2

Rules-related issues

What should be the scope of WTO rules?

There is more to the Doha Agenda than market access—the "rules of the game" are also the subject of intense debate. At the heart of this debate is the question of what sort of trade rules make sense for development. Answering this question requires considering not simply how existing trade rules can best be adapted, including through special and differential treatment, to address the needs of developing countries, especially the poorest ones at the core of the Millennium Development Goals. It also requires considering the more fundamental question of what, from a development perspective, should properly be the scope of trade rules in the first place. That is, are there issues that simply do not belong on the WTO agenda?

This question has become more pressing with proposals to include on the WTO agenda issues such as the Singapore issues, which relate ever more closely to "behind the border" or domestic regulatory issues. Such proposals are unsurprising, as the reduction of traditional trade barriers has increased the visibility of differences in national regulatory regimes. But while trade liberalization may have thrown these differences into sharper relief, it does not follow that trade rules are the best means of addressing the issues arising from these differences. Three tests can usefully be applied to determine whether rules on regulatory issues should be included in the WTO. First, is the issue related to trade, specifically to market access? Second, is it in line with broader development priorities? Third, what is the specific value added of a WTO agreement? These three criteria are of course related and should be considered in light of each other.[1]

Is there a link to market access?

The threshold question is whether a particular regulatory policy is being used or can be used to restrict market access. This is the traditional WTO criterion

for inclusion of an issue on the agenda: whether a policy is trade-related, that is, whether it impedes market access or distorts competition on a third market. Regulatory measures can be a substitute for explicit barriers (such as product standards) and, as seen in chapter 6, multilateral rules on preventing protectionist abuse of such measures can be warranted in order to ensure market access. WTO rules in this context may also lead to reciprocal benefits similar to traditional trade liberalization: greater contestability of domestic markets and improved market access abroad. Where the link to market access is not clear-cut, serious doubts can be raised regarding the appropriateness of including the policy areas in the WTO.

Are there domestic benefits to negotiating rules on regulation?

A key question is whether proposed regulatory rules make sense from a national perspective in terms of addressing development policy priorities, even if there are no market access considerations. Some domestic regulatory issues that have been proposed for inclusion on the WTO agenda are not priorities for low-income countries and risk diverting scarce administrative and political resources from those that have higher development payoffs. Where agreements on regulation require significant investment of real resources by poor countries, a strategy of "just say no" may make sense if a cost-benefit analysis suggests that the net benefits are less than would be feasible if resources were invested elsewhere. It must be recognized that scarce policymaking resources in many low-income countries imply that there are opportunity costs associated with an expansion of the negotiating agenda.

Determining national priorities on regulatory issues requires country-specific evaluation of policy and institutional options. Assessing the relative development contribution of reform in a particular policy area will thus require proactive engagement by national stakeholders and extensive policy research.

Is there specific value in a WTO agreement?

A major function of international agreements is to overcome domestic constraints that prevent the adoption of welfare-improving policies. They can tackle domestic vested interests that are blocking reforms in the general interest to preserve their narrow group interests. International agreements may also be useful in cases where the benefits of reform are maximized when others reform as well—as in the case of customs procedures. Finally, they may be necessary to deal with situations where a country's policies generate negative spillovers or where problems go beyond the ability or scope of national authorities to handle (such as where the same information is required in different formats by exporting and importing countries, thereby raising transaction costs for firms).

That there are benefits to collective action does not necessarily mean that the WTO is the right forum. Other international organizations or fora could take the lead. Here the extent to which the issue meets the first criterion

(trade-related) is essential. While certain policies may be desirable for any sound, modern economy, they may not necessarily be appropriate subject matter for—or be appropriately promoted by—trade rules. The dispute settlement system, with its promise of more effective enforcement, may be a powerful attraction, but just because a certain policy is desirable does not mean that it is best fostered by international rules backed by formal dispute settlement. The WTO's remit is trade; it is not the world economic organization, and it cannot carry the load of ensuring that countries have all the policies they need in a globalized economy. In many cases, other forms of international cooperation, such as voluntary agreements, information exchanges, and peer reviews, may be more appropriate. Even where action may be appropriately undertaken in the WTO, mechanisms and linkages are crucial to ensure the close involvement of other organizations with technical expertise in the issues at stake.

It is also inherently difficult to design generic rules that apply to all when it comes to behind-the-border policies. Given the general presumption that regulatory regimes should reflect local conditions, substantive harmonization may well be inappropriate. What is needed in the behind-the-border regulatory areas is to design agreements that are flexible and encourage experimentation, learning, and competition. The easiest way to ensure "regulatory creativity" is not to include issues too early in the WTO. Indeed, countries with only limited experience of implementing certain policies at the national level may not be ready to sign onto binding multilateral rules governing their application. Alternatively, flexibility can be maintained by limiting agreements on regulatory subjects to due process and transparency-type requirements.

Even if negotiators get the economics right, there is a danger that good policies will be resisted because dealing with these types of issues in the context of negotiation may lead countries to perceive reforms as costly concessions to foreign interests, as opposed to being in the national interest. Further, the dynamics that drive the WTO require countries to bring "concessions" to the table if they are to induce partners to liberalize politically sensitive sectors. Such linkage strategies may require consideration of negotiations in a particular area because of expected payoffs in other areas. In this case two considerations are paramount. First is that any negotiation be in the national development interest (as underlined above) and involve policy commitments that are seen to be desirable. Agreements that involve a welfare loss should not be accepted. Second is to avoid "paying twice" for the same reforms by trading partners. The linkage question boils down to how to design a socially beneficial grand bargain scenario—what can and should be offered in the context of WTO talks in order to obtain a desirable outcome?

These tests form the backdrop to the major questions addressed in this part of the report: What issues should, from a development perspective, be the subject of trade rules? And what sorts of trade rules on those issues make sense from a development perspective?

Chapter 9

The Singapore issues

At the Doha Ministerial Conference it was decided that negotiations would be launched in Cancún on competition law, trade and investment, transparency in government procurement, and trade facilitation—if an explicit consensus was reached on the modalities for these talks.

That this deal was open to different interpretations emerged strongly at the Cancún Ministerial Conference. While the EU insisted that the talks on all four issues were mandated to begin, most developing countries argued that—particularly in the absence of adequate progress on issues of interest to them, notably agriculture—there was no consensus for negotiations on the Singapore issues. The EU offered to drop two of the issues, but the African Group insisted that all four be taken off the table, while Japan and the Republic of Korea insisted that all four be kept.

After Cancún it was apparent to almost all but the most die-hard supporters that three of the Singapore issues (competition, trade and investment, and transparency in government procurement) were effectively off the table. Debate in the lead-up to the 2004 Doha Work Program (DWP) text thus largely focused on whether negotiations would be launched on trade facilitation. Developing countries, in particular the G-90, remained concerned that such negotiations could impose heavy implementation costs and overload their limited negotiating capacity. Intensive consultations were undertaken with developing countries stressing that any such negotiations should be limited in scope (bearing in mind the experience with TRIPS, which began with agreement to negotiate on trade in counterfeit goods and ended with harmonization of patent protection) and that special and differential treatment (SDT) and provision of assistance should be integral parts of any negotiations.

The 2004 DWP text states that members agree to launch negotiations on trade facilitation "by explicit consensus," but that the other Singapore issues

"will not form part of the Work Programme [set out in the DDA] and therefore no work toward negotiations on any of these issues will take place within the WTO during the Doha Round" (although there may be some ongoing argument about what precisely this means and whether the WTO Working Groups on these issues can continue).

First, this chapter assesses the exclusion of trade and investment, trade and competition policy, and transparency in government procurement from the WTO agenda against the general criteria set out in the previous chapter for determining whether particular issues should be subject to multilateral trade rules. It then explores the rationale for an agreement on trade facilitation in light of these same criteria, and discusses possible ways in which any such agreement could be responsive to the needs and concerns of developing countries.

The Singapore issues left out of the Doha Round

Trade and competition, trade and investment, and transparency in government procurement have rightly been left off the negotiating agenda for the Doha Round. None appears to meet all three of the tests set out in chapter 8: are they related to trade and market access? are they in line with broader development priorities? and what is the specific value of a proposed WTO agreement?

In terms of the first criterion, all three issues are in some way related to market access—investment most directly, competition and transparency in government procurement more indirectly.[1] However, in terms of the second criterion, many of these issues would not seem to be development priorities. In the case of competition law, for example, many of the poorest developing countries do not have such laws; most developing countries that have them have not had them for long, have often not been enforcing them, and generally need to develop much more experience to determine what works and what does not. Finally, it is not clear for any of these issues that a WTO agreement would contribute significant value added to existing international initiatives in terms of overcoming domestic or international collective action problems.[2]

Trade and competition

It is hard to see what benefits a WTO-based initiative on competition policy could bring. All but a handful of the poorest developing countries' economies are small. A sound trade policy based on moderate and as uniform as possible tariffs, on the absence of nontariff barriers, and on a liberal investment policy is likely to ensure the highest possible level of competition in their domestic markets. That small markets do not necessarily attract enough competitors is a problem that competition policy cannot handle. While a multilateral ban on export cartels would be beneficial, it was not at all clear that OECD countries would have been willing to put this on the table or what price would be demanded. This is an issue where unilateral action could be taken if there was a serious interest in promoting development—the same is true with respect to

other pro-developing country proposals that had been identified in some of the proposals that were put forward in the Working Group: such as introducing competition law criteria in the enforcement of antidumping actions, or explicitly taking into consideration the effects of anticompetitive behavior by national firms operating on developing country markets.

Trade and investment

A multilateral agreement on investment is unlikely to increase protection of investor rights beyond what is already provided for in the more than 2,000 existing bilateral investment treaties, and countries are already undertaking massive unilateral and plurilateral liberalization of investment (UNCTAD 2003f). Nor is action at the WTO likely to add much to existing international initiatives to curb improper public or corporate practices. Where a multilateral agreement could be useful is in addressing "beggar thy neighbor" policies to attract investment, in particular competitive subsidizing. However, available evidence about the capacity to discipline such subsidies suggests that the WTO is unlikely to succeed where governments have generally failed.

Transparency in government procurement

There are clearly potential domestic governance benefits from increasing transparency in government procurement, though they depend crucially on whether the reforms are backed by senior political leadership in the context of broader governance reforms. Would a trade agreement help?[3] Given the difficulties in pulling off unilateral domestic procurement reform in developing countries, a trade agreement might galvanize political constituencies behind domestic reform in return for some other benefits—such as improved market access abroad. However, putting transparency provisions at the core of such an international agreement is unlikely to stimulate much support from domestic exporters who are mainly interested in market access (Evenett 2003). The developmental impact, therefore, of WTO discussions on only transparency in government procurement is likely to be limited.

Trade facilitation

The current conditions of trade facilitation in the world suggest strong handicaps for developing countries—particularly for the poorest ones, and even for those located in the most dynamic regions of the world, such as the Asian-Pacific countries (Wilson, Mann, and Otsuki 2003). For instance, customs clearance for sea cargo takes an average of 2.1 days in developed countries and 4.8 in East Asia and the Pacific. But traders in Latin America and the Caribbean must wait up to 9 days, and those in Africa and South Asia, 10 days (World Bank 2003a).

Port charges, delays, and freight costs are significant constraints to exporting, and the availability of adequate transport and logistics infrastructure and

management greatly affects market delivery of products. The "list of detentions" published by the U.S. Food and Drug Administration reveals that the main reason for detentions from Africa was that most food exports from the region were rotten (Jha 2002). Availability of sound logistics also influences investment decisions. With intrafirm trade now accounting for 33 percent of total world trade, companies' choice of location is heavily influenced by the ease and cost of import and export (World Bank 2004).

What is the rationale for disciplines on trade facilitation?

