

## A LOOK BEHIND THE MIRROR: STANDARDISATION, INSTITUTIONS AND THE WTO SPS AND TBT AGREEMENTS

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### I INTRODUCTION

The World Trade Organization ('WTO')<sup>1</sup> *Agreement on the Application of Sanitary and Phytosanitary Measures* ('SPS Agreement')<sup>2</sup> and the *Agreement on Technical Barriers to Trade* ('TBT Agreement')<sup>3</sup> represent an ambitious attempt to mediate the classic tension between the use of standards as a mechanism of public regulatory process and their impact on trade flows. Notably, both agreements accord some deference to harmonised standards established by international organisations.<sup>4</sup> Not surprisingly – given differing perspectives on regulatory values and risk management amongst the now 151 Members of the WTO – this deference is by no means absolute. A WTO Member state is free to regulate at a higher standard than an international benchmark provided that it complies with some additional criteria such as a 'risk assessment' which, especially in the case of the *SPS Agreement*, requires proof that the chosen level of regulation is supported by a base level of scientific evidence.

Significant scholarly attention has focused on the suitability of the role of science in this delicate mediating role on a WTO Member state's regulatory autonomy.<sup>5</sup> These analyses focus on the ability of a state under the *SPS* and *TBT Agreements* to regulate at a higher level than a given international benchmark.

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- 1 Established pursuant to the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('*WTO Agreement*').
- 2 Ibid, annex 1A (*Agreement on the Application of Sanitary and Phytosanitary Measures*) 1867 UNTS 493.
- 3 *WTO Agreement*, above n 1, annex 1A (*Agreement on Technical Barriers to Trade*) 1868 UNTS 120, Article 2 ('*TBT Agreement*').
- 4 Ibid art 2(4); *SPS Agreement*, above n 2, art 3(1).
- 5 See, eg, Alan O Sykes, 'Exploring the Need for International Harmonization – Domestic Regulation, Sovereignty and Scientific Evidence Requirements: A Pessimistic View' (2002) 3 *Chicago Journal of International Law* 353; Stephen P Croley and John H Jackson, 'WTO Dispute Procedures, Standard of Review and Deference to National Governments' (1996) 90 *American Journal of International Law* 193.

This paper will analyse these agreements from an alternate perspective, that being the base obligation to link a regulatory standard with an internationally harmonised benchmark where such a benchmark exists. This is of particular concern to developing country Members of the WTO as the creation of domestic regulatory standards tends to be linked to levels of development. Developing countries often have less stringent regulations and standards than developed states, especially where matters of product quality are concerned. In turn, the *SPS* and *TBT Agreements* will require many of these countries to implement reform processes to meet a given international benchmark in order to access market opportunities, particularly in high-value agri-food exports. Yet, law reform in this context cannot simply be accomplished by the stroke of a pen. Much of the regulatory reform required by these agreements demands enormous investment in creating a functioning institutional framework.

The primary thesis advanced in this article is that the marginalisation of the issue of institutional investment under the *SPS* and *TBT Agreements* is highly problematic given the political economy considerations surrounding the ongoing Doha 'Development Round' of WTO negotiations. In Part II, I develop this argument by first considering the strategic factors which have driven the current emphasis on institutional capacity as a necessary condition to development. The backlash resulting from events like the 1997 Asian financial crisis largely focused on the instability caused by short-term capital flows. But it also prompted serious reconsideration of the relationship between institutional capacity and liberalisation policies when it comes to the pursuit of developmental objectives. The WTO is by no means immune from developing country dissatisfaction with the promise that market openness will inevitably lead to development outcomes. The dissatisfaction that manifested itself at the 2001 Doha Ministerial and successive Ministerials in Cancún and Hong Kong has gone beyond the contested welfare-effects of initiatives such as the *Agreement on Trade Related Aspects of Intellectual Property Rights* ('*TRIPS Agreement*')<sup>6</sup> to encompass the important issue of implementation and capacity-building expected under the skewed Uruguay Round compact.<sup>7</sup>

Part III engages this broader debate by examining the particular institutional capacity demands required under the *TBT* and *SPS Agreements*. Part III will present a comparison of the enormous investments required of developing countries under these agreements with the largely aspirational promises of technical assistance. The eventual argument in Part III for increased substantive technical assistance for developing countries is not based on a form of

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6 *WTO Agreement*, above n 1, annex 1C (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) 1867 UNTS 299 ('*TRIPS Agreement*'). The dissatisfaction of developing countries with the *TRIPS Agreement* is detailed in Part II of this article.

7 *Ministerial conference – Fourth Session, Doha: Implementation-Related Issues and Concerns – Decision of 14 November 2001*, WTO Doc WT/MIN(01)/17 (2001) ('*Doha Implementation Decision*').

cosmopolitan morality.<sup>8</sup> Although I have some sympathy for the cosmopolitan view,<sup>9</sup> I instead present the argument for substantive technical assistance on the basis of enlightened self-interest; that is, the need post-Cancún and Hong Kong to maintain a rough balance of concessions and interests in order to overcome the current political economy impasse and to sustain the overall WTO compact.

