen 2001, 371-373. The perspective of an institute which tries to “sell” its standards is presented by *Thomas*, DIN-Mitteilungen 2002, 168-169.

³⁷ *Hoekman*, World Trade Review 1 (2002), 23 (38).

³⁸ For example, *Union of Industrial and Employers’ Confederations of Europe (UNICE)*, Position on a Future WTO Agreement on Trade Facilitation, available on the Internet: <www.unice.org> (visited on June 3, 2003).

³⁹ *ODASCE/SITPRO/EFA* discussion paper for the European Business Trade Facilitation Network, WTO: A Rules-Based Trade Facilitation Agreement, 5 June 2002.

⁴⁰ See *Staples*, in: *Hoekman et al.* (eds.), *Development, Trade and the WTO*, 139 (140).

“Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of Members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area.”⁴¹

There should be a clear commitment of developed and developing countries alike to give high priority to the fact that time-consuming and inefficient customs procedures are a hindrance to the international exchange of goods. Such procedures are very costly for the parties that are directly concerned as well as for consumers. As a consequence, time delays and the tying of resources are often of a magnitude that is far greater than the tariff burden itself, in essence the same argument that is made for technical barriers to trade above. This means that the potential for liberalization is particularly great in the area of trade facilitation. As a result, German industry had clearly supported a multilateral agreement on trade facilitation in the preparation of the Doha Round. Especially for developing countries, a multilateral agreement must offer an opportunity to thoroughly modernize customs handling procedures. Traders and companies emphasize time and again that the most important problem is not a lack of rulemaking for, e.g., customs clearance procedures. The rules are already in place in most countries, what is lacking is their enforcement and the capacity to enforce the rules. Therefore, substantive assistance for the implementation of new customs procedures should be offered from the outset of the negotiations. In fact, developing countries are still struggling to implement the WTO customs valuation agreement. Further rules only make sense if there are resources devoted to their implementation. Though it is not officially a WTO topic discussed under this heading, fighting corruption in customs handling is a major issue and its resolution would greatly contribute to trade facilitation.

European industry has made its priorities for negotiations on the topic clear in that a future agreement should take the form of a framework agreement drawing more closely together existing WTO provisions dealing with border-crossing procedures. During the preparation for Doha, European industry agreed with the EU Commission’s proposal to concentrate on three key principles: transparency in order to limit the discretionary powers of customs and other government agencies involved in administering trade; non-discrimination in order to guarantee even-handed treatment of operators; least trade-restrictiveness in order not to unduly hamper trade among the international transaction chain.⁴² Since good practices have been agreed upon multi-

⁴¹ WT/MIN(01)/DEC/1, para. 27.

⁴² See *UNICE*, Position on a Future WTO Agreement on Trade Facilitation, 16 February 2001; Communication from the EC to the WTO Council for Trade in Goods, 6 June 2000, G/C/W/211.

laterally already in the World Customs Organization (WCO), the revised Kyoto Convention (adopted in June 1999) should form the basis of a future WTO trade facilitation agreement. Emphasis should be placed on harmonization and automation of rules governing means of payment, of transport/cargo procedures and documents as well as simplification of technical and labeling requirements.

IV. Prevent Abuse of Antidumping Measures

Over the last few decades, the number of measures against dumping and subsidies has risen considerably. Antidumping actions are the most frequently used trade remedies. Over the past decade, 2,500 antidumping actions have been initiated and communicated to the GATT/WTO.⁴³ In 1999, 339 antidumping cases were initiated worldwide. Even though this number decreased in 2000 to a total of 251 cases, the year 2000 still had the second highest level of antidumping activity since WTO's founding in 1995. Initially, some factors point to a connection between the Asian financial crisis and the increasing number of newly initiated trade policy measures. Due to slowing domestic demand, some southeast Asian countries experienced a rise in exports, which were sold at low or subsidized prices. Unfortunately, the appeal that antidumping measures are enjoying these days might also be the result of the fact that, over the last decades, tariffs have been reduced. Since the protection of many trade sectors through tariffs has lost in importance, protective interests are focused on introducing other instruments in order to prevent cheap imports. It is feared that, in many cases, countries will again resort to trade policy instruments now that customs barriers have been lowered and multilateral disciplines were imposed by the Uruguay-Round on safeguards, including the prohibition and elimination of voluntary export restraints as well as the commitments to phase out the Multi-Fibre Arrangement quotas under the Agreement on Textiles and Clothing. More and more frequently, non-traditional users - particularly developing countries - are also resorting to antidumping measures, thus undermining our efforts towards greater market liberalization and the elimination of trade barriers: "antidumping is now a 'global' instrument and every country is now both a potential user and a potential target of antidumping action."⁴⁴

Since the Agreement on the Implementation of Article VI of GATT 1994 entered into force on 1 January 1995, a *multilateral* antidumping agreement is governing the application of antidumping measures among WTO members for the first time. The underlying purpose of the agreement is twofold: on the one hand, the agreement recognizes antidumping measures as a WTO-compliant means for defending against unfair trade practices; on the other, the provisions of the WTO Agreement set limits for national antidumping procedures and measures. Antidumping measures may serve to maintain fair competition, not distorted by dumping, and in this way safeguard a level playing field. But antidumping measures also lend themselves to pursuing protectionist goals. Studies show that the mere initiation of an antidumping procedure already can have half of the trade-limiting effect as the imposition of actual antidump-

⁴³ UNCTAD, TD/B/COM.1/EM.14/2, 24 October 2000.

⁴⁴ Submission from the European Communities, WTO Doc. TN/RL/W/13.

ing measures (investigation effect).⁴⁵ Price concessions made in exchange for the promise of dropping an antidumping procedure can even have the same effect as the antidumping measures that, in return, were not introduced (suspension effect).⁴⁶ Antidumping procedures are a powerful tool against imports, even if they do not result in any specific measures.

The views of German industry as to the usefulness of antidumping procedures are far from being homogenous. German industry⁴⁷ in the position of producers can be an active user of EU antidumping procedures when it comes to preventing unfair trade practices undertaken by companies in third countries. At the same time, sectors of German industry, in their role as industrial users, have an interest in a restrained implementation of EU antidumping measures. But, increasingly, German companies themselves operating in third countries are affected by trade policy measures, particularly by antidumping procedures. In the course of the last few years, antidumping procedures have been used with greater frequency all over the world. Proof of this development is the rising number of antidumping initiatives directed against EU companies in third countries. From the beginning of 1995 to the middle of 2001, companies in EU member states were the target of a total of 287 procedures in third countries. Although developing countries continue to be the main targets of antidumping measures, antidumping measures have also been resorted to more frequently by non-traditional users, many of which have introduced antidumping legislation since the entry into force of the WTO Agreement.⁴⁸

From our point of view, excessive use of antidumping measures provokes counteractions and undermines our arguments for further market opening and the elimination of trade barriers. Therefore, German industry as well as the German government have traditionally advocated a rather cautious approach regarding the use of the antidumping instrument. Furthermore, in the past, German industry has always strongly rejected all efforts using trade policy mechanisms that are aimed at pursuing economic and industrial policy goals through state planning measures. Successful liberalization worldwide must not be counteracted through increased use of trade policy interventions.