Trade facilitation is directly related to trade gains from market access (the first of the three tests), and it brings a range of other development gains that make it a more general development priority (the second test). The list of handicaps above implies that gains to be expected from allowing customs and firms to operate in a more competitive framework—a mix of improving customs procedures and related services—are large. Initial estimates of such gains suggest magnitudes equivalent to those brought by tariff liberalization, though they vary depending on the definition of trade facilitation used (that is, the extent to which it includes broader factors such as transport costs) (box 9.1). Moreover, such gains are likely to be larger for small and medium enterprises, which tend to suffer most from current poor trade facilitation—hence they tend to be larger for the poorest developing countries, which tend to have the worst

Box 9.1

Gains from trade facilitation

Source: Wilson 2003; Wilson, Mann, and Otsuki 2003; Australian Department of Foreign Affairs and Trade and Chinese Ministry of Foreign Trade and Economic Cooperation 2001; Walkenhorst and Yasui 2003; Hummels 2001; WTO 2000b; Staples 1998; Guasch and Spiller 1999.

- The cost of moving goods across international borders is now as important as tariffs in determining the cost of landed goods.
- Enhanced capacity in global trade facilitation would increase world trade by roughly $377 billion, or 9.7 percent. About $107 billion (2.8 percent) of the total gain would come from improvements in port efficiency and about $33 billion (0.8 percent) from those in the customs environment. The largest gains would come from an improvement in service sector infrastructure and e-business usage ($154 billion or 4 percent). Gains from the exporter's improvements in trade facilitation would dominate those from the importer's improvements.
- Improving specific aspects of trade facilitation can already bring large benefits. If developing countries were able to shave off an average of one day in the time spent handling all of their trade, the savings would amount to some $240 billion annually. Documentary red tape in customs procedures can increase the cost of imports substantially—under one estimate, by up to 7–10 percent of the value of world trade. Inefficient regulation of port operations can give rise to implicit tariffs of 5–15 percent in exports in Latin America. Each day saved in shipping time, in part due to faster customs clearance, is worth a 0.5 percent reduction in the *ad valorem* tariff. Within APEC, moving to electronic documentation for trade could yield cost savings of some 1.5–15 percent of the landed cost of an imported item. The introduction of electronic data interchange (EDI) systems in Chilean customs led to savings of more than $1 million a month for a system cost of $5 million. Duty shortfalls traced to irregular customs have been estimated as up to 50 percent, harming those poorest developing countries for which tariff revenue is an important source of public finances.

current trade facilitation practices and a larger share of small and medium enterprises. New security demands underline the interest of all WTO Members in upgrading the world's trading machinery.

As a result, many developing countries recognize that improved trade facilitation is in their own interests and are already taking steps to make the necessary improvements (though progress is slow, often due to resource constraints).

But does trade facilitation satisfy the third test? That is, what is the rationale for a WTO agreement on trade facilitation? And under what circumstances would such an agreement serve development?

Developing countries have raised a number of concerns about negotiating trade facilitation in the WTO (World Bank 2004). First, they fear being required to take on obligations that are expensive, difficult to administer, and require investment in infrastructure beyond their capacities. These fears are not unjustified: costs of customs reforms are high, and reform cannot be achieved overnight. Second, in the face of these costs, there is concern that adequate technical assistance may not be forthcoming. Again, experience with other WTO agreements (notably TRIPS) suggests that these fears are not unjustified. Third, there is the fundamental question of whether binding WTO rules are the appropriate way to promote what is essentially institutional development in poor countries. Building institutions and infrastructure requires sustained effort and investment over a long period; WTO agreements are argued to be a blunt instrument for ensuring such efforts.

The 2004 DWP text on trade facilitation provides little guidance on what could be a WTO agreement on trade facilitation, and it leaves some key questions open. WTO Members agreed "by explicit consensus" to launch negotiations on trade facilitation, but they did so "without prejudice to the format of the final result of the negotiations and would allow consideration of various forms of outcomes." The negotiating mandate recognizes the implementation challenges faced by developing countries and provides for SDT and enhanced assistance and capacity building (box 9.2). The scope of the negotiations is also clearly limited. While trade facilitation can encompass the whole raft of domestic policies, institutions, and infrastructure associated with the movement of goods across borders, the scope of WTO negotiations on trade facilitation is narrower, focusing on three GATT Articles that directly concern aspects of trade facilitation: transit of goods, fees charged for customs clearance, and transparency in applicable legislation and administrative requirements.

There are three main arguments in favor of a WTO agreement on trade facilitation. First, the existence of an agreement galvanizes political will to ensure that reforms are actually undertaken within a meaningful time frame. But this gives rise to concerns that it will divert spending from other, greater development priorities. While investment in trade facilitation will be compensated over the longer term by increased exports, in the short term there may be

Box 9.2

The 2004 Doha Work Programme mandate on trade facilitation

Source: WTO 2004d.

Aim. Negotiations shall aim to clarify and improve relevant aspects of GATT Articles V (Freedom of Transit), VIII (Fees and Formalities Connected with Importation and Exportation), and X (Publication and Administration of Trade Regulations) with a view to further expediting the movement, release, and clearance of goods, including goods in transit. A further aim is effective cooperation on trade facilitation and customs compliance issues.

Special and differential treatment. The negotiations should take "fully into account the principle of special and differential treatment for developing and least developed countries" and this should "extend beyond the granting of traditional transition periods for implementing commitments." The timing and extent of commitments shall be related to implementation capacity and countries. LDCs will be required only to undertake commitments "to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities."

Technical assistance. The negotiations also aim to enhance technical assistance and support for capacity building, and developed countries are to provide assistance for both the negotiation and implementation of commitments. In the "limited cases" where infrastructure is required, developed countries will make every effort to ensure that support and assistance directly related to the nature and scope of the commitments is provided—although such commitments are not open-ended. Where assistance is not provided, implementation is not expected. The effectiveness of assistance will be subject to review. A collaborative effort on assistance is foreseen, involving the IMF, OECD, UNCTAD, WCO, and World Bank.

greater immediate priorities (clean water, HIV/AIDS programs, and the like) in a context of very limited government spending.

This is where the second rationale for a WTO agreement comes in. The main benefit of a WTO agreement in trade facilitation would lie in providing a mechanism for channeling international assistance into meeting these costs. There is a strong case for international assistance. In addition to the fact that it allows developing country government spending to focus on core development issues such as health and education, trade facilitation is also a global public good; all countries benefit from improvements in others' trade management capacities. Gains may increase when improvements are concurrent. Conversely, all countries are affected by weak links in others' export and import capability; in the new security environment, such weak links can be a major source of vulnerability. There is also a strong argument that international assistance for developing countries should focus not simply on meeting basic needs and providing social infrastructure, but on building the production and trade capabilities that can in turn generate growth (UNCTAD 2004b). The real value added of a WTO agreement on trade facilitation would thus depend on how effective it is in providing a mechanism to attract additional resources—from both developed and, to a lesser extent, developing countries—for trade facilitation.

The third argument is that the trade facilitation agenda spans matters that revolve around the traditional domain of GATT/WTO negotiations: cross-

border negative (monetary) spillovers. An example is the conditions that are imposed on transit trade, something that is of great importance for landlocked countries. Another example concerns the negative impacts of trade costs for express carriers, which may impede them from offering their services, or may greatly reduce the extent of their potential market in specific countries.

Options for a trade facilitation agreement

A WTO agreement on trade facilitation cannot be business as usual. It should not impose heavy obligations on developing countries and make light promises of assistance. A new approach is needed so that the agreement provides something in the trading interests of all countries, but in a way that ensures that the entirety of the implementation burdens do not fall on the countries least able to afford them. How might this be achieved?

Should it apply to all WTO Members? The 2004 DWP text does not refer to a trade facilitation agreement but to disciplines on trade facilitation. The absence of a reference to an agreement is argued by some to mean that the disciplines need not apply to all Members. However, others note that the language referring to clarification of GATT Articles V, VIII, and X, along with the reference to the negotiations having been decided by "explicit consensus," make it clear that the negotiations are part of the single undertaking of the Doha Agenda. They also note that the reference to the extent and timing of entering into commitments by developing and Least Developed Countries being related to their implementation capacities implies that all will be subject to the rules. However, the words "entering into" commitments also imply a possible GATS-like structure where countries only undertake market-opening commitments when they are ready to do so. This could imply that trade facilitation disciplines could be signed onto on an *à la carte* basis.

These options do not provide for differential commitments, however—although it is possible that the timing for implementation of certain provisions could be so long as to be indefinite. There are several reasons for this. First, improvements in trade facilitation are in a country's own interests, so if there are grounds for a WTO agreement at all, it is as a mechanism for helping countries to achieve those gains, not for excusing them from doing so. Second, if a WTO agreement is to prove a meaningful instrument for marshaling resources, the "public good" argument must be stressed—and this argument leaves more limited scope for some countries never to have to contribute to its provision. Third, a WTO agreement should not include provisions that any of its Members can never implement. If the provisions are so demanding or resource intensive they arguably have no place in a WTO agreement. Either certain provisions are truly necessary to promote trade facilitation, in which case it is in everyone's interests that they be implemented at some point, or they

are not, in which case there is no need for them to be in a WTO agreement, given that Members are always free to exceed their obligations if they wish.

This argument is analogous to the consideration given to a possible plurilateral agreement. Under a plurilateral approach, all countries are involved in the negotiations, but can choose whether to join the agreement or not. However, plurilateral agreements pose several problems. Once the agreement is in place, countries gradually come under pressure to join (acceding countries in particular), especially if the agreement aspires to covering a certain percentage of world trade. Plurilateral agreements also run the risk of discriminating against nonparties. Some developing countries have also expressed concerns that a plurilateral approach on the Singapore issues could set a precedent for similar approaches on environment or labor standards. These problems are likely also to arise in the context of a trade facilitation agreement where not all provisions applied to all Members.

Types of obligations. A trade facilitation agreement is likely to work best where the commitments to be undertaken take the form of general principles and are not overly prescriptive on the precise means to achieve them. Most WTO agreements specify general objectives without being too specific as to how countries achieve them or the technological means they use to do so. Where they have ventured into more specific and prescriptive disciplines—such as the precise periods specified for patent protection under TRIPS—they have been open to charges of "one size fits all" and have experienced considerable problems with implementation. Further, in the trade facilitation case, the Kyoto Convention of the World Customs Organization (WCO) already provides detailed instruction for national authorities on the improvement of customs procedures.[4]

Given that most OECD countries have the required trade facilitation frameworks largely in place, the implementation burden of any new disciplines would fall on developing countries. In view of this asymmetry, and the fact that some developing countries face real resource constraints in implementing trade facilitation reforms, the agreement should match these country obligations on trade facilitation disciplines with developed country obligations to provide the necessary assistance. That is, binding commitments by developed countries on the provision of adequate technical and financial assistance to developing countries facing implementation difficulties should be negotiated as part of any new trade facilitation agreement.

Such assistance could be provided bilaterally or could tap into the considerable assistance in this area under way or planned through international or regional organizations. For example, given that a number of developing countries are currently taking out loans from the World Bank for trade facilitation or related infrastructure, one option in terms of provision of assistance could be for developed countries to fund the provision of interest-free or otherwise

subsidized loans to developing countries for trade facilitation infrastructure. The World Bank at Cancùn also launched a major new initiative on trade facilitation, including a review of the Bank's project portfolio in ports, customs, and other trade-related infrastructure. Additionally, considerable assistance with customs reform is provided by the IMF and the WCO. Bilateral donors including the EU, U.S., and Japan are already funding projects tied to strengthening the WTO system, security upgrades, and related trade facilitation infrastructure (World Bank 2004). WTO Members could fund country-specific projects under these and other existing programs.

Five options. The five options presented below aim to take into account these aspects. They range from a traditional WTO agreement with SDT to a GATS-type approach providing greater flexibility for countries to choose the timing of their commitments. They are all based on the assumption of general disciplines and parallel commitments by developing and developed countries on substantive obligations and the provision of necessary assistance to implement them respectively.

Option 1. The "GATS commitments" model

Countries would sign onto individual disciplines related to trade facilitation as they were ready to implement them. They would not undertake commitments until they felt comfortable that they could implement them, or had already implemented them. Developed countries would be under a general obligation to provide the necessary assistance to help developing countries reach the point where they could agree to be bound by certain disciplines.