A shift towards substantive capacity-building is, however, only a partial solution to the issue of developing country engagement with harmonised standards. It is effectively a reactive strategy to allow poorer countries to comply with a given, existing standard. It offers little insight to the manner in which such countries might act proactively to influence the content of given standards. Part IV of the paper considers this often hidden dimension to standardisation by examining the internal deliberative procedures of the Codex Alimentarius Commission ('Codex') and the International Standardization Organization ('ISO'). Codex and the ISO represent the two most prominent international standardisation bodies referenced in the *SPS* and *TBT Agreements*. Their internal deliberative procedures – which in turn often reflect a technical, expert-driven perspective – have enormous potential on their terms to sideline developing country Members. The resultant imbalance in membership and participation raises significant representational legitimacy concerns given the default deference placed on the work of these bodies by the *SPS* and *TBT Agreements*.

## II THE EVOLVING NEXUS BETWEEN TRADE, INSTITUTIONAL CAPACITY AND DEVELOPMENT

The current round of WTO negotiations launched in Doha, Qatar in 2001 has been christened a 'Development Round'.<sup>10</sup> There is little doubt that developing countries have proven increasingly assertive in presenting their negotiating demands in the WTO. The negotiating parameters agreed at Doha reflect key

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8 For example, John Rawls' influential theory of rights engages this form of morality by asking how certain forms of a society would be evaluated 'behind the veil of ignorance'. In other words, how would we regard particular institutions or rules if we had to evaluate them without knowing of our place in society? Rawls' account of justice clearly emphasises the role of equality. In particular, he argues that there is a general duty of assistance to help what he terms 'burdened societies' which are those afflicted with unfavourable conditions. Notably, the duty of assistance is framed in terms of establishing just and basic institutions of governance: John Rawls, *The Law of Peoples* (1999) 105–7.

9 For an insightful account of the prospects (and limits) of a project framing an ethical obligation of poverty alleviation within the WTO see Joel Trachtman, 'Legal Aspects of a Poverty Agenda at the WTO: Trade Law and "Global Apartheid"' (2003) 6(1) *Journal of International Economic Law* 3.

10 See, eg, Kym Anderson and Will Martin (eds), *Agricultural Trade Reform and the Doha Development Agenda* (2006); World Bank, *Global Economic Prospects 2004: Realising the Developmental Promise of the Doha Agenda* (2003).

areas of interest to developing countries, not least of which is agricultural trade.<sup>11</sup> At the same time, the negotiations remain stalled due, in large part, to an impasse between developed and developing countries.<sup>12</sup> There is a degree of entrenchment in negotiating positions particularly on agriculture that has made it increasingly difficult to craft an end deal.

The assertiveness of developing states in the current negotiations should not be seen in isolation. It instead reflects a deeper dissatisfaction with the promises inherent in the completion of the Uruguay Round negotiations that led to the formation of the WTO in 1994. Those negotiations can be broadly characterised as a wager by developing countries on the benefits of an export-led approach to economic development.<sup>13</sup> In return for concessions in areas of export interest to developing countries such as agricultural and textiles trade, those countries agreed to extensive commitments in intellectual property and trade in services and investment. In the decade that has followed it has become clear that developing countries have received a less than expected dividend from their Uruguay Round wager. On agriculture, for example, the Uruguay Round *Agreement on Agriculture* has had very modest results.<sup>14</sup> The most notable achievement was the idea of ‘tariffication’ of pre-existing non-tariff barriers on agriculture such as quotas and quantitative restrictions into their tariff equivalents. Unfortunately, the actual conversion was left to Member countries

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- 11 The negotiating parameters on agricultural trade include ‘substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support’: *Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/1 (2001) [13] (Doha Declaration). This is not to say that liberalisation of all barriers and distortions to agricultural trade will benefit developing countries uniformly. Indeed, recent models have predicted net welfare losses for small, low-income African countries should the Doha Round as currently structured be completed. There are two reasons for this. First, low-income countries will lose some of their preferential market access to rich countries as the latter reduce their tariffs to other, less poor countries. Second, removal of agricultural subsidies will raise the world price of agricultural commodities, imposing a net burden on the poorest nations of the world, who tend to be food importers. See Timothy Wise and Kevin Gallagher, *Doha Round and Developing Countries: Will the Doha Deal Do More Harm than Good?* (2006) 22 *RIS (Research and Information System for Developing Countries) Policy Briefs* <[www.ase.tufts.edu/gdae/Pubs/rp/DohaRIS2Apr06.pdf](http://www.ase.tufts.edu/gdae/Pubs/rp/DohaRIS2Apr06.pdf)> at 22 August 2007; Sandra Polaski, *Winners and Losers: Impact of the Doha Round on Developing Countries* (2006) Carnegie Endowment for International Peace <<http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=18083>> at 22 August 2007.
- 12 See generally Sungjoon Cho, ‘The WTO Doha Round Negotiation: Suspended Indefinitely’ (2006) 10(22) *American Society of International Law – Insights* <<http://www.asil.org/insights/2006/09/insights060905.html>> at 22 August 2007.
- 13 For a representative optimistic view of the benefits expected to flow to developing countries from the Uruguay Round compact, see Will Martin and L Alan Winters, ‘The Uruguay Round: A Milestone for the Developing Countries’ in Will Martin and L Alan Winters (eds), *The Uruguay Round and the Developing Countries* (1996), 1. Cf the more cautious and ultimately accurate assessment of Rubens Ricupero, the Secretary-General of United Nations Conference on Trade and Development (‘UNCTAD’): Rubens Ricupero, ‘Integration of Developing Countries into the Multilateral Trading System’ in Jagdish Bhagwati and Mathias Hirsch (eds), *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel* (1998) 9.
- 14 *WTO Agreement*, above n 1, annex 1A (*Agreement on Agriculture*) 1867 UNTS 410. For a comprehensive analysis on the tortured path of agriculture into the WTO compact see Melaku Geboye Desta, *The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture* (2002).