Unfortunately, the antidumping procedures of third countries frequently are not in compliance with the provisions of the WTO Antidumping Agreement, thus making it difficult for German and EU companies to sufficiently defend themselves against such actions. Recently, criticism has focused especially on the United States, India and China. In this context it is one of WTO's central tasks to further develop effective and non-discriminatory use of the antidumping mechanism. This requires procedures to be transparent and independent of political influences on all levels of investigative and decision-making processes. The WTO Antidumping Agreement took the first steps in the right direction by establishing a *de minimis* factual threshold

⁴⁵ Out of 466 cases completed world-wide from 1997 to 1998, as many as 45% were concluded without any measures, see *Kempton/ Stevenson*, International Trade Law Reports 1 (2000), 6.

⁴⁶ *Senti*, WTO: System und Funktionsweise der Welthandelsordnung, 365.

⁴⁷ See position paper of the *Federation of German Industries (BDI)*, Urgent Need for Harmonization of Antidumping Mechanism in the New WTO Round, September 2002.

⁴⁸ *UNCTAD*, TD/B/COM.1/EM.14/2, 24 October 2000, 3; for China see *Huang*, Journal of World Trade 36 (2002), 255 *et seq.*

for ‘dumping’ and ‘injury’ and by setting sunset clauses specifying a duration of five years for antidumping measures. But this must not be the end of the road.

At the Fourth Ministerial Conference, Ministers agreed to negotiations aimed at clarifying and improving disciplines under, *inter alia*, the Antidumping Agreement, while preserving the basic concepts, principles and effectiveness of that Agreement and its instruments and objectives.⁴⁹

For German industry, it is an important priority in the new round to integrate language into the Antidumping Agreement to make it more transparent and predictable and to arrive at a harmonized and non-discriminatory application of the antidumping mechanism.

Companies are calling for a universally applicable basis for collecting information from the parties concerned by way of standardized questionnaires. Questionnaires can be excessive, unclear and drafted in languages that are difficult to translate.⁵⁰ To eliminate translation costs and in order to obtain a “level-playing field”, the WTO Agreement should include the obligation to provide the parties concerned in antidumping procedures with an English version of all the documents submitted in the native language. Respondents should have the right to respond only in English.

Furthermore, a universally applicable methodology for defining key terms such as dumping, injury, etc., which would mean more stringent criteria for the imposition of antidumping measures would be a further improvement.⁵¹

Companies complain time and again that third country antidumping procedures are structured in such a way that it is almost impossible for the companies concerned to successfully protect their rights. Exaggerated requirements regarding the presentation of facts and evidentiary documentation combined with short response periods often lead to allegations that our companies are not sufficiently cooperative. Based on the “facts available” principle, the assertions of third country complainants are then assumed to be true. That is why the language of Article 6.8 and Annex 2 of the agreement must be revised to be more specific.

The WTO agreement should also include a provision, which would allow larger interests to be considered. Besides the EU, there are at least another four antidumping authorities that provide in their legislation that proposed antidumping measures are in the “public interest”.⁵² Therefore, a “public-interest clause” should be introduced, as it is provided by the EU antidumping regulation.⁵³ Such a clause should be legally binding and be applied on the basis of uniform principles that are specified in detail.

Furthermore, most national antidumping procedures allow the imposition of antidumping measures solely on the basis of a dumping margin. Only a few procedures, among them that of the EU⁵⁴, require a reference to the margin of injury (so-called “lesser duty rule”), i.e. a limitation of the antidumping tariff to the amount that is

⁴⁹ WT/MIN(01)/DEC/1, para.28.

⁵⁰ A positive example is the Indian questionnaire. See *Ministry of Commerce (Directorate General of Antidumping and allied duties)*, Exporters Questionnaire, New Delhi.

⁵¹ For details see *Kempton/Stevenson*, *International Trade Law Reports* 1 (2000), 6 (9 *et seq.*).

⁵² Argentina, Canada, Paraguay, and Zimbabwe, see *ibid.*, 16.

⁵³ Article 21 of Reg. 384/96. See also Submission from the European Communities, WTO Doc. TN/RL/W/13.

⁵⁴ Article 9 (4) Reg. 384/96, OJ No. L 56/1, 6 March 1996.

necessary to eliminate the injury. The WTO agreement should make the “lesser duty rule” a requirement.⁵⁵ This should be done because it is the goal of antidumping measures to eliminate the injury done to the industry concerned. Antidumping measures are not an aim in themselves, but are set up to undo injury emanating from unfair trade practices. With regard to this point, a universally applicable approach must be found.

It has furthermore turned out in practice that price commitments from third country companies found to have engaged in dumping are difficult to monitor. Therefore, price commitments should continue to be the exception. Additionally, complainants should be consulted before price commitments are being considered. In order to accomplish the required transparency, such commitments must be justified and monitored.

Circumvention of antidumping measures is on the rise and undermines the effectiveness of the mechanism. Exporters that are subject to duties continue setting up local assembly plants using imported inputs (screwdriver plants). Member countries in the Uruguay Round were unable to resolve the circumvention problem. It is German industry’s view that this point should be clarified during the ongoing WTO negotiations with the goal of providing a clear definition of the elements of circumvention.

All members should be aware of the risks that will result from a world-wide spread of antidumping procedures. It should be a common cause among all OECD industries to tighten the commitments of the WTO Antidumping Agreement in the new round.

D. New Rulemaking for Investment and Competition

In Doha, the EU was only partly successful with its comprehensive approach. Due to prevailing concerns among developing countries regarding their capacity to enter into negotiations and implement agreements in new areas, certain issues in which German industry has an intense interest did not manage to be included in the start of actual negotiations. The Ministerial Declaration stated that these issues should be negotiated after the Fifth Ministerial.⁵⁶ Still more work must be done to convince some developing countries to actually start negotiations on these topics. Having said that, it must be stated that the OECD business community does not have homogenous views on these issues either.⁵⁷ There are good arguments for new rules in the areas of investment, trade facilitation, competition policy and government procurement. But many business leaders who see the usefulness of new rules in principal are at the same time sceptical whether the round can lead to tangible results.

⁵⁵ Article 9 (1) of the WTO Antidumping Agreement so far states only that it is “desirable” that a lesser duty be imposed if that would be sufficient to remove the injury being caused, OJ No. L 336/111; see also Submission from the European Communities, WTO Doc. TN/RL/W/13.

⁵⁶ Which will take place from September 10-14, 2003 in Cancun (Mexico).

⁵⁷ For example, U.S. business does not have an articulated interest in negotiations on investment since it sees its interests protected by U.S. bilateral investment treaties. Thus, the U.S. was not and will not be demandeur on this issue.