This approach provides a high degree of flexibility to countries to prioritize implementation costs against other priorities for development spending.

This option has two main drawbacks. First, it is unlikely to provide any great impetus for the improvement of trade facilitation procedures in developing countries. This is a disadvantage for those countries, as many costs are incurred because of lack of trade facilitation infrastructure and procedures—costs that must be weighed against the costs of implementation. Second, there is likely to be parity between the nature of developing country commitments on trade facilitation and the nature of developed country commitments to provide adequate technical and financial assistance. Open-ended time frames for developing countries to undertake commitments are unlikely to result in greatly increased assistance from developed countries.

Option 2. The "unilateral GATS precommitments" model

A particular technique used in the GATS—precommitments—would form the basis of the agreement. Under the GATS a country can commit itself to implementing a particular obligation for a specific service from a certain date in the future. Under this option, developing countries would autonomously

indicate, for each discipline in the agreement, the future date by which they would implement it.

This approach provides for some certainty and an end date by which obligations will definitely be implemented, but still allows individual WTO Members the freedom to select those dates according to their existing capacities, development spending priorities, and the relative resource-intensiveness of different obligations.

This option has three main drawbacks. Some countries may opt for end dates that are so far into the future as to render the agreement meaningless—and such commitments are also unlikely to attract meaningful technical and financial assistance. It may also leave those obligations that would confer the most benefit in terms of improvements in trade facilitation to be last. Countries may also have difficulty in predicting realistic dates for implementation of parts of the agreement.

Option 3. The "negotiated GATS precommitments" model

Instead of being determined unilaterally, precommitments could be reached through a process of request-offer negotiations (as they are in the GATS). This same process would be used to negotiate parallel commitments by developed countries for the provision of adequate assistance to facilitate implementation by the given date.

There are several benefits to this approach. First, it allows for differentiation among developing countries based on their capacity to implement, without the need for creating new categories among them. This is particularly useful as *a priori* categories may be based on criteria that do not reflect their actual capacity to implement a trade facilitation agreement. For example, despite being at comparable levels of GDP, countries may have quite different problems and capacities—some will be landlocked; others might face difficult geographical conditions (natural disasters, remoteness). Equally, given the heavy role of governments in providing many of the necessary services for trade facilitation (such as customs inspection), governance issues and the political circumstances may have a particular influence on ability to implement. The request-offer process would allow for these individual circumstances to be taken into account in agreeing deadlines for particular provisions.

Under this option, the poorest countries may choose to use an additional possibility, that is, to negotiate as a group to maximize their resources and negotiating power. A regional, coordinated approach may make sense for countries whose own progress on trade facilitation is partially dependent on that of their neighbors—as is the case for landlocked countries. A group approach may also facilitate the creation of regional technical assistance schemes. The group approach would not preclude individual countries from establishing their own implementation deadlines, however.

Negotiations may also result in a more sensible differentiation between developing countries in the sense that major traders are more likely to be subject to greater pressure for early compliance than poorer countries. Equally, the fastest reformers among developing countries can set the pace and encourage others to speed up the reform process. A major benefit is that countries are more likely to respect deadlines that they have developed and agreed to in negotiations, rather than dates they may feel have been arbitrarily established.

The second benefit of this approach is that, by subjecting the provision of assistance to the negotiation of bound commitments, it forces greater coordination among developed country donors. Given that countries will be negotiating implementation dates simultaneously with commitments for the assistance to help make implementation by that date feasible, it will be in the interests of major donors to coordinate among themselves to determine how the cost of assistance will be distributed and who will take the lead in providing assistance to individual countries. In practice, countries tend to devote more assistance to those closer or more important to them—this model would likely reflect that reality, with major donors taking primary responsibility for providing assistance to their traditional recipients. Arrangements among donors would need to be made to ensure that all countries were covered. While there is a potential free-rider problem, developed countries are likely to place sufficient pressure on each other to ensure that all pay their share of assistance.

In addition, within governments, this system could assist in better coordination between trade and aid ministries, as aid officials would be involved in the negotiations from the start. Instead of the trade agreement being signed and the aid agencies later being approached for help in implementation—without any sense of ownership on their part—under this process, they would be involved throughout the process in negotiating their own commitments. This need not involve—or solely involve—visits to Geneva; negotiations could also take place in the capital of the developing country concerned through local embassies and specialist delegations. This would foster a more integrated approach to such trade-related assistance in bilateral aid programs and greatly increase the chances of adequate follow through.

This option has three main drawbacks. First, the potential downside of negotiating commitments to provide technical assistance is the risk that it could undermine efforts to take a more demand-driven locally owned approach to the provision of assistance. Much would depend on the extent to which the relevant authorities were involved in the negotiations and in the level of specificity used in the identification of assistance. While the risks might be lower were an envelope of assistance to be agreed, there is still the question of whether ear-marking an envelope of funds for this specific purpose would cut across efforts to move toward greater budget, not program, aid (designed to promote the ability of individual countries to set their own priorities). Second, any assistance negotiated under this scheme would simply displace exist-

ing bilateral assistance. It could be argued, however, that the transparency of this arrangement and the scope for concerns to be raised in negotiations (and traded off against implementation deadlines) would go some way toward helping to ensure that trade facilitation assistance was genuinely additional to existing assistance. A third drawback is that this process may be relatively time-consuming and resource-intensive.

Option 4. The standard GATT agreement model, including enhanced SDT

A fourth option would be for the agreement on trade facilitation to consist of a set of obligations that would be implemented immediately by OECD countries, with developing countries given an extended period of time to implement the agreement—say, 5 years. The poorest developing countries would be given 10 years.

Developed country commitments to provide adequate technical and financial assistance would be applied over the same time frames, and failure to provide assistance could be raised by developing countries as a defence in any dispute settlement case regarding the agreement.

One or two reviews of each implementing member would be held during the implementation period. Reviews would cover both the developing country in question's progress in implementing the agreement and the adequacy, quality, and effectiveness of the assistance provided by developed country members. Expert advice would be given by the WCO, World Bank, UNCTAD, and any regional organization involved in the provision of assistance (such as APEC). The reviews would be seen as an opportunity to identify problems with implementation and gaps in the provision of assistance. That is, the process would be strictly disconnected from any dispute settlement action.

Attendance at implementation reviews by appropriate capital-based experts from each country under review could be facilitated by the creation of a fund administered by the WTO Secretariat to which all developed country members would contribute as part of their assistance obligations. Developing country members could then request assistance from the fund. Participation by other developing countries in the review process would be encouraged as they might be able to offer useful perspectives from their own experience. Scheduling reviews should, to the extent possible, aim to facilitate opportunities for networking by developing countries facing similar issues.

In addition, the following SDT provisions would apply:

- A "Peace Clause" (that is, a moratorium on dispute settlement) would exist for a further, say, five years after the end of the implementation period. During this period, WTO Members would be free to consult about matters related to implementation, but no dispute settlement processes could be brought. For the poorest developing countries, the moratorium would apply for another, say, 10 years.

- Developing countries would also have the possibility to seek an extension of time to implement the agreement. These extensions would be subject to negotiation with the Trade Facilitation Committee, but would be subject to a requirement that requests receive sympathetic consideration. (A similar provision exists in the Customs Valuation Agreement.) Consideration of requests would also take into account the assessment of assistance received in the previous reviews. Negotiated extensions would include review provisions—again of both implementation and assistance received—and they would draw on expert advice from the WCO plus any other organization substantially involved in the provision of assistance to the country concerned (similar to the advice of the IMF used with regard to exercise of the exceptions related to balance of payments concerns). The Peace Clause would continue in effect for the additional implementation period, and would expire as normal five years after the original implementation date or two years after the end of the new agreed date for implementation, whichever is the longer. A variation on this model would make the extension provision available only with regard to the most complex or resource-intensive provisions of the agreement, rather than the whole agreement.

This option provides for a clear timetable for implementation of the agreement and thus provides incentives for both developing and developed countries to take their obligations seriously. It also affords some flexibility for developing countries in implementation, through the possibility of negotiating extensions and the Peace Clause—giving the poorest countries an incentive to implement, while shielding them from dispute settlement action. And it combines the best elements of technocratic assessment of actual capacity, including by drawing on external expertise, and the use of the WTO as a mechanism for countries to coordinate, negotiate, and agree among themselves on a reasonable overall package.

Its main drawback is that developing countries are still required to implement the agreement by a set date and thus it could still be argued to distort development spending priorities. The monitoring and review process is also somewhat resource-intensive.

Option 5. The "GATS precommitment" model, with review

This proposal would combine the GATS precommitment models with the review mechanism outlined above. The dates for the reviews would also be negotiated as part of the request-offer process. The possibility of extension would exist as for Option 4, to be negotiated for each provision for which the implementing country was seeking an extension. The Peace Clause would apply for an additional one year after each implementation date for the relevant provision for developing countries. For the poorest developing countries this period could be, for example, five years.

This option combines the strongest elements of all the systems outlined above. Implementation deadlines could be customized in negotiations with individual countries and are thus more likely to be feasible and respected. Technical and financial assistance packages could be likewise negotiated and customized, with the greater involvement of aid ministries at an early stage, which should result in greater ownership and follow through. The regular review and monitoring process would allow for problems to be identified and addressed in a timely fashion, with input from expert organizations and other developing countries with similar experiences, and the possibility of negotiated extensions would exist to deal with unforeseen difficulties or where the time and assistance required had been underestimated. Lastly, the Peace Clause would provide some final breathing space for countries experiencing final implementation problems.

The main drawback is that it makes the agreement longer to negotiate, the implementation less even, and the monitoring and review process more complicated.

Should dispute settlement apply?

The 2004 DWP text is silent on the issue of whether trade facilitation disciplines should be subject to dispute settlement.

The key issue is the extent to which commitments by developing countries to implement trade facilitation and those by developed countries to provide the necessary assistance would be parallel from the point of view of dispute settlement. Developing countries could bring a case against a developed country for failure to provide the promised assistance; however, this may not always be a good use of their scarce dispute settlement resources. That said, in the case of a pattern of nondelivery by a donor country, the lodging of a complaint by a group of developing countries could be feasible. This situation is not inconceivable—for instance where a donor country's political processes had tied up the necessary funds (perhaps due to linkages to unrelated issues in parliamentary bodies), the lodging of a WTO complaint might be a useful boost to those domestic agencies trying to push the funding through.

Most of the time, however, developed country commitments on assistance will be used as a form of counter-claim in any disputes on developing country nonimplementation brought by developed countries. The effect could be to make developed countries think twice about bringing disputes, given that they would be required to prove that the full extent of their promised assistance had been provided. In this way, the onus of proof is also reversed—in arguing that a developing country had not complied with the agreement, the developed country would have first to prove that all its promised assistance had been provided in a timely manner.

This is a powerful incentive for developed countries to implement their assistance obligations. Developed countries wish to see trade facilitation improvements in developing countries, and the effect of this system is to strengthen the link between that implementation, the ability to enforce it through dispute settlement, and their own role in providing assistance.

Conclusion

The options proposed above are designed to play to the strengths of the WTO as a forum for the negotiated exchange of "concessions," while making this process more balanced and responsive to the needs of developing countries by ensuring that the provision of assistance is subject to the same negotiating and dispute frameworks as developing country implementation obligations.[5]

On balance, Option 5 would seem to be the most promising approach. Out of the proposals above, it comes closest to providing a framework to effectively channel increased international resources into the promotion of trade facilitation, while minimizing to the extent possible the disproportionate burden on developing countries.

The options outlined above apply to trade facilitation, but they could be adapted to fit other types of WTO agreements related to rules with implementation costs. This possibility is discussed in chapter 11 on special and differential treatment.