themselves which led to the questionable practice of ‘dirty tariffication’ where countries deliberately chose high levels of tariff equivalents. This has meant that average agricultural tariffs remain much higher than manufacturing tariffs in developed countries.<sup>15</sup> Moreover, unlike the treatment of export subsidies in non-agricultural products in the *General Agreement on Tariffs and Trade* (‘GATT’)<sup>16</sup> and later the WTO, the distortive practice of export subsidisation in agriculture was still allowed although putatively capped and subject to reduction commitments.<sup>17</sup>

On the other side of the ledger, it has become very clear that developing countries seriously underestimated the welfare effects of some of the Uruguay Round commitments of strategic interest to developed states. The *TRIPS Agreement* has come under particular attention in mandating a minimum level of intellectual property protection regardless of the level of economic development of the state concerned. This is problematic for most developing countries where innovation is not a major source of economic activity. These countries are generally more likely to benefit in terms of consumer welfare by permitting cheap domestic imitations of innovations created elsewhere.<sup>18</sup> Similarly, concerns have been raised on the limitations imposed by the *Agreement on Trade-Related Investment Measures* (‘TRIMS Agreement’)<sup>19</sup> on the policy space of developing countries in using performance requirements to try and extract benefits from the entry of foreign investment.<sup>20</sup>

There is an entirely separate but often marginalised impost that flows from the Uruguay Round compact. The broad set of WTO agreements demand significant institutional investment and capacity-building, demands that tend to fall disproportionately on developing countries. Take, for example, the *TRIPS Agreement*, which as we have seen presents a base obligation to establish a minimum level of legal protection for intellectual property rights. Aside from the drafting of laws to implement that level of protection, there is the resource-intensive requirement to create the administrative and procedural infrastructure (such as a patents and trade-mark office) to give effect to those laws.

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15 For example, agricultural tariffs remain at around 19 per cent for the European Union in comparison to 4.2 per cent for manufactured goods. In Japan, tariff and related border protection on rice is estimated at a staggering 700 per cent of production cost (at world prices). Significant tariff barriers to agricultural trade remain in operation in Canada and the United States: World Bank, *Global Economic Prospects 2004: Realising the Developmental Promise of the Doha Agenda* (2003) 118–30.

16 For the most recent, and current, version of the *GATT*, see *WTO Agreement*, above n 1, annex 1A (*General Agreement on Tariffs and Trade*) 1867 UNTS 190. For the original version of the *GATT* see *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 29 July 1948) (‘*GATT 1947*’).

17 *WTO Agreement*, above n 1, annex 1A (*Agreement on Agriculture*) 1867 UNTS 410, art. 9.

18 For an analysis of the welfare implications of intellectual property protection amongst different states at different stages of development, see Robert Howse and Michael Trebilcock, ‘Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics’ (1998) 6(1) *European Journal of Law and Economics* 5, 18–21.

19 *WTO Agreement*, above n 1, annex 1A (*Agreement on Trade-Related Investment Measures*) 1868 UNTS 186.

20 See, eg, Dani Rodrik, *The New Global Economy and Developing Countries: Making Openness Work* (1999) 147–8.

Outside of the WTO, the role of institutional capacity in development policy has come into sharp relief due to successive financial crises in East Asia, Turkey, Russia and Argentina. Although assessments on the causes of the crises vary, most observers concede that the premature liberalisation of financial markets and capital in disregard of the necessary institutional framework to manage volatile short-term capital flows bear much of the blame.<sup>21</sup> The financial panic that spread from Asia to Russia and then Latin America has led to a reassessment by many developing country policy-makers of the benefits of participation in the global economy. A notable example in 1998 is that of Malaysia, which introduced strict capital and exchange controls in the aftermath of the crisis despite the opposition of the International Monetary Fund ('IMF') and the World Bank.<sup>22</sup> The discontent flowing from these crises has largely focused on the workings of the international financial system rather than the international trading regime. Yet, it has catalysed a broader reassessment of the types of complementary policies on both trade and capital flows necessary to manage developmental strategies.

These events have prompted a notable shift in development theory in the last few years. The inward-orientated model of infant industry protection that dominated most developmental strategies in the immediate post-World War II period placed an inordinate amount of faith in the benefits of state intervention.<sup>23</sup> In comparison, the extreme reaction against this model in the structural adjustment programs of the IMF and World Bank minimised the role of the state to that of a mere guarantor of legal and property rights.<sup>24</sup> Economists are now

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21 See, eg. Joseph Stiglitz, *Globalization and its Discontents* (2001) 99; Paul Blustein, *And The Money Kept Rolling In (and Out): Wall Street, The IMF and the Bankrupting of Argentina* (2005) 32–7. It is worth noting the difference in stability between short-term capital flows such as portfolio investment and bank lending as against the longer-term nature of foreign direct investment (FDI). FDI inflows remained almost unchanged during the 1997–98 Asian financial crisis in the five most serious affected Asian countries whilst short-term capital flows fell dramatically: UNCTAD, *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development* (1999) 20–3.