I. Towards a Multilateral Agreement on Investment

The General Agreement on Trade in Services (GATS) comprises rules governing services and ongoing negotiations on further liberalization of the services sector. Through the inclusion of rules on “commercial presence” (mode 3) the GATS recognizes that foreign direct investment (FDI) is a prerequisite for exporting many services. It is difficult to explain to companies why a service provider investing in a WTO member state (mode 3) benefits from regulations for market access and protection standards established by GATS, while an investing manufacturer has no such protection or access regulations. As of today besides the GATS, only the Agreement on Trade-Related Aspects of Investment Measures (TRIMS) and the Agreement on Subsidies and Countervailing Measures are dealing with investment. This is in sharp contrast to the ever increasing importance of investment as the driving force of globalization. In fact, whereas official development assistance has declined considerably in the past decade, private sector investment in low- and middle-income countries has been growing rapidly. FDI in developing countries rose from about 24 billion US dollars in 1990 to 178 billion US dollars in 2000.⁵⁸ FDI by German companies amounted to 48.3 billion euro in 2001. Approx. 20 % of investments went into developing countries and emerging markets.⁵⁹ However, compared to FDI of 92.3 billion euro in 2000, we are confronted with a visible decline in investment activity. Leaving aside macroeconomic determinants, measures to increase and protect investment flows, especially to developing and least-developed countries, need to be taken more seriously again as a catalyst to promote investment and development. The economic benefits of investment for the host country and the necessity of a stable, predictable and transparent environment to attract investment have been described in great detail by, for example, the WTO working group on trade and investment, various studies of the OECD, the SOFRES study of the EU-Commission and other academic research: increasingly, access to markets involves some form of investment. All countries seek investment in their economies, desirous of technology transfer, skills and standards, job creation and opportunities for concomitant industrial development. Thus, there is almost a worldwide consensus among governments that FDI is “especially important for its potential to transfer knowledge and technology, create jobs, boost overall productivity, enhance competitiveness and entrepreneurship, and ultimately eradicate poverty through economic growth and development”.⁶⁰

From a business perspective, German industrial companies use FDI to explore new markets and to enhance their competitiveness. The lion’s share of foreign investment occurs in the German chemical, automotive, machinery, electrical and construction industry sectors.

With 126 bilateral investment treaties (BiTs) in force, Germany is a major player in the development of investment law and German industry has traditionally been a

⁵⁸ *World Bank*, Global Development Finance, 2001.

⁵⁹ *German Federal Reserve Bank*, Kapitalverflechtung mit dem Ausland, Statistische Sonderveröffentlichung 10, 2002, available on the Internet: <http://217.110.182.53/stat/download/stat_sonder/statso10.pdf> (visited on June 3, 2003).

⁶⁰ *United Nations*, Monterrey Consensus of the International Conference on Financing for Development, 5, para. 20.

strong supporter of legally binding investment agreements, actively supporting negotiations of a multilateral investment agreement under the umbrella of the OECD.⁶¹

The declaration concluding the Fourth Ministerial in Doha does not include the commitment to immediately start investment negotiations, as German industry would have hoped. Nonetheless, the issue of trade and investment has been included in the declaration, and there is general agreement that negotiations should be started after the Fifth WTO Ministerial Conference.⁶² Investment is currently being discussed in the Working Group on the Relationship between Trade and Investment.⁶³ The Declaration does recognize the needs of developing countries with regard to enhanced support for technical assistance and capacity-building and lays out the work program until the Fifth Ministerial:

“In the period until the Fifth Session, further work in the Working Group on the Relationship between trade and investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members”⁶⁴

It is important to note that by laying out the work program until the Fifth Ministerial, the Declaration does not exclude that the negotiations may deal with additional topics at a later stage.

The general arguments in favor of a multilateral investment agreement have become more widely and more accepted among trade experts. When it comes to the substance of negotiations, however, there is a considerable divergence of opinions. A case in point is already the definition of investment: from the business perspective, a broad definition of the term “investment”, including not only physical assets and equity but also non-equity investments, is of vital importance. Additionally, secured claims (monetary or services) that already have an economic value should be included. Finally, intellectual property rights and business concessions under public law should be part of a broad definition of investment. This broad definition has been adopted only recently by the revised bilateral investment treaty between Germany and China as well as in many other German BiTs with developing countries. A single definition

⁶¹ See *Böhmer*, GYIL 41 (1998), 267 *et seq.* There are numerous reasons for German industry’s proactive approach: The large volume of investment by German manufactures abroad and the positive backward linkages of FDI to the German economy, not least of all for German exports; many regions of the world pose additional risks for investors which is reflected by the demands of German manufactures for governmental investment protection guarantees. See *PWC*, Annual Report 2001: Investitionsgarantien der Bundesrepublik Deutschland, available on the Internet: <<http://www.pwc.de/investitions Garantien>> (visited on June 3, 2003).

⁶² WT/MIN(01)/DEC/1, para. 20: “Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment [...], we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.”

⁶³ A position paper from *Nippon Keidanren* (Japan Business Federation) from 16 July 2002 asks that the Working Group be given effective status as a forum for preparatory negotiations, given the limited amount of time between the Fifth Session in September 2003 and the deadline for the conclusion of the Round 1 January 2005.

⁶⁴ WT/MIN(01)/DEC/1, para. 22.

of the term “investment” should apply to both liberalization and protection provisions of a WTO investment agreement. Unfortunately, the Doha-Declaration refers to “long-term cross-border investment”. The proposal submitted to the WTO by the EU is reluctant to envisage a broad definition.⁶⁵ One argument is that developing countries can only be convinced of entering into real negotiations on a multilateral investment agreement if a narrow definition of investment is applied. On the other hand, countries such as Taiwan speak in favor of an asset-based investment definition, while excluding portfolio investment.⁶⁶ We take the view that only a broad definition would cover our companies’ investment interests and would have the potential to increase investment flows to host countries, particularly in the developing world. Only second best would be the option to adapt the scope of the definition of investment depending on the nature of any substantive obligations. Under this option, a broad investment definition might at least be included in an agreement regarding the post-entry investor protection clauses [national treatment, most-favored nation (MFN) treatment, expropriation and free transfer of funds].

Certainly, non-discrimination must be one of the cornerstones of a WTO investment agreement. This proposition seems to be largely accepted among members. While the details are rather controversial, our position is straightforward. To begin with, the concept entails national treatment and most-favored nation (MFN) treatment. Treatment of foreign investment must be no less favorable than that accorded to domestic investors and foreign investors of any other country. Non-discrimination must apply to both the entry into the market and during the post-establishment period.