The TRIPS Agreement

In debates about the scope of WTO rules, no area has generated more controversy than the TRIPS Agreement. For some, the protection of intellectual property rights (IPRs) has no place in the trading system; others view their inclusion as in principle legitimate, but believe the TRIPS Agreement to be seriously flawed; still others view it as perfectly legitimate. This chapter explores whether developing countries have an interest in IPR protection in the WTO and whether the existing agreement affords them sufficient flexibility with reference to two issues that dominate the TRIPS negotiating agenda: access to medicines, and geographical indications (GIs).

Access to essential medicines came close to derailing the Doha negotiations, first during the 2001 Doha Ministerial Conference, then in subsequent negotiations leading up to the 2003 Cancún Ministerial. A belated solution was only reached less than two weeks before the Cancún Ministerial, when the U.S. finally dropped its reservation to the text previously agreed by all other WTO Members nine months earlier. However, by that stage, serious damage had already been done by months of often acrimonious negotiations and a very public, equally acrimonious, debate between the pharmaceutical industry and a number of high-profile NGOs. At issue was both the nature and legitimacy of intellectual property rights protection for medicines and whether the trading system should be used to enforce those rights.

GIs are the main current TRIPS issue on the negotiating agenda. These negotiations are likely to attract less public attention—though some products, such as tobacco or traditional knowledge or designs, could become the center of attention from some NGOs—but they are also shaping up to create deep divisions among the WTO membership. Unlike access to medicines, however, these divisions do not split along developed-developing country lines. In particular, and somewhat ironically, the positions of most WTO Members—from

the U.S. or the EU to India or Egypt—on GIs are the complete opposite of their position on the drug issue: the U.S. is the hardliner on drugs against India, but India, along with the EU, is among the hardliners on the GIs issue.

This fluidity of interests and positions may be seen as reflecting the inherently second-best feature of the TRIPS Agreement in a world of multiple distortions. Drugs and GIs require countries to find a balance between the interests of inventors-producers and the needs of the public for access to products, information, and services—and there is no reason that this balance should be the same for each TRIPS topic in every country.

This fluidity also suggests that some developing countries might have growing interests in IPR protection in the WTO. Despite the fact that economists would have preferred that the complicated TRIPS issues would be dealt with in a more pragmatic way and outside the WTO, an increasing number of WTO Members appear to have some interests in the TRIPS Agreement. These interests may be actual (GIs) or potential in areas not covered, or insufficiently covered, by the agreement to date. For instance, developing countries are well endowed with traditional knowledge and genetic resources for which they are seeking increased protection under the agreement (chapter 12).

There is perhaps more agreement on the extent to which the TRIPS Agreement provides sufficient flexibility for developing countries. As a basic matter, there is wide agreement that the time and resources required to implement the Agreement were greatly underestimated and that implementation has (and will, if nothing is done) put a considerable strain on many developing countries. Assistance from developed countries, and the additional implementation periods permitted developing countries, have not been commensurate with the size of the task.

Additionally, in some cases, the substance of the Agreement provides insufficient flexibility, imposing a "one size fits all" model of IPR protection on countries at widely differing levels of development and requiring protection of the full range of IPRs despite varying interests and priorities. In other cases, the problem may be not so much that the Agreement has no in-built flexibility. Rather, it is that some WTO Members are not permitting others to take advantage of the existing flexibility. For instance, while the agreement provides for differing implementation periods, countries acceding to the WTO may not even have access to these normal flexibilities. Additionally, certain WTO Members—the U.S. on drugs, the EU on GIs—are trying to impose strict (and thus unacceptable for a vast majority of the rest of the world) limits on the existing TRIPS flexibility.

Both these issues—the potential areas of developing country interest and the question of how much flexibility the agreement provides and whether countries are actually able to use it—are discussed below with reference to access to medicines and GIs. It is important to remember during the following discussions that, in the absence of any new decision, the full effect of TRIPs

will be felt only after 2005 by the developing countries, and after 2016 by the poorest countries.

At the outset, it is useful to revisit some of the reasons why the TRIPS Agreement was introduced into the WTO. In the middle of the Uruguay Round negotiations, support for freer trade in developed countries was fading. The U.S. coalitions for investment, and later for services—the engines of the negotiations during the first years—had disappeared or were in disarray. By contrast, opponents of a Uruguay Round deal in the U.S. and EU farm and clothing sectors were strong. The support of IPR-intensive sectors (drugs, software) became essential to move the negotiations forward. The Uruguay Round became a "TRIPS for textiles (and agriculture)" deal in which the developing countries agreed to extend protection for IPRs in exchange for liberalization of trade in textiles and clothing (and agriculture) (Panagariya 1999).[1] However, relatively little has been achieved on textiles liberalization to date (chapter 5), and farm barriers were left almost intact by the Uruguay Round Agreement on Agriculture (chapter 3).

TRIPS and access to medicines

The signatories of the TRIPS Agreement were aware that extension of IPRs to all WTO Members would have the effect of increasing the price of essential medicines—and other IPR-based products—in developing countries, and reducing the ability of many developing countries to access new technologies.[2] For this reason, they included certain provisions intended to lessen some of the most severe potential negative consequences by balancing the interests of IPR-holders with those of the society at large. As will be discussed further below, the extent of some of these flexibility provisions was the focus of the negotiations at Doha and during the following year (box 10.1).[3]

Between the signing of the Uruguay Agreement (1994) and the 2001 Doha Ministerial, the spread of HIV/AIDS reached pandemic proportions. But research into detection and treatment yielded a cocktail of drugs that could reduce the viral load almost to zero. A disease that had been a death sentence two decades previously could now be treated, affording its victims a near normal life. However, the new drugs are subject to patent protection, with a typical treatment costing $12,000 a year per person in developed countries—a sum far out of reach for most AIDS victims in the developing world. This situation prompted a discussion of possible interpretations of the TRIPS provisions on patents that would enable consumers in developing countries, particularly in the poorest ones, to have access to essential drugs under patent protection. This discussion was only partly about legal interpretations of the TRIPS provisions—most legal experts already agreed that these flexibilities exist—and the Doha Declaration itself adds little in legal terms. What was really at stake was the ability of countries to actually make use of the TRIPS flexibilities, in light of political pressures not to do so. A clear political message of the legitimacy of such use was needed to help in countering this pressure.

Box 10.1

Key concepts and provisions for TRIPS and medicines

Source: Lehmann 2002.

A patent is a property right granted by a state to the inventor of a novel (not previously disclosed anywhere in the world, or only in the national territory, according to domestic law), non-obvious, and useful invention. The purpose of a patent is to provide incentives for creation and investment by granting a limited-term exclusive property right over the invention.

Under the TRIPS Agreement, WTO Members are obliged to extend patent protection without discrimination as to field of technology (TRIPS Article 27). Patents have to be made available for both processes and products. The term of patent protection is to be 20 years from the date of filing. WTO Members have discretion to adopt measures necessary to protect public health, but they should be consistent with the provisions of the Agreement (TRIPS Article 8).

Developing countries have until 2005 to implement patent protection for pharmaceuticals. At the Doha Ministerial it was decided that LDCs would not be obligated to implement, apply, or enforce the TRIPS obligations on patents or undisclosed information before 2016. However, the exclusive marketing rights provision in TRIPS specifies that new drugs invented between 1996 and 2005 will qualify for patent protection when they come onto the market after 2005. Indeed, some of those drugs are already on the market, benefiting from protection in countries that have already implemented their patent obligations.

Governments can authorize the use of a patented invention by someone other than the right-holder by issuing a compulsory license (TRIPS Article 31). However, they must first make efforts to obtain authorization from the right-holder on reasonable commercial terms and conditions. This requirement can be waived in a national emergency. Products produced under a compulsory license should be predominantly for the domestic market of the member authorizing the use, and the right-holder is to be paid adequate remuneration.

WTO Members can provide limited exceptions to patent rights provided that these do not unreasonably conflict with the normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties (TRIPS Article 30). For example, a WTO panel has ruled that drugs producers can develop and submit for regulatory approval a generic product before the patent life of the original product has expired (the "Bolar" or "early working" exception, see below).

Exhaustion of intellectual property rights refers to whether countries permit products legitimately marketed under a patent right in other countries to be sold in their market without prior permission of the domestic IPR-holder. National exhaustion, as opposed to international exhaustion, means that patented drugs initially marketed outside the territory cannot be resold without the domestic patentee's consent within the domestic market. TRIPS leaves all members free to take their own approach (TRIPS Article 6). (The exhaustion issue raises important questions from a domestic competition policy perspective, given that what is really at stake is arguably exclusive distribution rights in a particular market.)

Initially, the solution was to rely on existing provisions under the TRIPS Agreement—hence at the Doha Ministerial, the WTO Members affirmed the use of TRIPS Article 31, which permits the use of compulsory licensing, including in the event of a national health emergency. However, these existing rules contained an important gap: under TRIPS Article 31(f), drugs produced under compulsory licenses must be intended primarily for domestic use. In other

words, countries with little or no drug production capacity—mostly the poorest countries—still would have difficulty gaining access to the necessary quantity of essential drugs once they were covered by patent protection after 2005 (although it should be mentioned that most of the drugs on WHO's list of essential drugs are off-patent). The Doha Ministerial thus directed the TRIPS Council to make recommendations concerning access for these countries by the end of 2002.

Interpreting the TRIPS patent regime on essential drugs

In 2002 the TRIPS Council undertook the challenge of finding some means to provide access to AIDS drugs and other pharmaceuticals for countries lacking manufacturing capacities without undermining the value of the TRIPS Agreement and the patent system in stimulating and rewarding innovation.[4] There were essentially three general approaches that could be taken to the issue—leaving aside the option of building sufficient domestic manufacturing capacity in the poorest countries to enable them to take advantage of the existing compulsory licensing provisions of the TRIPS Agreement.[5]

Expanding the exceptions provision. One proposal was for an authoritative interpretation of TRIPS Article 30. This solution was based on the fact that Article 30 does not enumerate the subject matter scope of exceptions, thus leaving the freedom to provide an exception to patent rights for the purpose of exporting essential medicines to countries with insufficient drug production capacity. TRIPS Article 30 already provides for limited exceptions to patent rights (see box 10.1), which have been interpreted to mean, for example, that persons other than the patent holder can undertake testing and seek regulatory approval for their generic drug prior to expiration of the patent.[6] This was the main proposal favored by developing countries.

However, the U.S. noted, among other arguments, that the proposed interpretation of Article 30 would violate the Article 30 requirement that exceptions not unreasonably prejudice the legitimate interest of the patent holders (U.S. Department of State 2002). It suggested two variants on this proposal: either a waiver on the obligations of TRIPS Article 31(f) or a moratorium on dispute settlement on the same provision. Neither of these proposals found favor with developing countries, which preferred the greater legal certainty conferred by an authoritative interpretation of the agreement. A waiver is normally time limited, subject to periodic renewal and negotiation of conditions. Likewise, a moratorium on dispute settlement would also normally be time limited. Crucially, instead of conferring cover by means of an agreed exception, a moratorium would also have still left members exporting drugs produced under compulsory license technically in breach of the agreement.

Relying on exhaustion and differential pricing. Another, earlier approach promoted by developing countries before the Doha Ministerial was to facilitate

deeper price discounting in developing countries, that is, by boosting incentives for patent-holders to price-discriminate across markets (after the Ministerial, they mostly favored the Article 30 solution above).[7] This approach relied on the existing flexibility under the TRIPS Agreement for each country to establish the terms under which property rights are exhausted in its own territory (see box 10.1). For instance, the U.S. has adopted the principle of national exhaustion: patented drugs initially marketed outside the U.S. cannot be resold on the U.S. market without the express permission of the patent holder. The EU has adopted the principle of regional exhaustion covering all EU member states. National (or regional) exhaustion facilitates market separation, hence price discrimination across national markets, since patent holders have a profit-incentive to charge a profit-maximizing price in each market.