22 However, the reassessment was by no means blunt or absolute. The controls imposed by Malaysia were aimed primarily at short-term capital flows. The restrictions explicitly excluded FDI which was something that the Malaysian authorities were at pains to publicise: International Monetary Fund and World Bank, 'Statement by Dato Mustapa Mohamed, Second Finance Minister of Malaysia' (Press Release No 45, Oct 6–8, 1998).

23 For a historical overview of the origins and influence of the infant industry argument from John Stuart Mill to Friedrich List to Alexander Hamilton see Douglas A Irwin, *Against the Tide: An Intellectual History of Free Trade* (1996) 116–37. Gilbert Winham notes quite rightly that, whilst derided in our contemporary age of internationalism, the tenor of the economic nationalism championed by List and others has an intrinsically elevating quality to its appeal: Gilbert R Winham, *The Evolution of International Trade Agreements* (1992) 32–3.

24 For an insightful view on the role of these institutions in the 1980s and 1990s in forcing change in developing country approaches to economic development see Robert Gilpin, *Global Political Economy: Understanding the International Economic Order* (2001) 313–6. The pendulum shift of perspectives on the role of market openness in the process of development has been perceptively described by Amartya Sen, who remarked that '[t]he virtues of the market mechanism are now standardly assumed to be so pervasive that qualifications seem unimportant. Any pointer to the defects of the market mechanism appear to be, in the present mood, strangely old-fashioned and contrary to contemporary culture (like playing an old 78 rpm record with music from the 1920s). One set of prejudices has given way to another – opposite – set of preconceptions. Yesterday's unexamined faith has become today's heresy, and yesterday's heresy is now the new superstition.' Amartya Sen, *Development as Freedom* (1999) 111.

beginning to understand that the nexus between trade and development is much more complex than either of these extreme positions. Indeed, some prominent economists such as Dani Rodrik have argued that trade, or more broadly, economic openness, will not of itself lead to economic development.<sup>25</sup> Thus, while openness is part of a development strategy, it is not a substitute. Instead, a greater emphasis needs to be given to complementary policies and especially institutions that must be in place at the domestic level.<sup>26</sup> Aside from domestic investment strategy to kindle what he terms the ‘animal spirits’ of entrepreneurs, Rodrik’s approach is especially notable in his emphasis on the need to strengthen institutions of conflict management. He argues that the Asian economies that imploded in 1997 did so because their social and political institutions of conflict management were inadequate to bring about the bargains required for macroeconomic adjustment. Without these institutions to mediate conflict amongst social groups, the necessary policy adjustments to reestablish macroeconomic balance are likely to be delayed as labor, business and other social groups block the implementation of fiscal and exchange-rate policies. On this reading, participatory political institutions, civil and political liberties, high-quality bureaucracies, the rule of law and mechanisms of social insurance are essential to bridge the deep cleavages that can lead to policy paralysis in poorer countries.<sup>27</sup>

With this background in mind, it is not surprising that developing countries have proven themselves to be far more assertive in advocating for a development agenda at the WTO. Indeed, the palpable sense of developing country dissatisfaction with the skewed bargain that resulted from the Uruguay Round has continued to shape the negotiations launched at the Doha Ministerial in 2001. At a substantive level, the *TRIPS Agreement* came under particular scrutiny at that Ministerial in the context of the HIV-AIDS pandemic. The strong patent protections mandated by the *TRIPS Agreement* were viewed as driving up drug prices, thus putting medicines out of reach for the citizenry of poor countries. The public nature of this issue led to the crafting of a political, albeit non-binding, statement supportive of public health from delegates at the Doha Ministerial.<sup>28</sup> Not surprisingly, the issue did not disappear after Doha. In the weeks leading up to the Cancún Ministerial in 2003, WTO Members agreed to a

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25 See generally Rodrik, above n 20; Dani Rodrik, ‘Trade Policy Reform as Institutional Reform’ in Bernard Hoekman et al (eds), *Development, Trade and the WTO* (2002) 3, 9–10.

26 See generally Dani Rodrik, ‘Why Do More Open Economies Have Bigger Governments?’ (1998) 106(5) *Journal of Political Economy* 997; Dani Rodrik, ‘Institutions for High-Quality Growth: What They Are and How to Acquire Them’ (2000) 3 *Studies in Comparative International Development* 3. Whilst Rodrik is a particularly forceful advocate of the nexus between institutional capacity and development, he is by no means alone. See, eg, Johannes Moenius and Daniel Berkowitz, ‘Institutional Change and Product Composition: Does the Initial Quality of Institutions Matter?’ (Working Paper No 662, William Davidson Institute, 2004, finding that improvements in institutional quality increase the share and volume of a country’s complex product exports; Michael Trebilcock, ‘What Makes Countries Poor? The Role of Institutional Capital in Economic Development’ in Edgardo Buscaglia, William Ratliff and Robert Cooter (eds), *The Law and Economics of Development* (1997) 15, citing the results of an empirical study on institutional capacity in Papua New Guinea.

27 Rodrik, ‘Trade Policy Reform as Institutional Reform’, above n 25, 4–7.

28 *Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN(01)/DEC/2 (2001).

landmark relaxation of the stringent patent protections mandated by the *TRIPS Agreement* despite the opposition of the pharmaceutical lobby.<sup>29</sup> Under this agreement, small countries that have insufficient manufacturing capacity in the pharmaceutical sector are allowed in cases of public health emergency to import low cost generics produced under compulsory licence in other WTO Member countries.