Furthermore, both concepts have to be applied to the pre- as well as to the post-establishment period of an investment. While we accept that most BiTs reserve the right of the host state to regulate the entry of foreign investments into their territory, we are of the opinion that the exercise of such rights should not be used as a pretext to protect local markets. Although many countries’ direct investment laws are in a continuing process of further liberalization, there are still techniques in place of controlling access to the host state’s economy in many markets that are significant for German investors. Therefore, market access commitments should be a central objective when negotiating an investment agreement. In this respect a multilateral agreement on investment could produce an added value for German industrial companies as compared to German BiTs which do not provide for market access.⁶⁷

Our preferred approach for negotiating market access commitments would be to follow a so-called negative list approach (“top-down approach”). This involves establishing a general non-discrimination provision including national treatment and MFN-treatment with regard to the pre-establishment (market access) phase of an investment. According to this concept, countries wanting to exclude certain sectors from such an obligation must list them in country-specific reservations annexed to the agreements. In addition, an agreement should include a provision that guarantees market access in an absolute sense, irrespective of whether certain restrictive measures

⁶⁵ WT/WGTI/W/115.

⁶⁶ WT/WGTI/W/128.

⁶⁷ So far only US BiTs provide for a right to establishment, see *Dolzer/Stevens*, *Bilateral Investment Treaties*, 240.

concerning the entry of foreign investment are discriminatory. One advantage of the negative list approach is that new sectors, arising as a result of technological development, could automatically be covered by the disciplines of an agreement, unless explicit action were taken to exclude them. It goes without saying that, from the perspective of German industry, a negative list approach would be the most transparent and liberalization-promoting concept, and we would prefer to see it included in a WTO investment agreement. However, the Doha Declaration does refer to the positive list approach. Furthermore, the EU Commission seems to be cautious when it comes to any further proposals,⁶⁸ and it is realistic to assume that some members of the WTO will be reluctant to adhere to a negative list approach. Therefore, a second-best option must be considered. In this respect, a pre-establishment provision (market access and non-discrimination) might be negotiated using a GATS-like positive commitments approach, giving countries the opportunity to decide positively which sectors they want to include under such a regime. Obviously, the outcome of negotiations using this model will be less investor-friendly and will lessen the overall level of liberalization. With this approach, there is an imminent danger that members will tend to file only their current liberalization achievements rather than new market-access commitments, thereby limiting the market-opening effect and its added value for German investors. Therefore, negotiators have to make sure that at least the standards for these commitments are high, including: national treatment and MFN treatment commitments with regard to market access; comprehensive sector coverage; a “standstill” commitment: no further country-specific exceptions to either market access or non-discrimination commitments; a “rollback” obligation, meaning progressive liberalization of those areas where countries have issued exceptions.

Whereas state sovereignty is strongly affected by entering into legally binding obligations concerning market access, effectively granting a right of establishment to foreign investors, the case is different with regard to the treatment of investors once an investment has been made. Thus, high standards regarding the post-establishment phase of investments can be expected from a WTO investment agreement. The granting of national treatment and MFN treatment in the post-establishment phase of an investment must be truly comprehensive. As a rule, exceptions should not be allowed. If exceptions are to be allowed, there must again be a clear “standstill” commitment and a progressive removal of the non-conforming measures according to a well-defined time schedule (“roll-back”). For the sake of transparency, there should be no general exception clause (e.g. excluding “any existing non-conforming measures”), but detailed country-specific exception lists.

A high standard in absolute investment protection provided by standards of international law is another important requirement for any investment regime. This normally involves the principle of fair and equitable treatment as well as provisions on expropriation. Protection of foreign investors from expropriation must include direct as well as indirect expropriations and measures “tantamount” to expropriation (so-called creeping expropriation caused by progressive erosion of the original conditions under which the initial investment decision was made).⁶⁹ When such actions occur,

⁶⁸ WT/WGTI/W/121.

⁶⁹ Case law suggests so far that a compensable expropriation is not found where governments issue environmental regulation for legitimate purposes. “It is only when the environment becomes a

expropriations must be for a public purpose, carried out in a non-discriminatory fashion and investors must be provided with an acceptable timetable for divestment. Prompt, adequate and effective compensation should be paid in freely convertible currencies. German BiTs with many developing countries and least-developed countries contain these standards; just recently these high protection standards were accepted in a revised German BiT with China.

There seems to be no valid argument in favor of giving up these high investor protection standards in a multilateral agreement right from the start. In the follow-up to the Fifth Ministerial, German industry would like to see expropriation standards included in the negotiations.

A further central element of an investment agreement must be a provision guaranteeing investors the free transfer of their investments and returns. This should include the principal and additional amounts to maintain or increase the investment, returns, proceeds obtained from the sale of investments and payments pursuant to a loan agreement in connection with investments. Transfers must be allowed without delay in a freely convertible currency and at the prevailing market rate of exchange applicable within the host state and on the date of transfer.

Transparency should be another cornerstone of a WTO investment agreement. All national provisions affecting rights of entry and post-investment operations such as sectors restricted to domestic investors, conditions applying to joint ventures, taxation etc. should be made available to the public and subject to scrutiny and judicial review.

WTO agreements are effective because they can be enforced. German industry favors a full extension of the WTO dispute settlement procedure to all provisions of a WTO investment agreement. Furthermore, German industrial companies' experience with the investor-to-state provisions contained in German BiTs is very positive. The latter can provide an additional procedure for investors in case of conflicts and tend to have a depoliticizing effect in a dispute. State-to-state arbitration is bound to be influenced by political considerations, often setting aside economic interests of investors, and should be confined to the evaluation and interpretation of the framework agreement. Thus, the recognition of an investor-to-state arbitration procedure or a reference to a recognized arbitration forum (ICSID, ICC International Court of Arbitration) must be provided as an important tool of investor protection. Such a clause could be restricted to the post-entry phase of an investment.

In addition, a full extension of the WTO dispute settlement procedure to every provision of an investment agreement must be guaranteed.

We believe that only by providing high standards of investment protection and market access in a WTO investment agreement can companies achieve an added value as to the predictability of their investments, which in turn may lead to additional investments. Thus, any failure to meet the standards described above will limit the positive effect of an investment agreement as a measure to foster investment in developing

pretext for domestic protectionism and when elements of discrimination, of breach of governmental commitments or of use of regulation to extract benefits unrelated to the legitimate purpose of the regulation can be detected that a regulatory taking would, and should, be found. In the extreme case of complete and indefinite destruction of the economic value of property by otherwise fully legitimate regulation, and if individuals are required by regulation to make a special sacrifice in terms of their proprietary rights for the benefit of the society at large, compensation is also owed." See *Waelde/Kolo*, ICLQ 50 (2001), 811 (846).

countries. The upcoming negotiations on investment run the risk of neglecting the benefits for business while focusing on the interests of developing countries and concerns of NGOs. The argument is that developing countries' support is vital in order to start negotiations on investment in the first place. We would claim that the same is true for business. Our approach to international rulemaking for investment is rather pragmatic: we support the forum which gives us the highest standards. If WTO negotiations fail to deliver, we will not support them any longer. At the same time, we are fully aware that it will be difficult to achieve all of the above-mentioned obligations in the current round of WTO negotiations. Our major objective in this article is to state German companies' expectations so that they can serve as a yardstick for evaluating the proposals put forward by members in the WTO as well as the final results of the negotiations. As to the level of protection standards which can be achieved in a WTO multilateral investment agreement, for German industry the burden of proof rests with the negotiators who would have to explain why they divert from standards which have been accepted in 126 German BiTs, many of them concluded with developing countries. It is our understanding that even the core provisions of an investment agreement as described above are already supporting development. Thus, there is no need for granting special and differential treatment to developing countries regarding the core provisions of the agreement. The special situation of developing countries must be taken into account by means of sector exceptions and phasing-in periods. Moreover, technical assistance and capacity-building in helping to implement the provisions of an agreement are an important prerequisite for giving genuine life to a multilateral agreement on investment.