There are problems with this approach, however, all related to the lack of incentives for drug companies to serve the markets of the poorest countries in the first place. First, given the very limited ability to pay for essential medicines in the poorest countries, the profit-maximizing price may not even constitute a tiny mark-up over marginal cost. Even priced at marginal cost, essential medicines may be prohibitively expensive for many developing country consumers. Second, drug companies feared that deep price-discounting in developing countries would undermine their ability to charge a profit-maximizing price in developed country markets. They argued that public health agencies in developed countries that purchase large volumes of essential medicines would press their suppliers to offer discounts similar to those offered to developing countries. This fear would seem unwarranted, however; generic equivalents of drugs patented in the Western world were available for years in places such as India at a fraction of the price charged in the developed countries, without these price differences leading to a collapse of prices in the rich world. That said, from the point of view of the companies, the sorts of complications created by price discrimination between industrial and developing country markets may override the negligible profit opportunities available on sales to developing country markets. Third, during a severe health emergency, drug companies may prefer, in terms of their image, to present price discounting as a donation motivated by humanitarian concern for the very poor and very sick, rather than profit-maximizing price discrimination (donations are not a perfect substitute in any case, in view of problems with their scope and sustainability).

Using compulsory licensing for other than the domestic market. The third proposed solution referred to a permanent amendment of the requirement under Article 31(f) that production under a compulsory license be predominantly for the domestic market, to allow some countries to supply drugs to other countries without manufacturing capacity at lower cost. Again, this solution opened the possibility that some of these drugs might find their way into developed

countries' markets—although it should be noted this problem would have also existed in the case of an Article 30 solution.

The U.S. sought to limit the scope of diseases, medicines, and beneficiaries to be covered because they were concerned about an agreement being abused for "industrial policy objectives." There was a long debate about whether the discussions during the Doha Ministerial had focused on the few always-named diseases (AIDS, tuberculosis, malaria, and "other epidemics") as argued by the U.S. and a few other countries, or whether they referred to a broader set of diseases ("public health concerns") as argued by the developing countries.

The interim solution

On August 30, 2003, the U.S. joined the consensus, enabling the adoption of a waiver to TRIPS Article 31(f). Under the waiver, patented drugs may, on certain conditions, be produced by a compulsory licensee exclusively for export into countries that lack domestic drug manufacturing capacities. U.S. agreement to the deal was secured by the Chair's reading a written statement to the effect that the flexibility being granted to developing countries was to protect public health and not to pursue industrial and commercial policy objectives through compulsory licensing. The statement also referred to 11 countries that had voluntarily agreed to opt out of using the agreement except in situations of national emergency or other circumstances of extreme urgency or in cases of public noncommercial use.[8] Additionally, in the text of the decision itself, a number of developed countries indicated that they would not use the system as importing members.[9]

Under the deal, all LDCs are entitled to import drugs from other members under compulsory license; other importing members must notify the WTO of their intention to use the system, although no approval is required. Some developed countries (such as Canada, Norway, and those of the EU) are also currently in the process of implementing changes to their laws to enable their domestic generic industry to export to developing countries. Developing countries that still enjoy the TRIPS transitional provisions will need to issue a compulsory license to export drugs under the system after 2005, when they must fully implement patent protection for pharmaceuticals. Both importing and exporting members are obliged to provide information on their use of the system for transparency purposes.

Compulsory licenses issued by the exporting member must be limited to the amount necessary to meet the needs of the importing member, with the entirety of production exported to that country. In addition, there are several measures designed to prevent products leaking into the markets of other countries, including:

- Products produced under the license are to be clearly identified through specific labeling or marking. Suppliers should use special packaging or special coloring/shaping of the products, to the extent feasible and without a significant impact on price.

- Importing members must take reasonable measures within their means to prevent re-exportation of the products (technical and financial cooperation should be available on request).
- All members must ensure the availability of effective legal means to prevent the importation into, and sale in, their territories of these products.

While this deal originally took the form of an interim waiver from the existing rules on compulsory licensing under TRIPS, the TRIPS Council was instructed to initiate work on an amendment to the TRIPS Agreement to replace the waiver, with a view to its adoption by the end of June 2004. This is still ongoing, but progress is difficult. In particular, controversy has arisen over the status of the Chair's statement made at the time the U.S. accepted the deal: the U.S. argues that it should form part of the amendment, but most others are refusing on the grounds that the amendment should be based on the agreed legal text only. A further disagreement has emerged about whether the legal solution takes the form of a footnote to the text (the U.S. preferred option) or a new paragraph in Article 31. The latter is favored by developing countries as it affords greater legal clarity and certainty. Members have now agreed to extend the deadline for approving an amendment to March 2005.

The solution has attracted criticism from a number of NGOs on the basis that it still fails to provide sufficient flexibility for developing countries. While some of this criticism is based on the premise that pharmaceuticals should be excluded from patent protection altogether, others criticize particular aspects of the scheme—for example, the notification requirements before using the system are argued to be too burdensome and in need of revisiting. The greatest concerns, however, have been expressed about additional conditions being placed on compulsory licenses in the context of preferential free trade agreements (FTAs). The U.S. in particular has included a range of TRIPS-plus provisions in its recent FTAs, which, *inter alia*, place additional limitations on the use of compulsory licenses and extend the effective term of protection for pharmaceutical products (chapter 13).

Alternative approaches

Just as countries (such as Brazil, Canada, and the U.S.) [10] have in the past used the threat of issuing a compulsory license to negotiate reduced prices from pharmaceutical patent-holders, this solution might also give patent-holders stronger incentives to supply the poorest countries in health crises at a price at (or even below) marginal cost. A regime capable of preventing re-export of deeply discounted products from the poorest countries to the rest of the world may also increase the willingness of drug firms to price-discriminate across markets. The simplest, most natural regime may be national exhaustion, that is, a complete ban of parallel imports from poor to rich countries. A more complicated approach would be to allow developed countries to impose an appropriate tariff against drug re-exports (Brown and Norman 2003). The

bans or the tariffs could be a powerful instrument—in terms of both implementation and economic benefit. They could potentially be used as the basis for arguing for reduced terms of patent protection, as drug firms would have the opportunity to make profits on both developed and developing markets. Lastly, assistance organizations could also exercise additional controls when distributing drugs, in order to minimize the emergence of gray markets in essential drugs.

In any event, these solutions will be insufficient if not combined with aid (subsidized purchases of essential medicines) because even generic drugs offered at marginal cost remain prohibitively expensive in the poorest countries. For example, a generic package of HIV/AIDS drugs currently costs about $200 annually. While considerably below the $12,000 charged in developed countries, such a sum is a substantial share of the GDP per capita in the poorest countries severely affected by the AIDS epidemic. Moreover, this gap is not covered by insurance; health insurance coverage in most developing countries is confined to a small share of the population, the people with higher incomes.

From an economic perspective, the best approach to intellectual property in the drug industry would be to subsidize research and development and to grant no patent rights (or to grant patent rights and subsidize production up to the point where the patent-holder maximizes profits by setting price equal to marginal cost). However, this approach seems out of reach for a long time.

In fact, the international extension of intellectual property rights, as it applies to drugs, may progressively become (as the effect of TRIPS-induced patent protection will be felt mainly in the future) welfare-reducing from a world perspective and particularly from a developing country point of view. This is because most developing countries have virtually no ability to contribute meaningfully to the costs of developing major drugs, and there is little worldwide gain in terms of new product development funded by developing country purchases.[11] By contrast, the cost of drug protection to developing countries may increase because the monopolies created by the extension of patent protection may progressively cut many developing countries off from essential medicines. In sum, no innovation gain may ultimately compensate the monopoly-related loss brought about by extending patent protection to the developing countries. A related and important point is that the research priorities of pharmaceutical companies are based on rich-country demands. They thus concern lifestyle drugs and diseases that do not represent the heaviest health burden in poor countries—raising the crucial issue of the alternative policy mechanisms that could promote research and development specific to poor country needs.

Ideally, dealing with health crises would have been achieved by not including medicines, essential or otherwise, in the TRIPS Agreement, and by encouraging countries to use their domestic regulatory process to enforce property

rights. Then the use of drugs in the developing countries would have risen from almost zero to a point where price equals marginal cost, while, in the developed countries, the prices paid by consumers and the incentive to innovate would not have been disturbed.

The agreement reached on the interpretation of TRIPS Article 31 is an approximation of this solution. How good an approximation remains to be seen. In this context, it should not be forgotten that developing countries could have unilaterally suspended the enforcement of the TRIPS Agreement as it pertains to essential medicines. They would have run the risks of the U.S. and EU retaliating and withdrawing concessions of equal value. The blow to the multilateral trade regime would have been enormous—for all WTO Members.

Interpreting the TRIPS regime on geographical indications

Geographical indications (GIs) are place names (or words associated with a place) used to identify the origin and quality, reputation or other characteristics of products. GIs have a long history of controversial negotiations, dating back from the first (and failed) effort to include the word "origin" in the 1958 Lisbon Conference for the Revision of the Paris Convention. Similarly, their inclusion in the TRIPS Agreement was so difficult that the only way to avoid blocking the TRIPS negotiations was to agree to further talks—hence the mandate that appears on the list of negotiating issues in the Doha talks. GIs are the only TRIPS issue mentioned in the July 2004 Doha Work Programme framework as part of the continuation of the ongoing consultative process on implementation and as an issue of interest, but not agreed, in agriculture.

Under the TRIPS Agreement, GIs must identify goods with "a given quality, reputation or other characteristic essentially attributable to its geographical origin." GIs move thus beyond the usual concept of "appellation of origin" in two important ways. They may identify a particular geographical area through words and pictorial symbols, not necessarily through the place name itself. They refer not only to quality, but to a much broader concept of reputation or characteristic that can cover, for instance, local innovativeness (craft goods) rather than physical characteristics emanating from climate or soil quality—as long as this reputation or characteristic is tied to a unique geographical origin.

The TRIPS Agreement creates two layers of GIs protection: a basic one for products other than wines and spirits, and a higher one for wines and spirits.[12] In the latter case, it requires WTO Members to prevent the use of GIs identifying wines and spirits that do not originate in the place indicated, even where the true place of origin is indicated or the GI is used in translation or accompanied by such expressions as "kind," "imitation," or the like. It also mandates negotiations concerning the establishment of a multilateral system of notification and registration of GIs for wines and spirits eligible for protection in those Members choosing to participate in the registration system.

This two-layered GIs structure has generated international and domestic tensions—not surprisingly because exclusive rights emanating from GI-based production may enhance export prospects and raise value added (monopoly rents) for those regions that can establish distinctiveness of this kind. International tensions have been visible since the 1996 Singapore Ministerial Conference, which had to address the question of extending the GIs higher protection for wines and spirits to other products. This was based around a provision in the Agreement (TRIPS Article 24.1) mandating further negotiations on higher protection for individual GIs (not related to wines and spirits). The meaning of this provision was the subject of much debate, with some members arguing that the reference to higher protection for individual GIs did not provide a mandate to negotiate extension of such protection to an entire new category of products.

In 1998 the EU mixed the two mandates, by proposing a register not limited to wines and spirits (opening the door to products such as cheese, chocolates, beer, and embroidery designs). This register was conceived as a complex process of registration and challenges, and as a source of substantive obligations for all WTO Members as they would be required to protect all GIs in the register (which is thus not a mere database). In particular, registration itself would create the presumption of eligibility, thereby restricting the scope for flexibility on the part of members. Australia, Canada, Chile, Japan, New Zealand, and the U.S. (joined later by Argentina and Mexico, among others) argued that the EU proposal interfered with the WTO Members' right to choose appropriate national implementation methods (Members are required only to provide "the legal means" to protect GIs) and that it raised unreasonable administrative burdens. These countries proposed a voluntary register without legal effect, but which participating Members would agree to refer to when making decisions regarding national protection of particular GIs.

These international tensions are also mirrored in domestic tensions. For instance, the EU negotiators worked hard to broaden the scope of the register to products beyond wines and spirits (foodstuffs, tobacco products, artisan goods, goods based on collective knowledge, and even services) with the aim of trying to get support from more countries (Bulgaria, the Czech Republic, Egypt, India, Mauritius, Pakistan, Slovenia, and Sri Lanka). But these efforts are attracting increasing criticism from the EU wine and spirits sector, which fears that the disciplines they would like to get for their own products will be diluted.