Agricultural policy remains at the heart of the political economy impasse of the current WTO negotiating round. Success will depend largely on the ability of the WTO membership to craft a deal that encompasses reductions in agricultural tariffs and the distortive practice of domestic and export farm subsidies.<sup>30</sup> Developing countries are the typical demandeurs of these forms of liberalisation. There is, however, nothing to suggest that agricultural policy will remain any less sensitive now than in the past. With this in mind, there may be significant value – especially from a developing country perspective – in looking to target other, potentially less politically sensitive forms of barriers to agricultural trade. The ability of developing states to meet existing food and safety standards as a precondition to the export of products into developed states would seem a likely candidate in this respect. The next part of this article will tease out the potential trade benefits for developing countries in meeting the default preference on harmonised standards under the *SPS* and *TBT Agreements*. These benefits must in turn be seen in light of the significant institutional investment required of developing countries in meeting that default preference.

### III THE SPS-TBT AGREEMENTS, STANDARDS AND INSTITUTIONAL CAPACITY

The growth in regulatory standards on health, safety and consumer protection tracks the rise of the welfare state in industrialised countries. Developing countries tend to have fewer standards and regulations than developed countries and often less stringent standards and regulations when matters of quality are concerned.<sup>31</sup> Yet, divergences in regulatory standards – often linked to differential levels of industrialisation – can clearly affect trade in goods and

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29 *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/L/540 (2003). This decision acts as a limited waiver of Articles 31(f) (compulsory licence of patented products to apply only to the domestic market of the authorising member) and (h) ('adequate' remuneration to be paid to the patent holder). For coverage of the opposition of the pharmaceutical industry at Doha to relaxation of patent protection in the *TRIPS Agreement* see 'Fight over TRIPS Narrowed to Whether Declaration Would Be Binding' (3 Nov 2001) *Inside U.S. Trade – Special Report* <<http://www.insidetrade.com>>; 'WTO Countries in Deadlock on TRIPS' (2001) 1(43) *Inside US Trade* 1, 22–3 <<http://www.insidetrade.com>>. In 2005, the General Council of the WTO agreed to a process to convert this waiver to a formal amendment of the *TRIPS Agreement* although the amendment has not yet come into force: *Amendment of the TRIPS Agreement: Decision of 6 December 2005*, WTO Doc WT/L/641 (2005).

30 Sungjoon Cho, for example, has argued that a successful Doha round would require a grand deal on a 'triangle' of issues: the US' substantial reduction of its farm subsidies, the EU's more generous cut in agricultural tariffs and major developing countries (especially Brazil and India) further lowering their industrial tariffs: Cho, above n 11.

31 Alan O Sykes, *Product Standards for Internationally Integrated Goods Markets* (1995) 136.



services. An Organisation for Economic Co-operation and Development ('OECD') estimate has gone so far as to claim that 80 per cent of world trade is affected by standards or associated technical regulations.<sup>32</sup>

Regulatory standards, however, are obviously different in principle from tariffs and quotas on trade. Those classic trade barriers are explicitly discriminatory barriers on foreign economic activity which raise costs for consumers and inefficiently allocate resources. In contrast, regulatory policies can be implemented to achieve important objectives that might go ignored in the private market such as protection of public health and the environment. Standards are often in the nature of a public good such as emissions standards and fuel economy requirements that contribute to cleaner air. Sanitary and phytosanitary requirements can improve health and quality of life. Standardisation can also facilitate information flows between suppliers and consumers regarding the characteristics and quality of products. Further, by allowing producers to work within a limited range of product characteristics or processes, standards and regulations can promote economies of scale.

At the same time, there is abundant evidence that standards can raise costs and serve to restrain trade. The OECD has found that the costs of meeting differing standards and technical regulations in its member nations, along with the costs of testing and certification, can amount to between 2 and 10 per cent of overall product costs.<sup>33</sup> The potential impact on trade potentiality of compliance with standards in the non-OECD developing countries is even more severe. A requirement to meet a certain product or process standard can act to stop trade altogether. For example, a European Union regulation requires that dairy products be manufactured from milk produced by cows kept on farms and milked mechanically. The requirement blocks imports from many developing countries, especially those with numerous small producers for whom mechanisation is too costly.<sup>34</sup>

Sanitary and phytosanitary measures that apply in agricultural trade are of particular importance to many developing countries. Agriculture is by far the largest employer in low-income countries, accounting for 60 per cent of the labour force and producing about 25 per cent of GDP.<sup>35</sup> Given that 73 per cent of the poor in developing countries live in rural areas, agricultural production and trade is crucial to poverty alleviation in developing countries.<sup>36</sup> It is also important to bear in mind the changing patterns of agricultural exports of developing countries. High value food products like fresh and processed fruits and vegetables, fish, live animals and meat now account for 50 per cent of the

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32 Akira Kawamoto, 'Regulatory Reform and International Standardisation' (Working Paper No 10, OECD, 1999) 4.

33 Trade Directorate: Working Party of the Trade Committee, *An Assessment of the Costs for International Trade in Meeting Regulatory Requirements* (2000) OECD <<http://www.oecd.org/dataoecd/33/14/1955269.pdf>> at 22 August 2007.