II. Competition Policy

Similar to investment policy, competition issues as well have only been tackled in rudimentary fashion under the umbrella of the WTO. The Agreement on Antidumping is directed against perceived anticompetitive practices such as international price discrimination, international predatory pricing and intermittent dumping. GATS includes provisions concerning monopolies and restrictive business practices.⁷⁰ But for most anticompetitive practices there are no binding international rules. Voluntary guidelines and fora such as the "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" set up by the UN in 1980 or the practice of bilateral cooperation between competition authorities exist.⁷¹ But all

⁷⁰ Articles VIII and IX of GATS.

⁷¹ The General Assembly in its resolution 35/63 of 5 December 1980 adopted the "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" approved by the United Nations Conference on Restrictive Business Practices. These principles are recommendations. Since 2001 there exists the "International Competition Network", which serves as a forum for information exchange and cooperation between antitrust authorities; more detailed informations are available on the Internet: <www.internationalcompetitionnetwork.org> (visited June 3, 2003). Meanwhile it has more than 60 members from industrialized as well as developing countries.

this is far from being binding or enforceable and does not substantially increase predictability and international coherence.⁷²

The majority of the German business community understands the necessity of a multilateral agreement on competition policy. It should provide for legal certainty, e.g., as regards the international handling and assessment of mergers and acquisitions. In the age of globalization and ever closer linkages between markets, the fact that a merger has been approved by a domestic competition authority does not guarantee that ultimately there will not be an adverse ruling of the competent foreign competition authority in an export market. The company affected would have to either undo the merger or give up exporting to this country. Even though the transatlantic cooperation is working smoothly in most cases (there is still room for improvement), the overall coordination is not at all satisfactory. Even though in most cases this is indeed crisis prevention, German business pleads for rules which could encompass notification requirements and notice periods before a merger or acquisition could become subject to scrutiny.

Moreover, one should bear in mind that anticompetitive practices can have an important impact on market access. Cartels can price potential foreign newcomers out of a market. A company which is hindered by its competitors to penetrate a market by means of anticompetitive practices should have the opportunity to make its case before the national competition authority. A minimum of competition law, basic rules and remedies should be guaranteed. Above all, non-discriminatory access to the national authority must be safeguarded. For all this, a binding and enforceable multilateral agreement is extremely useful. One of its tasks is to safeguard effective market access – so that the lowering of tariffs is not undermined by anticompetitive practices.⁷³

The plea for a multilateral agreement under the auspices of the WTO does not imply the demand that competition policy should give absolute priority to market access considerations. There are indeed cases where the restriction of competition (e.g. long-term agreements between suppliers and clients) can enhance efficiency.⁷⁴ Although competition policy should not focus on market access considerations only, it must be kept in mind that market access is always crucial for the efficient functioning of markets and therefore an important criterion for competition policy.

Competition policy is far from being a burden for economic development. On the contrary, it is a crucial element of every market economy. A multilateral agreement can function as a catalyst for the establishment of competition law and bodies in those WTO member countries where this particular element of a market economy is still missing. Targeted capacity-building efforts must definitely facilitate the establishment of such structures. In this sense the multilateral agreement can be a practical step towards good governance.

⁷² An economic assessment of diverse forms of international harmonization of competition policy, either via cooperation, common rules or even a supranational authority can be found at *Cadot et al.*, JWT 34 (No. 3, 2000), 1 *et seq.*

⁷³ Effective market access can be compared to the bottleneck principle. The tightest condition determines the overall accessibility.

⁷⁴ See *Hoekman/Holmes*, *World Economy* 22 (1999), 875 *et seq.*

E. Trade Conflicts and the Reform of Dispute Settlement

The WTO dispute settlement mechanism is one of the major achievements of the Uruguay Round. The value of the WTO as a rule-oriented system is largely recognized in the business community since it tends to reduce the risks that entrepreneurs take when making export and investment decisions.⁷⁵ However, there is strong criticism in the German and European business community regarding the economic consequences of the current enforcement mechanism of WTO rulings.⁷⁶ In real life, business leaders ask the question why companies have to carry the economic burden, especially with regard to retaliation, if a WTO member fails to live up to its commitments.⁷⁷

This issue did arise, for instance, in the EU/U.S. dispute over bananas.⁷⁸ For several years, the EU's decision-making process proved unable to implement the relevant WTO ruling. As a consequence, the U.S. imposed retaliatory duties sweeping some European producers from the American market. These companies, which had nothing to do with banana trade, became the economic victims of a trade conflict outside of their economic reach.

Unable to make the EU institutions implement the WTO ruling, some companies decided to sue the European Union before the European Court of Justice, albeit without success. The current understanding of the ECJ is that since WTO law has no direct effect on Community law, an individual or a company does not have any rights arising from WTO rules against EC institutions.⁷⁹ Thus, it is possible, also in the future, that they may face the economic consequences of retaliation without any hope for compensation.

The political reasoning behind retaliation is, of course, that the companies affected by retaliatory action will do their utmost to exert pressure on their government to implement a WTO ruling. Practice shows that this mechanism may make sense under certain conditions. But with regard to burden-sharing, this mechanism is far from satisfactory.

The burden-sharing problem of the current mechanism becomes particularly evident in the EU/US conflict over beef hormones.⁸⁰ The WTO ruled that the EU

⁷⁵ Jackson describes this as one of the two values of a rule orientation system. *Jackson*, *World Trade Review* 1 (2002), 101 (108).

⁷⁶ See UNICE, Update of UNICE Discussion Paper on WTO Dispute Settlement System, May 31, 2001, available on the Internet: <http://www.unice.org/unice/Website.nsf/HTML+Pages/UK_index_UK.htm> (visited on June 3, 2003).

⁷⁷ Retaliation, or „suspension of concessions“, is permitted under Article 22 of the WTO Dispute Settlement Understanding.

⁷⁸ See the final ruling in WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body of 9 September 1997, WT/DS27/AB/R. The request for consultation on the part of the U.S. dates back to November 1997. Finally, after years of retaliation against EU products, the new EU banana import regime was granted a waiver at the Doha Ministerial Conference in 2001, see WT/MIN(01)16.