These tensions make GIs quite different from drugs because it is by no means an issue pitting developed against developing or poorest countries. Instead, it is largely one in which some exporters see potential benefits for their producers by claiming distinctive place-based qualities and thus exclusive rights to certain terms, arrayed against other exporters, who perceive that their commercial interests lie in being able to continue to use those same commercially

valuable terms—which they consider to be generic, or common, names for certain types of products—to market their products.

That the disagreements remain wide implies that cross-issue negotiations may be required to achieve consensus. In particular, it is often said that the EU and other participants preferring a strong system will need to offer other concessions, especially in agriculture. However, this tradeoff is a potentially dangerous one—market access granted for agricultural products could be undermined where foreign producers are not permitted to use commercially valuable product descriptors.

Economic perspectives on geographical indications

Geographical indications share many features of trademarks, another form of IPR.[13] Both aim at guaranteeing the ultimate origin of a product (Landes and Posner 1987). By permitting firms to attach their reputation for quality to particular symbols or expressions, trademarks offer a solution to the fact that information is costly to acquire and asymmetrically distributed between consumers and producers. In the absence of trademarks, consumers would have higher search costs for finding quality of the desired level and, if they are risk-averse in the presence of uncertain information, would consume less. Hence selling under trademarks gives firms an incentive to sustain quality, but it also provides incentives to seek out profit-maximizing market segments (such as consumers of high-fashion goods at low volumes versus consumers of low-quality products at high volumes). The result is extensive product and quality differentiation. This is reinforced by the fact trademarks induce new firms with distinctive products to enter markets, providing the foundation for interbrand competition among firms in similar but differentiated products—all key processes for market deepening and growth in developing countries.[14]

As GIs bear all the above characteristics, with potentially stronger, more direct information content on quality or reputation, they may be expected to have some pro-competitive and pro-development features, and to provide global consumers lower search costs, greater choice, and a deeper continuum of quality.

However, there are important differences between GIs and trademarks. Primarily, a trademark attaches to a firm regardless of its location, whereas a GI designates a particular area, within which many firms may have rights to its use. In this context, a number of complications arise.

Even though a product may come from a region that has a particular reputation, the product of specific firms may still be differentiated by quality (and therefore require supplemental trademark protection). Some wines from Bordeaux are surely better than others, and their relative price premia reflect both the geographical designation and their individual reputations. In this context, GIs are hardly sufficient to encourage competition among member firms in quality. Rather the firms might be expected to migrate toward some average or

least-cost quality, meaning that GIs may not carry with them automatic pressures among firms to sustain quality.[15]

There is also no necessary restriction on entry of firms into the area covered by a GI, implying that popular ones may become congested in a "commons" overuse of the joint property right. Under an arbitrary initial allocation of a fixed bundle of rights, participants may be expected to achieve maximum rents from the location and improve incentives for maintaining quality. However, this raises at least two difficult—and costly—issues. First, many regions can be expected, prior to the adoption of GIs, to have both firms that are solidly within some notion of its boundaries and firms that are on its margins. Determination of whether the latter firms should be awarded GI use is liable to be costly and litigious, as experience has suggested in the case of Australian wine regions.

Second, and related, the very definition of how broad a region a GI should cover is difficult. Consider the use of a GI to register and protect traditional clothing designs. It is likely that many villages or provinces within a developing country have skilled artisans making such clothing. It might be sensible, therefore, to register a broad territory (even the country) as a GI in order to economize on registration and marketing costs. However, the broader the territory, the more difficult the coordination problem, and the greater the incentives to cheat on quality.

Put differently, while GIs solve one market failure (information asymmetry) they give rise to another (coordination difficulties). Producer associations may be capable of managing this difficulty, but they may equally act in an exclusive and monopolistic fashion, reducing the net gains (and their diffusion) to small firms and potential entrants. At the not-so-unlikely extreme, authorities may need to be involved in the definition of specific geographical areas and GIs.

As a result, the fixed costs of organizing and sustaining a system of GIs are far higher than in the case of trademarks. Little surprise, then, that while there are hundreds of thousands of registered trademarks in the world, there are fewer than 1,000 registered GIs (Fink, Smarzynska, and Spatareanu 2003; Escudero 2001). In this regard, small regions in poor developing economies may not be able to marshal the resources needed for an effective use of geographical indications on a global scale. Technical and financial assistance, both for identifying appropriate market niches and for establishing the right forms of registration and marketing, may be central in this area of TRIPS.

GIs and the developing countries

A number of developing countries have indicated interest in expanded protection for GIs on products other than wines and spirits. For some, GIs are seen as a useful way to differentiate their agricultural products and benefit from niche markets (Sichuan pepper, Madagascar vanilla). For basic agricultural products,

this may be the best—or often only—way to negotiate higher prices. For others, GIs are seen as an important mechanism for defining and protecting the commercial fruits of certain forms of traditional or collective knowledge. Undeniably there is a link here, for GIs may be scaled to incorporate all local users of knowledge regarding the exploitation of natural resources or design traditions. Indeed, GIs are the only form of TRIPS that provides this kind of collective right, albeit based on production location rather than underlying knowledge. They also have the benefit of being not limited in time, as opposed to copyright or patents. Thus there is scope for combining these two concepts in order to reduce poverty. However, the coordination costs noted above for GIs are of much higher magnitude in the area of traditional knowledge, and it is not clear whether these costs would be offsetting or cumulative (Luthria and Maskus 2003).

In sum, this analysis suggests that determining whether particular countries or regions would benefit from a rigorous multilateral and extended system of registration of GIs is not at all straightforward, all the more because existing GIs regulations are notoriously arcane and difficult to implement in a costless way (Rangnekar 2002).

However, it is possible at this stage to set out some useful guideposts for thinking about this question. First, GIs are clearly most applicable to agricultural goods and foodstuffs. Their application to designs, services, and traditional knowledge are less concrete. Second, the establishment of GIs on their own is likely to be insufficient to provide significant incentives for building markets and exports. Complementary technical and financial assistance may be required. More centrally, other forms of TRIPS (trademarks, trade secrets, design protection) and competition regulation are required complements. Third, careful consideration needs to be paid to the tradeoffs between economies of scale (large area GIs) and problems of coordination. Fourth, because most conceivable GIs would implicate firms that are already producing with some access (perhaps remote) to the associated region or knowledge, instituting a system of GIs will generate significant redistribution of opportunities and wealth across actors—a key difficulty inhibiting these newcomers in the GI field, the developing countries to benefit from GIs.

Some additional factors should be borne in mind in the context of the TRIPS negotiations on GIs. Terms are normally required to have a history of domestic protection before being eligible for recognition by others as a GI. For some developing countries with no history of IPR protection, establishing that their terms warrant recognition as GIs on a TRIPS register may thus not be a straightforward prospect. Equally, developing countries should weigh the relative benefits of international protection through a register for their own GIs against the costs of having to ensure protection at the national level for the large number of GIs likely to be claimed by the EU and others. These costs are both administrative (and unlikely to be a development priority) and actual—as

producers and exporters incur costs, and risks of lost market share, in finding different terms to describe their products.

The proposed register would arguably severely limit the existing flexibility under TRIPS for countries to determine at the national level, taking account of local conditions (whether a domestic consumer is likely to be misled as to the origin or nature of the products by the use of a certain term), whether any particular term qualifies as a GI in their market. That is, while TRIPS currently provides for the protection of GIs, it does not stipulate *a priori* that any given term actually qualifies as a GI—that is left to each member to determine. The effect of a register would be that certain terms would be considered to be automatically protected as GIs in all countries, with exceptions only for countries that specifically objected. Given the likely volume of registrations, developing countries could find themselves having to protect a large number of terms simply because they were not able to lodge objections in time.

In light of these uncertainties it is surprising that so many developing countries are advocating for a multilateral registration system with strong legal effect. For most nations, especially the poorest ones, it is probably advisable at this point to maintain as much flexibility as possible. This would mean not linking themselves to the extensive registration system, and taking advantage of the limitations on GIs set out in TRIPS.

However, as with the U.S. and pharmaceuticals, this process is already happening in the context of bilateral or regional agreements pursued by the EU—as illustrated by the bilateral wine agreement with Australia or the GI element in the free trade agreements with Chile and South Africa. The EU is also pursuing higher protection for other terms that it deems to be "traditional expressions" in the context of these and other preferential agreements.

Conclusion

Should IPRs have been included in the WTO? From an economic point of view, probably not, because IPRs require a very delicate balance of market forces and public action—a balance unlikely to be the same for countries with wide differences in terms of income and technology, all the more because obligations of the TRIPS Agreement also tend to be "one size fits all," taking no account of levels of development and varying interests and priorities.

That said, the TRIPS Agreement would appear to be here to stay. And it is not without areas of actual or potential interest for developing countries (although the balance of costs and benefits will vary among developing countries and according to the issue), nor is it without some flexibility in its provisions. However, the flexibility provided for implementation of TRIPS seems yet insufficient on paper, and even more so in practice, and the assistance provided is clearly inadequate. Just as for access to medicines, there is a clear case for revisiting more of the rules to determine their impact on developing countries and whether any additional flexibility is required. This issue is discussed

further in the following chapter on special and differential treatment. In other cases, the Agreement provides for flexibility, but certain WTO Members—the U.S. on drugs, the EU on GIs—are trying to narrow unacceptably the scope of that flexibility. Developing countries should resist this trend—that it is taking place in the context of preferential free trade agreements (chapter 13) should give countries pause to reflect on the value of those agreements versus multilateral rules.

Chapter 11

Special and differential treatment

Previous chapters have focused on the issue of what, from a development perspective, should be the subject of trade rules and have considered the sort of trade rules on those issues that make sense from a development perspective with regard to specific—and controversial—issues on the Doha Agenda: TRIPS and the Singapore issues. But the debate over what sort of trade rules make sense from a development perspective applies across the entirety of WTO agreements, and is at the heart of the debate over special and differential treatment (SDT).

Broadly speaking, SDT has three main dimensions. First, exemptions from specific WTO rules, implying either greater freedom to use restrictive trade policies that are otherwise subject to WTO disciplines, or exemptions from rules requiring the adoption of common regulatory or administrative disciplines. Second, making promises to provide technical and financial assistance to help developing countries implement multilateral rules binding, and thus enforceable. Third, expansion in development aid to address supply-side constraints that restricted the ability of firms to take advantage of improved market access.

The SDT agenda thus encompasses both the issue of the appropriateness of the rules themselves for developing countries and the need for developed countries to ensure provision of adequate assistance to implement those rules. While developed countries have tended to focus on the latter issue, many developing countries have also argued that the rules are unbalanced. There is a strong perception that the rules have been imposed on them through the Single Undertaking (the fact that WTO Members had to sign all the Agreements negotiated during the Uruguay Round, with the exception of the Agreement on Government Procurement) without their having been given the opportunity to participate meaningfully in their design. Many also argue that they did not understand fully what they were signing.

Discussions in the WTO have been plagued by both procedural and substantive disagreements. A fundamental problem is the absence of serious analysis underpinning the SDT debate. Proposals rarely, if ever, offer a robust rationale in terms of developmental significance or a justification for what is being sought. The assumption behind many of the proposals seems to be that development will be best served by the lowest possible level of policy commitments in the WTO. That is, if obligations can be diluted or ways found of ensuring they do not apply, this is beneficial for development. Aside from the problem already highlighted—that in the contractual environment of trade negotiations, the price of exemption has too often been loss of bargaining power—a case can be made that exemption may not confer development benefits.

This chapter considers whether different treatment is justified on development grounds—first, in the context of rules on traditional trade policy instruments and second, on those with a regulatory dimension. It also offers some thoughts on moving forward on SDT in the WTO.

Is there a development case for different treatment on "traditional" trade policy instruments?