34 John Wilson, 'Standards, Regulation, and Trade: WTO Rules and Developing Country Concerns' in Bernard Hoekman et al (eds), *Development, Trade and the WTO* (2002) 428, 432–3.

35 World Bank, *Global Economic Prospects 2004: Realising the Developmental Promise of the Doha Agenda* (2003).

36 Ibid 105–7.

total value of agri-food exports of developing countries, up from a 31 per cent share in 1981.<sup>37</sup> Their share of developing country trade continues to rise while that of traditional commodities – such as coffee, tea, cocoa, sugar, cotton and tea – declines. Reductions in traditional forms of trade protection (like domestic and export subsidies) that are currently at issue in the Doha round of negotiations are likely to have far less impact on the level and direction of trade in high-value foods than for certain traditional commodities.<sup>38</sup> It is instead the proliferation and strengthening of food safety and agricultural health standards that will acutely impact on developing country exports of these high-value products.

The *SPS* and *TBT Agreements* mediate in the use of standards as a mechanism of public regulatory process and their potential impact on trade flows. As a starting point, the *SPS Agreement* applies to all SPS measures of a WTO Member which are broadly defined as measures affecting human, animal or plant life and health.<sup>39</sup> In comparison, the *TBT Agreement* applies to all technical regulations which affect product or process characteristics but will not extend to SPS measures.<sup>40</sup> Neither agreement prevents a country from choosing their own level of regulatory protection. They do however oblige WTO Members to use international standards as a reference point for their national regulation where such standards exist.<sup>41</sup> The default mechanism of using international standards in turn acts as a presumption of compliance with these agreements.<sup>42</sup>

The preference towards harmonisation can act as an important benchmark for developing countries where the mere requirement to meet differing regulatory standards as a condition of importation might constitute a significant trade barrier. Yet, not surprisingly, the preference given to harmonisation efforts is not absolute. There may in fact be no international standard in a given subject area or, even where such a standard exists, a WTO Member may decide to regulate at a higher level. Crucially, this is not precluded by the *TBT* and *SPS Agreements*. A WTO Member is entitled to implement a higher standard than that set out in the international benchmark but in order to do so must meet additional criteria. These criteria require the regulating country to show some objective basis for its decision to regulate at a higher level than the international standard.<sup>43</sup>

The implicit discipline imposed by the *TBT* and *SPS Agreements* on the regulating state going beyond the international benchmark can be of crucial importance for developing country exports. Consider the conclusions of a study examining the impact of changes in the EU standard on aflatoxin levels in food using trade data for 15 European countries and 9 African countries between 1989 and 1998.<sup>44</sup> The results showed a significant negative impact of these new EU

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37 Ibid 1.

38 Ibid.

39 *SPS Agreement*, above n 2, art 1, annex A.

40 *TBT Agreement*, above n 3, arts 1(3), 1(5), annex 1.

41 *SPS Agreement*, above n 2, art 3(1); *TBT Agreement* above n 3, art 2(4).

42 *SPS Agreement*, above n 2, art 3(2); *TBT Agreement*, above n 3, art 2(5).

43 *SPS Agreement*, above n 2, arts 3(3), 3(5); *TBT Agreement*, above n 3, art 2(2), requiring the initiation of risk assessment.

44 Tsunehiro Otsuki, Mirvat Sewadeh and John Wilson, 'A Race to the Top? A Case Study of Food Safety Standards and African Exports' (Working Paper No 2563, World Bank, 2001).

standards on African exports of cereals, dried fruits and nuts to Europe. The EU standard – which was set above the relevant international standard – was estimated to have reduced health risk by approximately 1.4 deaths per billion a year. In turn, the EU regulation would decrease African exports by more than 64 per cent or US\$670 million as compared with the international standard.<sup>45</sup> A similar study has estimated comparable effects on the banana trade of the EU standard on pesticides which goes significantly beyond the Codex global standard.<sup>46</sup>

Nonetheless, the putative trade benefits for developing countries in the default preference for international standards within the *TBT* and *SPS Agreements* are subject to a number of important preconditions. The agreements themselves formally require only a limited level of institutional capacity in the form of enquiry points to deal with queries from other Members on the adoption of a given standard.<sup>47</sup> These formal costs merely represent the tip of the iceberg. The implementation costs required of harmonised standards go beyond merely passing legislation to extend to the creation of necessary infrastructure and developing the institutions to enable developing country exporters to meet the given international standard. Those compliance costs include both recurring items like the maintenance of regular surveillance and testing programs as well as significant, ‘lumpy’ non-recurring commitments such as the development of laboratory infrastructure and processing facilities.<sup>48</sup>

These institutional demands remain a significant impost given the multiple and competing demands for public sector investment in poorer countries. Finger and Schuler have calculated that it would cost a typical developing country US\$130 million to implement requirements under the *SPS Agreement*, the *TRIPS Agreement* and the *Agreement on Implementation of Article VII* (the so-called customs valuation agreement).<sup>49</sup> That sum – which represents implementation costs of only three of the large set of Uruguay Round agreements – was calculated to comprise more than the annual development budget for most of the least developed country Members of the WTO.<sup>50</sup> On one view, this form of heavy institutional investment may not be money well spent and that other alternatives – such as basic education for women and girls – might provide a more attractive rate of return for poorer countries.<sup>51</sup> At the other end of the spectrum there is the perspective that these implementation costs are part of the

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45 Ibid.