⁷⁹ See ECJ, C-280/93, *Federal Republic of Germany/Council of the European Union*, Judgment of the Court of 5 October 1994, ECR 1994, I-04973; ECJ, C-307/99, *OGT Fruchthandelsgesellschaft mbh/Hauptzollamt Hamburg-St. Annen*, Order of the Court of 2 May 2001, ECR 2001, I-03159.

⁸⁰ The U.S. has been authorized to initiate retaliation measures amounting to \$ 116,8 Mio. annually, see WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Recourse by the United States to Article 22.7 of the DSU, 15 July 1999, WT/DS26/21.

should lift its import ban on hormone-treated beef. There is, according to a WTO panel, no sufficient scientific proof that the consumption of this type of beef may cause health risks. The EU does not share this assessment and is not willing to implement the ruling, arguing that consumer protection has priority over trade rules. For years, the EU has been undertaking scientific research to prove that hormone-treated beef could indeed cause health problems. Some EU officials think that non-implementation of WTO recommendations and paying the price via retaliation is part of the dispute settlement procedure and therefore acceptable. At any rate, the companies, e. g. some yarn manufacturers, affected by U.S. retaliation pay a heavy price for this EU consumer safety approach. Would it not be fairer, if the economic burden were carried by the public, in this case by all those whose health is allegedly protected by the import ban?

The economic burden would be easier to bear if, instead of retaliation, the conflicting parties would agree more often on compensation. Additional market access concessions, which would be granted while the WTO ruling is not implemented, will of course have economic effects. For domestic producers lower tariffs would mean greater international competition. But it would be easy to find products for which there is no or little domestic production of like or similar products, or where the demand is not significantly influenced by the tariff (low price elasticity of demand) so that these effects can be either averted or at least kept very small.⁸¹

How can compensation become a more likely alternative to retaliation? At the moment, compensation very often fails in conflicts over the level of nullification. One basic idea, which is also officially proposed by the EU,⁸² is to evaluate the amount of nullification caused by the violation of WTO rules at an earlier point in time. Right now, this is only done at the arbitration stage, that is at a time where there is no real alternative to retaliation any more. The early assessment of the amount of nullification could serve as a basis for the talks on compensation. But at the same time it must be kept in mind that many governments do not want to agree on compensation, since they shy away from making a judgment as to which products would be subject to increased international competition. They prefer the easier route of having another party decide who should pay the economic price. Therefore skepticism is in order as to whether compensation can indeed occur more often.

A much more far-reaching, but at the same time much more effective idea is to have the amount of nullification being paid out of government budgets.⁸³ If nullification would be disbursed directly in the form of payments, the pressure to implement WTO rulings would be transferred from companies to legislators, namely the persons responsible for bringing national law in line with international commitments under the WTO. Instead of companies, it would be the parliamentary opposition urging the

⁸¹ In this context, suitable goods for compensation may be U.S. movies, European delicatessen or high-end designer clothes. Diverse possibilities to avert retaliation and to make compensation more likely are discussed by *Barfield*, *The Future of the World Trade Organization*, 129-132.

⁸² "Contribution of the EC and its Member States to the Improvement of the WTO Dispute Settlement Understanding", TN/DS/W/1, of 13.3.2002.

⁸³ This approach has been suggested by *UNICE*, Update of UNICE Discussion Paper on WTO Dispute Settlement System, May 31, 2001, available on the Internet: <http://www.unice.org/unice/Website.nsf/HTML+Pages/UK_index_UK.htm> (visited on June 3, 2003). See also *Bhagwati*, in: Bhagwati (ed.), *The Next Trade Negotiating Round*, 277 *et seq.*

government and the majority in parliament to end the financial burden. This proposition also implies that if a society is truly prepared to deliberately violate WTO rules, it must pay the price for doing so as a whole.

As it stands, the political pressure to implement WTO rulings, which can be exerted on the government or legislative body by affected companies, depends largely on their political influence and standing. High-profile multinational companies have much more leverage for influencing political decision-making than SMEs. This means that the current system is a particular problem for SMEs. And it is also a problem for developing countries. They tend to oppose retaliation, since this would very often deprive them of needed imports. The alternative now available in the DSU, namely to transfer the withdrawal of concessions to other sectors of the WTO, so called “cross-retaliation” is not convincing.⁸⁴ This shows that dispute settlement is another important field where the interests of business and developing countries are congruent.⁸⁵

F. Other Issues

This survey would not be complete without a few remarks on the two built-in agenda topics: services and agriculture. As much as progress in agriculture liberalization is regarded as a dealbreaker for developing countries in the new round, further services liberalization commitments are demanded on the part of OECD industries.⁸⁶ In terms of negotiating tactics, the issues of market access for industrial and agricultural goods are interdependent in the negotiations. Progress in both sectors can only be achieved in parallel. Finally, since in most countries the government is still the largest single purchaser in the economy, the issue of government procurement remains on the agenda for German industry.

I. Services Liberalization

In 1995, the General Agreement on Trade in Services (GATS) did become one of the pillars of the WTO. Thus the WTO, right from the outset, became the competent body for liberalization in the ever more important area of cross-border trade in services. However, right from the start, it was clear that the GATS architecture and

⁸⁴ This “cross-retaliation” (according to Article 22.3 DSU) has been invoked by Ecuador in the Banana case against the EU, which went to arbitration. The arbitration panel denied Ecuador the right to cross-retaliate and proposed to Ecuador to withdraw concessions on consumer goods, see WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Decision by the Arbitrators of 24 March 2000, WT/DS27/ARB/ECU, paras. 65 *et seq.*

⁸⁵ Therefore, the plea for financial compensation is also brought forward by developing countries. Pakistan, for instance, did suggest that the term ‘compensation’ used in Article 22 DSU should not only be defined as enhanced market access but also comprise financial compensation, see Preparations for the 1999 Ministerial Conference, Communication from Pakistan, 1 April 1999, WT/GC/W/162. An assessment of DSU reforms from the perspective of developing countries can be found at *Delich*, in: Hoekman *et al.* (eds.), *Development, Trade and the WTO*, 71 (77-79). Developing countries plead for financial compensation already in 1965 under the GATT. See *Hudec*, in: Hoekman *et al.* (eds.), *Development, Trade and the WTO*, 81 (84-86).

⁸⁶ Developing countries will also greatly benefit from service liberalization, see *Hoekman*, *World Trade Review* 1(2002), 23 (26).

the commitments made in the Uruguay-Round were only a first step - almost more a matter of principle than of tangible economic benefits. Already in 1995, further comprehensive negotiations were therefore mandated (built-in agenda). They started in 2000 and became part of the single undertaking in Doha.

German business has a major interest in the further liberalization of trade in services. Not only obvious service industries like banks, insurance companies or tour operators seek progress in this field. Also manufacturers are well aware of the fact that liberalization in this area serves their economic interests.

Increasingly, manufacturers are becoming important suppliers and consumers of services. Markets demand complete solutions, not only the "hardware". Thus the products sold internationally are not only the machines but problem-solving packages, i. e. the machine and complementary services. Therefore, companies must offer installations as well as consulting, training, or maintenance. Sometimes it is not the hardware but the after-sales service that brings profits.