For agreements and disciplines that pertain to the bread and butter of the WTO—traditional trade policies such as tariffs, quotas, and export subsidies that can be implemented readily—a good case can be made that developing countries should abide by the same core trade policy disciplines that apply to developed countries. The case for using traditional trade policy instruments to achieve economic development objectives is weak, and some of the exemptions found in the GATT for "more favorable" treatment of developing countries are not actually beneficial (box 11.1).

Infant industry protection

Some developing countries have asked for additional flexibility to use GATT Articles XVIII:a and XVIII:c to raise tariffs or impose quotas to afford protection to infant industries.

However, infant industry protection has a poor record of encouraging the growth of competitive sectors and kick-starting broader industrial development. It is more likely to create vested interests that seek to prolong protection, imposing costs on the domestic economy and prolonging misallocation of resources. Such protection also puts the government in the position of "picking winners," requiring that it be prepared to set—and stick to—a clear timetable for reduction of protection and to allow firms that cannot become viable within that time period to fail. For this to work, a strong framework of accountable, stable, and sufficiently expert institutions must be in place, a particular challenge for many of the poorest developing countries.

Using trade policy to promote industrial development is also an outdated and self-defeating strategy in a world of tradable services, increased foreign

Box 11.1

Major provisions allowing greater freedom to use traditional trade policies

Source: Hoekman and Kostecki 2001.

Infant industry protection

GATT Articles XVIII:A and XVIII:C allow for removal of tariff concessions or use of quotas if they are necessary to establish an industry in a developing country. Compensation must be offered to countries that would be negatively affected.

Balance of payments protection

Article XVIII:b allows for trade measures to be imposed to safeguard the balance of payments. In contrast to Articles XVIII:A and XVIII:C, surveillance and approval procedures are less burdensome, and there is no need to offer compensation to affected countries. As a result, since 1967 no country has invoked the infant industry provisions of the GATT, but numerous countries have made use of Article XVIII:b. Most developing countries had no need to invoke GATT articles to protect their industries, as their tariffs generally were not bound or were bound at high levels. However, GATT Article XVIII:b was needed to use quotas, as these are generally prohibited by the GATT. In the Uruguay Round, Article XVIII:b was revised, and surveillance procedures were tightened. WTO Members must now publicly announce time schedules for the removal of restrictive import measures taken for balance of payments purposes and in principle use price-based measures (tariffs).

Subsidies

The WTO Agreement on Subsidies and Countervailing Measures (ASCM) attempts to distinguish between subsidies—defined as financial contributions by government—that can be justified on market failure or noneconomic grounds and those that distort the incentive to trade in a major way. Nonspecific subsidies—defined as those where access is general or eligibility is automatic on the basis of clearly spelled-out, objective criteria—are nonactionable; that is, they are permitted and cannot be countervailed. Subsidies that are contingent on export performance or on the use of domestic over imported goods are prohibited (except for a group of poor countries—see below). Measures that in principle are permitted but create “serious prejudice”—defined to exist if the total *ad valorem* subsidization of a product exceeds 5 percent, if subsidies are used to cover operating losses of a firm or industry, or if debt relief is granted for government-held liabilities—can be countervailed or give rise to dispute settlement. The same may be possible if it can be shown that a subsidy has had a negative effect on a partner’s exports.

LDCs and countries with GNP per capita below $1,000 are exempt from the prohibition on export subsidies. The prohibition on subsidies contingent on the use of domestic goods (local content) does not apply to developing countries for a period of five years (eight years for LDCs). Developing countries that have become competitive in a product—defined as having a global market share of 3.25 percent—must phase out any export subsidies over a two-year period.

direct investment (FDI) flows, and global production chains (Hoekman, Michalopoulos, and Winters 2003). Openness to trade and FDI allows developing countries to improve the productivity of domestic firms, increase the efficiency of domestic resource allocation, and reap the positive externalities associated with learning through the diffusion and absorption of technology (see box 11.1). Protection, by contrast, is more likely simply to retard technological development and inhibit growth.

From an economic viewpoint, the drafters of the GATT were therefore justified in placing relatively stringent conditions on the use of trade policy for industrial development purposes, and in particular, on being most restrictive on the use of quantitative restrictions and local content requirements. Moreover, in cases where import competition proves too fierce, the WTO allows for safeguards—"emergency" and transitory protection. The conditions that the WTO imposes on the use of safeguards are useful because they help to enhance certainty and ensure that there is a good case for intervention.

Subsidies

Subsidy-type policies will generally be less distorting (more efficient) than trade policy in offsetting an externality or pursuing a noneconomic objective. WTO rules do not constrain the ability of governments to address market failures through subsidies or taxes. Interventions that are horizontal (general), not sector-specific or industry-specific, are deemed nonactionable under WTO rules. Consumption subsidies that do not affect the prices of tradable goods in a significant way are not covered by WTO rules. Thus, for example, food subsidies, household energy subsidies, and health and education programs are not vulnerable to WTO action. Similarly, factor-use subsidies—for example, to the wages of workers taken directly off the unemployment register—are not covered unless they are configured so as to make them *de facto* subsidies to specific sectors. Overall, therefore, the sorts of subsidies of most use in fighting poverty and offsetting market failures are not constrained by WTO disciplines (McCulloch, Winters, and Cirera 2001).[1]

In other cases the flexibility in WTO rules regarding subsidies can impose difficult choices on governments. For instance, the poorest countries (with a per capita income below $1,000) are exempt from export subsidy disciplines—that is, for more than 70 WTO Members, export subsidy disciplines do not bite. This flexibility is somewhat paradoxical—the poorest countries are given freedom to use instruments that they can ill afford and that raise domestic prices and adversely affect domestic consumers. (Unless the subsidized goods are produced in significant amounts by the poor, such subsidies are likely to worsen poverty.) However, governments may be attracted to export subsidies as a means to overcome the threshold barriers to engaging in an activity or to developing new lines of business—and these barriers are likely to be many in the case of the poorest countries. (Once a product line has become successful enough to lead to exports that exceed the market share threshold set out in the Agreement on Subsidies and Countervailing Measures, serious consideration would need to be given to eliminating the subsidy in any event). In sum, WTO rules on export subsidies leave to the governments of the poorest countries the very difficult task of assessing whether the possible gains from such subsidies outweigh their costs for the domestic economy and for the poor. Such assessments require stable and competent institutions and governance structures

(particularly given that sectoral producer interests can be adept at portraying themselves as the national interest).

The WTO prohibition on export subsidies is also a means of avoiding subsidy competition between governments. Such competition not only may lead to the transfer of rents to companies that can play governments off against each other, but would almost certainly harm the poorest countries, which cannot afford to play this game. Experience with export subsidies in agriculture all too clearly demonstrates the harm done to the poorest countries by such subsidies—as well as their diversion of domestic resources toward powerful vested interests. Indeed, the challenge in the Doha Round is to tighten the rules to prevent the use of such subsidies by those who can afford them—as best illustrated by developed countries in agriculture—not to extend the right to use them to other WTO Members. Developing countries do not benefit from greater freedom to use such bad and inefficient policies.

Given that a substantial dose of flexibility exists in the system (safeguards, general subsidies to address market failures), committing to abide by the same procedural rules on the use of traditional trade polices that pertain to developed countries makes good sense, as it will both benefit consumers and enhance welfare in developing countries.

Is there a development case for different treatment on regulatory-type rules?

But what of WTO rules that relate to regulatory disciplines and require investments of resources to establish (or strengthen) implementing institutions? These are fundamentally different from the traditional trade policy instruments above. The ability to implement and benefit from WTO disciplines on regulatory matters varies from country to country, depending on size and income and on factors such as institutional capacity and available human resources. There may also be uncertainty regarding the appropriateness of particular policy instruments for individual countries, given differences in capacity and domestic priorities.

Disciplines on regulatory matters thus pose quite different cost-benefit calculations for developing countries. This heightens the need for stringent application of the threshold tests of whether the issue should be included in the trading system at all.

First, where the implementation costs of an existing or envisaged agreement are very high and the tests—particularly of whether an agreement is serving domestic trade interests and development objectives—are not satisfied, the question is not so much one of how to manage difficulties in implementing rules through SDT, but whether the rules themselves belong in the trading system—as best illustrated by the Singapore issues left off by the Doha Round (see chapter 9).

Second, there are a number of existing agreements where the market access test is met but the test of alignment with broader development priorities is

not—that is, where the rules are market-access related but the development benefits are only a longer term priority. For such agreements, there is a case for flexibility in terms of their application. Flexibility must be proportionate: the more long-term the development benefit, the more extensive the flexibility. Just as the implementation costs differ among countries, so too does the alignment with development priorities—for more advanced developing countries the development benefits may be more likely to be realized in the short to medium term. There is also arguably a greater case for flexibility where the impact on others of nonimplementation will not be great, or not great in comparison with the size of the implementation effort required. Of course, this consideration is also related to the third test about the value of WTO agreements in contexts where the value of reform is raised if others reform as well, or in the achievement of global public goods (see chapter 8).

These considerations are particularly relevant in the case of the poorest countries with limited participation in international trade. For example, the poorest developing countries could be given considerably greater flexibility in terms of their obligation to implement the Customs Valuation Agreement. Implementation for these countries could be on a best endeavors basis for an extended period, in recognition of the fact that this agreement is likely to take a disproportionate share of government resources to implement and is really only a longer term priority. However, implementation costs may be lower and the agreement more in line with overall development priorities for more advanced developing countries and thus more limited flexibility may be appropriate (Mattoo and Subramanian 2004).

Third, implementation of a number of other agreements may be resource-intensive, and there are differences of view among countries about the development benefits of the agreement. For example, in the case of TRIPS there are differences of view about the scope for developing countries to gain from the agreement, as well as the extent to which they might be harmed by it (see chapter 10).

Where implementation is costly but development benefits are greater, agreements for those countries could be pursued along the lines of the model proposed for trade facilitation (see chapter 9). Under that model, countries could negotiate implementation dates individually (per GATS precommitments), and as a package with developed country commitments to provide adequate technical and financial assistance. Different dates could be agreed for different provisions—a useful flexibility in areas such as TRIPS where countries' priorities may vary considerably across the agreement For example, for some developing countries, pharmaceutical patent protection may not be a priority, but for those with geographical indications or software industries, other intellectual property rights may be more so. Technical reviews would assist in ensuring that assessments on effectiveness of assistance and capacity to implement were based, to the extent possible, on sound analysis, and a peace clause

would provide further flexibility with regard to the timing of the application of dispute settlement. Negotiated commitments on assistance by donors could ensure more assistance, better follow through, and improved coordination.

From a WTO systemic perspective, such resource-intensiveness, for both developed and developing countries, is not necessarily a bad thing. First, it serves as a natural brake on the number of new issues and agreements that can be pursued under the trading system at any given time. This should help keep the development of multilateral trade agreements more in step with the political and financial commitment of developed countries and with the political and technical capacity of developing countries to implement them.

Second, for the justifiable WTO agreements (those where the trade and development tests are met) resource-intensiveness is an opportunity to make these WTO agreements an effective lever to marshal the required level of international assistance. The WTO agreements on standards (Sanitary and Phytosanitary Measures, or SPS, and Technical Barriers to Trade, or TBT), for instance, are very burdensome to implement. However, they serve the trade interests of developing countries in helping to safeguard their market access interests (see chapter 6) and are not counter to their overall development interests (higher standards are also desirable at the national level of the developing countries). It could be argued that while there are gains in terms of raising domestic standards, meeting OECD-level standards might not be such a high development priority. However, the inability to meet these standards has ongoing costs in terms of lost trade opportunities and the loss of a potential means of generating growth—and of generating resources for achieving other development priorities.

If the real answer is greatly increased assistance, how can WTO agreements help achieve this? Both the TBT and SPS agreements are interesting illustrations because they include different kinds of obligations on developed countries to provide assistance (box 11.2). The TBT obligations are relatively strong—members "shall" provide assistance—although the proviso "on mutually agreed terms and conditions" means that it is not a blank check. However, it is worth noting that no developing country has made a request for assistance under these provisions (Rotherham 2003).[2] The SPS obligations are weaker in some respects—members are to "consider" technical assistance where developing countries face substantial investments in fulfilling their standards—but have likewise a poor record of meaningful implementation.