46 John Wilson and Tsunehiro Otsuki, ‘To Spray or Not to Spray? Pesticides, Banana Exports, and Food Safety’ (Working Paper No 2805, World Bank, 2002).

47 *SPS Agreement*, above n 1, annex B3; *TBT Agreement*, above n 3, art 10(1).

48 For a useful snapshot of the typical recurring and non-recurring costs of compliance in the case of agri-good standards, see World Bank, above n 44, 70.

49 Michael Finger and Philip Schuler, ‘Implementation of Uruguay Round Commitments: The Development Challenge’ (Working Paper No 2215, World Bank, 1999).

50 Ibid. For a comprehensive list of the high implementation costs of specific SPS-related projects see J Michael Finger and Philip Schuler, ‘Implementation of WTO Commitments’ in Bernard Hoekman et al (eds), *Development, Trade and the WTO* (2002) 493, 497.

51 Dani Rodrik, ‘Trade Policy Reform as Institutional Reform’ in Bernard Hoekman et al (eds), *Development, Trade and the WTO* (2002) 3, 8.

harsh reality of engaging in the global economy. Globalisation of production in industrial goods, which requires, particularly, component interchangeability and standardisation with optimal international requirements, is seen as an entry card to the world of producers. The issue of compliance costs on this view is a matter for the country concerned.<sup>52</sup>

The agreements themselves tend to treat the issue of institutional investment as a responsibility of the individual WTO Member, reflecting the ethos of the grand bargain between developed and developing states in the Uruguay Round. Under Article 9.1 of the *SPS Agreement*, the WTO Members 'agree to facilitate the provision of technical assistance' especially to developing country Members. Article 9.2 in turn recognises that 'substantial investments' may be required for an exporting developing country to meet a given SPS requirement, but there is only the non-binding obligation to 'consider providing ... technical assistance'. Article 10 sets out the special and differential treatment conditions under the *SPS Agreement*. Most notably, Article 10.2 obliges longer-time frames for compliance on products of interest to developing countries 'so as to maintain opportunities for their exports'. Interestingly, Article 14 gives developing and least-developed WTO Members the right to delay the implementation of SPS measures affecting their imports. The binding nature of Article 14 on the import side contrasts strongly with the decidedly aspirational tone of Article 9 on technical assistance to meet exporting requirements.

Within the *TBT Agreement*, Article 11.1 provides an obligation on Members to provide advice on the preparation of technical regulation. Yet, like the *SPS Agreement*, the issue of substantive technical assistance is heavily qualified. Articles 11.2 to 11.6 provide an obligation to grant a variety of forms of technical assistance but only upon 'mutually agreed terms and conditions'. Interestingly, Article 12.4 on special and differential treatment gives some latitude to a developing country Member to ignore international standards where they 'are not appropriate to their development, financial and trade needs'. However, once again, there is the issue of the extent to which this is a realistic option given that it may be a condition – at least on the export side – of participation in the market place. There is recognition of the heavy institutional investment required of developing countries in compliance with the *TBT Agreement*.<sup>53</sup> Yet, the answer seems once again to be the ability to be exempted for a certain period from the obligations themselves.<sup>54</sup>

The imbalance between the heavy institutional commitment expected under the *SPS* and *TBT Agreements* and the largely non-binding commitment to provide technical assistance should be seen in light of the political impasse of the current Doha Round of WTO negotiations. One might usefully characterise the WTO as

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52 For a particularly optimistic account of the benefits that would off-set the institutional investment required through standardisation within APEC see John Wilson, *Standards and APEC: An Action Agenda* (1995) 80–2.

53 *TBT Agreement*, above n 3, art 12(8): 'It is recognised that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures' (emphasis added).

54 Ibid.

a multi-issue bargain where countries have traded concessions across and within issues. Given the large size of the membership body, the sustainability of this bargain will increasingly depend on a fair albeit probably rough balance of benefits and burdens. The failed Cancún Ministerial marked a highpoint of dissatisfaction of poorer countries with the skewed bargain to result from the Uruguay Round and a legitimate concern that this imbalance would be further entrenched through negotiations on the so-called Singapore issues such as investment policy.

A greater willingness on the part of developed states to deliver substantive technical and institution-building assistance for developing countries might go some way in resolving this impasse. A blunt objection to this idea might be that it would amount to renegotiation (or rebalancing) of binding agreements consensually agreed to at the end of the Uruguay Round. There are two formalist answers to this objection. First, institution and capacity building have been, since Doha, negotiating items in their own right and thus any rebalance can be formally characterised in prospective terms.<sup>55</sup> Secondly, the settlement on compulsory licensing on the *TRIPS Agreement* provides in any event a useful precedent that parts of the existing bargain – if sufficiently problematic – can be renegotiated.

Ultimately, the trick in improving a cooperative institutional framework such as the WTO is, as Robert Keohane terms it, ‘not to ignore self-interest but to redefine it, to make it less myopic and more emphatic’.<sup>56</sup> In some ways, concessions on technical assistance and capacity-building may be easier commitments for developed states than the politically sensitive task of dismantling domestic support for farming interests and export subsidisation of agricultural products. A modest step forward on concessions such as these may in fact lay the foundation for the reciprocal concessions by developing countries on items of interest to the larger Members of the WTO, such as tariff barriers on manufactured goods.