As supplier and customer, German business is engaged in all four modes of supplying services as defined by the GATS. Some German manufacturers have their company software programmed in India or eastern Europe (cross-border supply, mode 1). German tour operators are among the largest in the world (consumption abroad, mode 2). Subsidiaries of German machinery and plant manufacturers are indispensable for offering after-sales services (commercial presence, mode 3). German companies frequently move key business personnel such as managers and engineers to their subsidiaries abroad and shift personnel from those affiliates temporarily to the German headquarter (presence of natural persons, mode 4). Thus, business considers GATS an important opportunity for the liberalization of services. This is reflected by the fact that European business founded a specialized office, the European Services Forum (ESF), to give advice to European policymakers regarding the ongoing negotiations on services).

Apart from the substantive negotiations, it must be stressed that German business would in principle like to see a complete overhaul of the GATS architecture. At its core should be a shift from the bottom-up approach (positive list) to the top-down approach (negative list). Under this new approach, the principle of national treatment would become the rule. Under the current positive list approach it is the exception. At the moment, any period without explicit ongoing liberalization implies not only a standstill but increasing protection: whenever new services emerge, they are not automatically covered by GATS and thus not liberalized. This substantial amendment of the GATS, however, is not part of the negotiating mandate. Negotiations will be limited to some horizontally applied rules and the specific sector commitments. Therefore all parties should concentrate on progress within the existing framework.

With regard to the substantive negotiations, a distinction must be made between general rules and sectoral issues. As to the horizontal rules, any amendment which leads to the strengthening of MFN and national treatment will be welcomed by the large majority of the German business community. Unfortunately, negotiators are urged by representatives of civil society and trade unions to weaken the existing framework by extending safeguard provisions. Broadening of safeguards is not necessary, since non-discrimination is already limited due to the positive list approach. Moreover, safeguards are particularly sensitive in the services sector whenever the con-

ditions for commercial presence are tackled. The withdrawal of concessions could undermine the economic value of an investment and create immense hidden costs. The mere risk that a safeguard might ultimately be applied would hamper investment. At the same time, it must be taken into account that the adoption of safeguards which could adversely affect foreign direct investment would violate bilateral investment treaties. To maintain investment flows and avoid any conflict with bilateral agreements the reach of the existing safeguard provisions should not be broadened.

A particular horizontal problem is the temporary movement of natural persons. In most countries, visa and labor regulations are not at all responsive to the needs of internationally operating companies. The temporary shifting of key business personnel from headquarters to a subsidiary or representation abroad is routine not only for large multinational companies but also SMEs with a commercial presence abroad. Government agencies apply the same procedures to resident aliens and persons who have to work in another country for a limited, well-defined assignment. Moreover, quantitative restrictions and economic needs tests are applied. This leads to complicated and time-consuming legal procedures. Many companies prefer to let their managers and engineers go abroad as tourists. Of course, this is not a satisfactory solution, because it imposes legal risks on individual workers and makes them prone to fines or even more drastic measures. A clear definition of the term "key business personnel" and provisions facilitating their movement should be incorporated into GATS. Once again, a plea that is vigorously supported by most developing countries.

Given the positive list approach, the focus of the negotiations must be the expansion of the explicitly liberalized sectors. For the construction industry and environmental services (such as waste management), effective liberalization is closely linked to the opening up of public procurement. A coherent approach would make special rules for services superfluous, since the plurilateral WTO Government Procurement Agreement (GPA) already exists. Therefore GPA should be part of the GATS talks. The goal is to motivate as many countries as possible to join the GPA. For energy services, a major problem for substantial liberalization commitments arises from the fact that this sector is not defined by the GATS. Therefore, energy services should be classified as a first step. A sufficiently broad definition which also covers energy-related services should be applied. In the area of financial services and telecommunications, progress has already been made since the accomplishments of the Uruguay-Round. But since the positive list approach also applies to these sectors, further commitments must be part of GATS-II. Transport services account for almost one quarter of internationally traded services. They are the backbone of trade in goods. But unlike most merchandise trade, international transport is still characterized by limited competition. The commercial terms of maritime transport are dominated by international cartels, so-called conferences. But also port services and air transport are highly regulated and to a large extent exempt from effective international competition. Thus, the positive effects of opening up transport services and exposing them to greater competition would be considerable and not limited to those transportation companies that are in a position to seize these new opportunities. Liberalization would make transport much more efficient and thus give a boost to world trade as a whole.

The GATS negotiations are also an opportunity for developing countries. They already expressed their interest in facilitating the movement of personnel. In the

North-South trade they have a clear advantage in labor-intensive services sectors, such as construction. Moreover, trade in services among developing countries still is very restricted and thus offers room for enhancing regional integration.⁸⁷

II. Agriculture

Given the high level of protection and subsidies that have characterized the agricultural sector, the Agreement on Agriculture is one of the major achievements of the Uruguay-Round. The elimination of variable tariffs and their translation into ordinary value-based tariffs⁸⁸, the reduction of tariff rates to decrease domestic support and to set the agenda for further negotiations - all these were important steps in the right direction. But, nevertheless, world agricultural trade is far from being liberalized. Like GATS, the agriculture negotiations, which started in 2000, did become part of the single undertaking of the Doha round.

Although agriculture contributes barely 1 % to the German GDP and accounts for only 7 % of German exports, the German business community is well aware of the crucial role agriculture may play for the overall success of the round.

Most industrial companies reject the special role agriculture claims to have due to its alleged multifunctionality.⁸⁹ The same reasoning developed by EU officials for agriculture could be applied to manufacturers to justify high tariffs and heavy subsidies for industrial goods: German manufacturers also create jobs in disadvantaged areas, thus improving the regional infrastructure; they provide goods that help protect the environment, and they care about consumer safety. Therefore the majority of German manufactures share most taxpayers' concerns, given the amount of money spent on subsidizing farms, thus aiming at slowing down and regulating the changing of the economic structure of this sector.

In the trade context, German business holds the view that it has to get involved to help overcome resistance to opening up agricultural markets, given the linkages between market access negotiations for agriculture and industrial goods.⁹⁰ In view of the single undertaking approach, no important field of the negotiations can be left out. As described above, there is a lot at stake for business in this round of negotiations. Companies therefore cannot afford to have agriculture be a dealbreaker, which would lead the entire liberalization process down a dead-end road. Whereas in most fields of the negotiations the EU follows an offensive, liberal approach, in agriculture it is on the defensive side and has to make crucial concessions.

Since the current Common Agricultural Policy is the main target of not only the Cairns group but a much broader array of industrialized and developing countries, the EU is under extreme pressure to offer substantial concessions. Other countries simply do not have such a big market and, at the same time, such high levels of support. So

⁸⁷ Hodge, in: Hoekman *et al.* (eds.), *Development, Trade and the WTO*, 221-234.