What can be done to strengthen these provisions?[3] One approach would be to make the provision of assistance to the poorest developing countries mandatory. For example, contributions to an SPS assistance fund by trading partners could be calculated on the basis of a percentage of the value of overall imports in relevant products. These contributions could be set at a certain level per year, or triggered when a developed country introduces an SPS measure significantly affecting the import of particular goods from a developing country.

Box 11.2

Current assistance obligations under the agreements on Technical Barriers to Trade and Sanitary and Phytosanitary Measures

Under the SPS Agreement, members agreed to facilitate the provision of technical assistance to developing countries through bilateral or relevant international agreements. This includes assistance in processing technologies, research, and infrastructure, advice, credits, donations, and grants for the purpose of seeking technical expertise, training, and equipment, and the establishment of national regulatory bodies so that countries can adjust to and comply with SPS measures in their export markets. Where developing countries face substantial investments in fulfilling the SPS standards of an importing member, that member is to consider technical assistance to the extent which would permit the developing country members to maintain and expand their market access opportunities for the products involved.

Likewise, under the TBT Agreement, members shall, on request, grant developing countries technical assistance on mutually agreed terms and conditions regarding the preparation of technical regulations; the establishment of national standards bodies and participation of these bodies in international standardizing bodies; the establishment of regulatory bodies or bodies for the assessment of conformity with technical regulations; information on how to implement technical regulations; the establishment of bodies for the assessment of conformity with standards adopted within the territory of the requesting member; the steps that should be taken by the producers if they wish to have access to systems for conformity assessment operated by governmental or nongovernmental bodies within the territory of the importing member; and the establishment of the institutions and legal framework to enable them to fulfill obligations of membership or participation in regional or international systems for conformity assessment.

Under the trigger approach, affected developing countries could petition specific assistance through the SPS Committee. This might permit both some multilateral scrutiny of the request and the possibility that other members might contribute to the necessary assistance. The trigger approach might also encourage more targeted assistance on the part of donors and limit the scope (to the extent possible) for them simply to shift funds from existing development projects. A tighter nexus between negotiating assistance and standards might have a useful chilling effect, discouraging the adoption of unnecessarily high standards that pose additional implementation burdens on developing countries.

Negotiations for extensions of time to implement should also be provided, for all suppliers to the market, not just major suppliers (smaller suppliers are more likely to have difficultly in implementing new standards). A model such as that proposed for trade facilitation could be considered to draw on expert advice and negotiate appropriate assistance at the same time. Assistance could be delivered on a bilateral basis, or through international organizations, perhaps using the recently created International Standards and Trade Development Facility.[4] A review process similar to that proposed for trade facilitation could also be used—or regular reports from both donors and recipients on the efficacy of assistance could simply form part of the SPS Committee agenda. This type of concrete assistance is likely to be more valuable over the longer

term, is more likely to result in tangible increases of agricultural exports from the poorest developing countries than preference regimes, and would represent a better use of donor resources.

Moving forward on special and differential treatment

SDT for the rules cannot be considered in a monolithic fashion. Not all rules are the same, and their cost-benefit analysis for developing countries varies considerably. The key question is what development purpose exemption would serve, since exemption from the rules is not synonymous with encouraging the development of efficient policies. Instead, the answer is to make the rules in such a way that development concerns and constraints, as well as capacities to undertake obligations, are factored in. And when the rules require actual investments of resources, the guiding principle for answering the two key questions—what SDT to grant and to whom—should be a cost-benefit analysis taking into account the relationship of the issue to trade, the extent of its alignment with broader development priorities, the costs of implementation, and the relative costs to others of nonimplementation.

In the case of rules on "traditional" trade policies, there does not seem to be a strong case for exempting developing countries from WTO rules. Additional freedom to use inefficient policies promises few development gains—and they may cause additional damage to other developing countries (such as subsidy wars). Indeed, rather than seeking greater flexibility to use these policies, the aim of the negotiations should be to remove the SDT that gives rich countries such flexibility—for export subsidies in agriculture and quotas in textiles and clothing.

In the case of WTO rules on domestic regulations, implementation costs can be high, and—more important—a positive cost-benefit balance cannot be taken for granted. Where the implementation costs are high and the trade and development tests are not satisfied, there is a strong case that the issue should not be subject to rules in the WTO. In other cases, assessments of the relative costs and benefits of WTO rules will vary among issues, and careful calculations are needed on an agreement by agreement country basis.

Where the costs are high, the trade test is met, and development benefits are present—but only a longer term priority—and the impact on others marginal, there is a strong case for extensive flexibility. But this flexibility should have some end-point, however distant. If an agreement is such that some WTO Members will never be able to implement it, or it will never be a development priority at any level of development, then it should not be part of WTO rules—it could be pursued in other international fora (chapter 8).

In other cases, where the development benefits are greater or more immediate, a model that calibrated commitments with assistance and gave greater flexibility to countries to determine appropriate implementation periods might be useful. Where implementation costs are high but the WTO rules promise

real and short-term benefits in terms of the trade and development interests of developing countries, full implementation may be desirable but not affordable. In these cases, concrete technical and financial assistance is required to ensure that developing countries can benefit from the rules, and agreements must be made more effective in generating the required assistance—for instance, through mandatory commitments subject to review and linked to implementation requirements of developing countries (and to dispute settlement—see chapter 9). However, making mandatory assistance work is not without challenges—for example, to ensure that such assistance is truly additional and well coordinated (Mattoo and Subramanian 2004).

Implementation costs, trade and development benefits, and impacts of nonimplementation on others are all variables that will also vary depending on the level of development of the country. The important consideration is that assessments of relative costs and benefits be based on sound analysis and not mere political bargaining. Effective SDT will require a pragmatic approach rather than abstract discussion. In the absence of concrete considerations, it can be too easy to slide from one dangerous extreme—"one size fits all"—to another—"one size doesn't fit any, ever."

Introduction of more concrete and usable SDT into the multilateral trading system will be no easy task. There is considerable debate over the approach to be used.[5] The choice of which type of approach is "best" requires considerable thought and discussion. What matters most at this point is first, that WTO Members recognize that capacities and priorities differ hugely across the membership, and second, that this discussion is based, to the greatest extent possible, on robust analysis rather than political bargaining. More information and analysis on the costs and benefits of alternative rules for all countries, and on the distribution of these costs and benefits within countries, are essential (see chapter 12).

In the context of this report, and in particular for market access (part 1 and box 11.3) we have used the concept of "poorest countries" as a way to address the needs of those developing countries that do not qualify as LDCs but are nonetheless low (or very low) income and suffer from a range of serious development challenges. Clearly, there are a wide range of factors that could be taken into account in thinking about which countries might fall under such a heading (see appendix 4), and other approaches may be equally feasible.

Whatever the approach taken, a balance will need to be found between targeting SDT more closely to the actual implementation needs of specific countries and avoiding overly substantial transaction costs and uncertainty. Moreover, in determining SDT eligibility, nonnegotiability once a deal has been reached is of great importance. A crucial contribution of the WTO to world welfare is the promotion of transparency and predictability. These are essential for producers and users of internationally traded goods, for investors, and ultimately for consumers. With this in mind, WTO Members will need to

Box 11.3
Special and differential treatment for market access

The key message from part 1 on market access is that there is a case for SDT for developing countries to allow them to undertake less market opening in goods, services, and agriculture. There is no doubt that the primary responsibility for delivering on market access for development in the Doha Round rests with the developed countries, which—being both primary beneficiaries of the current system and better able to manage adjustment—now bear a special responsibility to remove their egregious support and trade barriers in agriculture, their high tariffs and quotas in nonagricultural products, and their barriers to trade in labor-intensive services.

However, while lesser obligations for developing countries make sense, zero obligations do not. No obligations equals not only no ability to effectively prosecute negotiating interests across the agenda, it also means no ability to use the trading system to promote domestic reform and increase national welfare. The emphasis is on an approach that requires developing countries to participate in liberalization in a way that is both commensurate with their current level of development and likely to serve their long-term development interests.

It is not in developing countries' interests to remain completely outside of the reciprocal bargain that underpins the trading system. Developing countries have real export interests in agriculture, nonagricultural market access, and services to pursue for which they will need to make some—although not equal—concessions in return. Most important, middle-income developing countries are now far too important as markets for each other and for the poorest developing countries to leave their own barriers in place, particularly when those barriers actually harm the domestic economy.

What is expected from developing countries in terms of market access varies depending on their level of development and capacity to bear adjustment costs. Hence the greatest degree of flexibility is granted to the poorest developing countries, given the very serious constraints on their ability to adjust (for example, to reform the tax system to provide alternative sources of revenue as tariffs decline), to devise and provide complementary policies and safety nets, and to establish sound regulatory frameworks to underpin liberalization.

Equally, the implications for what should be done can also vary by sector. The chapters on agriculture, services, and nonagricultural trade all propose concrete ways forward for both developing and the poorest developing countries in this regard.

Finally, preferential market access is not a viable solution for addressing development needs in the context of market access. While the benefits have been, with few exceptions, relatively modest, the costs have been high—in terms of trade diversion from other developing countries, inappropriate specialization, and lost opportunities for domestic reform. Preferences can also prevent developing countries from forming alliances to combat the protectionism in OECD markets that causes real harm to their development interests.

be careful to avoid having SDT merely traded as a "concession" in the negotiation of agreements.

Efforts to make SDT more effective will also require strengthening the mechanisms for regular monitoring of SDT implementation. This should extend to the provision of information on national trade-related priorities by developing countries eligible for SDT, the funding and investment requirements these priorities involve, and the extent to which international and bilateral donors have provided assistance. Some of the proposals above already

include such mechanisms, including as part of mandatory developed country obligations. Equally, whatever approach is eventually adopted on SDT in the WTO, enforcement will be important. One question that arises then concerns the ability of low-income countries to defend their rights in the WTO. This is of course also a more general dimension of participation by developing countries in the system and is dealt with in chapter 14.

Any reform of SDT will also need to be underpinned by greatly increased international assistance—not simply to implement agreements, but also to help developing countries combat the many structural disadvantages they face in global trade. How to increase this assistance, and the priorities for its use, are discussed in the next chapter.

Box 11.4

Key points on special and differential treatment

SDT for the rules cannot be considered in a monolithic fashion. Not all rules are the same, and their cost-benefit balance for developing countries varies considerably.

For rules on traditional trade policies (tariffs, quotas, subsidies, and so on), exemption is unlikely to encourage the development of efficient policies. Additional freedom to use bad policies promises few development gains, and risks harming other developing countries (through subsidy wars).

For rules on domestic regulations requiring actual investment of resources, a cost-benefit analysis should guide the answer to the two key questions: what SDT to grant and to whom? This analysis would take into account several factors: the extent to which the rules are related to trade (market access); the extent to which they are in line with broader development priorities; the costs of implementation; and the relative costs to others of nonimplementation. Assessments of costs and benefits will vary by issue and also according to the level of development of the country concerned. The important consideration is that assessments be based on sound analysis and not mere political bargaining.

- Where the costs are high and the trade and development benefits minimal, there is a strong case that the issue should not be subject to rules in the WTO.
- Where the costs are high, the trade test is met, development benefits are present but only a longer term priority, and the impact on others is marginal, there is a strong case for extensive—but not eternal—flexibility.
- Where the development benefits are greater or more immediate, a model that calibrates commitments with assistance and gives greater flexibility to countries to determine appropriate implementation periods might be useful.
- Where implementation costs are high, but WTO rules promise real and short-term benefits in terms of the trade and development interests of developing countries, full implementation may be desirable, but not affordable. In these cases concrete technical and financial assistance is required to ensure that developing countries can benefit from the rules, and agreements must be made more effective in generating the required assistance—for instance, through mandatory commitments subject to review and linked to implementation requirements of developing countries.