⁸⁸ On "tariffication" see Sturgess, in: Bilal/Pezaros (eds.), *Negotiating the Future of Agricultural Policies: Agricultural Trade and the Millennium WTO Round*, 135 (148 *et seq.*).

⁸⁹ See the EC's comprehensive negotiation proposal G/AG/NG/W/90; See Fn. 3 on "multifunctionality".

⁹⁰ See BDI, *The WTO agricultural negotiations: Towards more market and international competition*.

far, the U.S. made less use of attackable support measures, and instead ran, for instance, crop insurance schemes.⁹¹ The Commission's plea to talk about all trade-distorting forms of support, not only those mainly used by the EU (e.g. U.S.-type crop insurance schemes), is understandable and justified. But it remains to be seen whether the EU will succeed in its efforts to broaden the negotiations. All this means that, in economic terms, farmers have a lot to lose. Because of the strong lobby farmers have in most EU countries, resistance to making these concessions is high.

Since the EU has to overcome all these internal difficulties, non-agrobusiness interests must try to encourage all those who want to lower tariffs and other barriers to trade in this area and decrease the level of overall financial support at the same time.

Apart from the negotiations, German business has a specific concern with regard to export subsidies. The EU, being the most frequent user of this instrument worldwide, spends 4-6 bio. U.S. dollars annually on these subsidies. In reality, export subsidies are banned by the Agreement on Subsidies, but WTO members agreed on a "peace clause" for the agricultural sector, exempting subsidies from dispute settlement until the end of 2003. This means that these subsidies could become subject to dispute settlement as of January 1, 2004. The concern for the business community is that dispute settlement will lead to numerous cases in which retaliation would ultimately not be confined only to agricultural products but also comprise industrial goods.⁹² There is no other way but for the EU to finally agree to do away with its export subsidies. By the end of 2003 at least a provisional solution must be found.

Since agricultural exports of developing countries are to a large extent hampered by the agricultural policies of industrialized countries, the opening of agricultural markets is another sector in which the interests of the majority of German businesses and those of many developing countries are identical.

III. Government Procurement

In the WTO system, the Government Procurement Agreement (GPA) is a special case. It envisages substantial liberalization and incorporates the principle of non-discrimination. At the same time, it is not as effective as it could be due to its plurilateral set-up.

German business, particularly the construction industry and machinery manufactures, has a vital interest in stringent multilaterally agreed standards for government procurement procedures. Government procurement should be transparent and conducted in line with efficiency-oriented criteria. This would benefit companies and taxpayers and, as a rule, also the consumers of goods and services. Giving priority to domestic bids - or even the exclusion of foreign bids - limits international competition and prevents the best offer from prevailing. The inclusion of non-economic criteria in the bidding process tends to result in non-transparent and arbitrary decisions. Giving

⁹¹ As regards the recently substantially stepped up U.S. subsidies it remains to be seen whether they are in line with WTO obligations. There are particularly serious doubts about their long-term compatibility with WTO rules. If market prices will decrease, many experts expect the overall level of support to surpass the level authorized by the WTO agreement.

⁹² However, WTO lawyers are discussing on which legal basis agricultural subsidies will be assessed after the expiration of the peace clause. See *Chambovey*, JWT 36 (2002), 305-352.

priority to domestic producers and non-economic criteria are interventionist measures, which usually do not serve as a solid developmental strategy. In the area of government procurement, breaking down barriers and enabling international competition is also the most suitable developmental strategy.

Originally, the GATT made government procurement an exception to the national treatment obligation.⁹³ Business complaints about discriminatory procurement practices resulted in the Agreement on Government Procurement in the Tokyo Round, which seeks to achieve greater liberalization of government procurement through the establishment of an agreed framework with respect to regulations, procedures and practices regarding government procurement and has been substantially revised during the Uruguay Round. The WTO Government Procurement Agreement offers a sound international framework.⁹⁴ Unfortunately, only a minority of WTO members (26 out of 144) - mainly industrialized countries - are currently signatories to this Agreement. Signing the GPA would give developing countries non-discriminatory access to the procurement markets of all other GPA signatories. GPA would also serve as a framework which could facilitate reform on the national level to fight corruption and to increase the overall efficiency of national procurement systems. German business holds the view that it would be best if the GPA were to become a truly multilateral agreement, signed by all WTO members. Reality shows, however, that developing countries have to familiarize themselves with the concept of transparent, non-discriminatory procurement. A step-by-step approach may be politically useful. Therefore, an agreement on transparency, which is mandated in the Doha Declaration as one of the subjects for negotiation after the Fifth Ministerial, would be a move in the right direction.

G. Conclusion

Making business more visible in the agenda of WTO trade negotiations requires greater consideration of business interests with regard to all the topics described above. Business interests need to be given a high priority on the agenda of the Doha Round since broad-based support from business is crucial for containing protectionist interests. Furthermore, at least on a range of market access issues, German business interests correspond in many cases to the needs of enterprises from developing countries. In order to meet both - the developmental objectives and private sector interests in OECD countries - the Doha Development Agenda should focus on its core field of action, namely those areas which have a substantial liberalizing impact on trade and investment flows.

Critics who argue that the current multilateral trading system and the outcome of the Uruguay-Round in particular are biased in that they favor the interests of developed countries and fail to deliver development-friendly results overlook the fact that

⁹³ Article III para. 8(a) GATT 1949.

⁹⁴ In an economic analysis of India's accession to the GPA, a welfare gain of 0,3 to 1,7 % of GDP has been identified, see *Srivastava*, India's Accession to the Government Procurement Agreement: identifying Costs and Benefits. For Korea the advantages have been quantified by *Choi*, Long and Winding Road to the Government Procurement Agreement, Paper presented at a World Bank PECC - Trade Policy Forum Seminar in Manila in July 2000.

there is no fundamental divergence between the needs of private companies in developing and industrialized countries. Lowering barriers to trade and trade-diverting subsidies and setting up a sound market-oriented legal framework is beneficial for companies in developing and industrialized countries alike.

Some companies or even some specific sectors of OECD industries may fear international competition and may argue for protectionism. But the great majority of the business community – in Germany and in most other industrialized and developing countries - is prepared to face the challenge and seize the opportunity of open markets. Boosting the private sector by opening up markets is crucial for alleviating poverty and overcoming environmental problems.

Should the Doha Development Agenda fail to persuade business in the course of the negotiations, companies may shift their focus to other means of enhancing trade, which may deliver results more easily. Inevitably, this would lead to an accelerated trend for ever more bilateral/regional free trade agreements (FTAs) which undermine the relevance of the multilateral trading system. The losers of such a trend would be those developing countries which are too small or too poor to be interesting partners for industrialized countries. They risk to become even more marginalized in the world trading system. Only progress on the multilateral side can decrease the gap between FTA trade and trade under MFN treatment. The multilateral system must deliver on enhanced liberalization and adequate multilateral rules, and it must do so soon.

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