This modest suggestion is not intended as a simple, one-dimensional answer to the complex problem of concluding the Doha negotiations. It is, however, an invitation – especially to developing countries – to view the necessary capacity and institution building to meet harmonised standards as core negotiating priorities in their own right. At the same time, the provision of substantive technical assistance is only part of the problem faced by developing countries when confronted by harmonised standards. The representational make-up of bodies tasked with the formation of these standards tends to exclude developing country interests. This hidden representational barrier and its impact on developing country trade is considered next.

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55 Doha Implementation Decision, above n 5.

56 Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984) 257.

#### IV REPRESENTATIONAL LEGITIMACY AND INTERNATIONAL STANDARDISATION

Both the *SPS* and *TBT Agreements* rely heavily on international standards and by extension, the international standardisation bodies that set those standards. For example, in the exhortation to harmonisation in the preamble of the *SPS Agreement*, there is reference to the work of Codex, the International Office of Epizootics and organisations operating within the *International Plant Protection Convention*. The *TBT Agreement* references the work of the International Standardization Organization ('ISO') and International Electrotechnical Commission ('IEC').<sup>57</sup> Given the default authority granted to these organisations by the *TBT* and *SPS Agreements*, it is important to have some understanding as to how these bodies operate.

International efforts at standardisation have often been linked to bursts of technological process especially in developing the infrastructure of transport and communications. Problems of a technical nature in linking railroads, post offices and telephones transcended national boundaries. Indeed, the late nineteenth and early twentieth century was clearly a highpoint in building cooperative mechanisms of international standards to overcome these barriers. Interestingly, this early period of standardisation was largely characterised by an emphasis on technicality and an almost utopian belief that one could transcend nationalism with scientific standards.<sup>58</sup> By the 1930s and 1940s a significantly different element infused the process of standardisation. Consumer advocates began to focus on testings and ratings as a mechanism to promote goals of human health and safety.<sup>59</sup> The current and dominant paradigm of standardisation originated in the post-World War II period. By this time there emerged an essentially functional approach to standardisation pushed in, a large degree, by producer interests that emphasise the benefits of efficiency and productivity.

Thus, within the spectrum of influences on the process of international standardisation, it is clear that economic (producer-interests) and equitable (consumer-interests) concerns have dominated in the development of standardisation efforts in the latter part of the twentieth century. This is in contrast to the scientific and technical concerns that underpinned efforts to standardise in the late nineteenth century. The diverse influence on the processes of international standardisation are instructive as they provide a framework through which to analyse the representational make-up of the primary standardisation bodies referenced in the *SPS* and *TBT Agreements* – Codex and the ISO.

##### A Codex Alimentarius Commission

Codex was established in 1962 as a joint undertaking of the UN Food and Agricultural Organization ('FAO') and the World Health Organization ('WHO').

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57 *TBT Agreement*, above n 3, annex 1.

58 Samuel Krislov, *How Nations Choose Product Standards and Standards Change Nations* (1997) 49.

59 *Ibid* 47–48.

Membership of Codex is open to all member states of the FAO and WHO. The mandate of Codex is stated to be ‘protecting the health of consumers and ensuring fair trade practices in the food trade and promoting coordination of all food standards work by international governmental and non-governmental organisations’.<sup>60</sup> Thus, it seems to fall within the realm of consumer interests in promoting standardisation of food standards. Yet Codex has been heavily criticised in recent years for the de facto influence of producer interests in promoting their own interests.<sup>61</sup> These producer interests do not seem to have direct representation in Codex; rather, they lobby through member governments to oppose initiatives such as compulsory labelling of genetically modified organisms.<sup>62</sup>

Aside from the evidence of producer lobbying at Codex, attention has also focused on the workings of its internal deliberative procedures. First, there is the issue of the requisite voting majority required to pass a Codex standard. The Codex eight step process to pass a standard is reproduced in the WTO Panel decision in the *EC – Hormones* case.<sup>63</sup> The final step of that process provides: ‘Adoption of standards is normally done on the basis of a consensus decision, however, if requested, a vote may be taken. In this case, a decision by the majority of Codex members is required’.<sup>64</sup> The Codex standard that was so influential in leading to a finding against the EU in the *EC – Hormones* case had been adopted by a vote of 33–29 with seven abstentions.<sup>65</sup> The EU attempted to rely on the marginal status of this vote (which had been taken at a time when the Codex members had not known that the *SPS Agreement* would accord a degree of deferential authority on the standard) to support its own higher regulatory standard. This was expressly rejected by the Panel.<sup>66</sup> The difficulty with the EU argument is that concern as to the internal deliberative processes lacks any textual basis in the *SPS Agreement*. That agreement speaks only of standards, guidelines and recommendations ‘established by the Codex’ without any reference to a consensus requirement.<sup>67</sup> This is in contrast with the comparable provision on international standards in the *TBT Agreement* that makes some – albeit confusing – reference to a requirement for consensus.

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60 FAO and WHO, *About Codex* (2007) Codex Alimentarius

<[http://www.codexalimentarius.net/web/index\\_en.jsp#](http://www.codexalimentarius.net/web/index_en.jsp#)> at 22 August 2007.

61 See, eg, OECD, ‘Regulatory Reform in the Agro-Food Sector’ in *The OECD Report on Regulatory Reform – Volume I: Sectoral Studies* (1997) 233, 251, which points out that the updating of Codex ‘has attracted great attention in recent years, not least from the various agro-food industries who want to promote their own agenda ...’

62 For insight from an Indian delegate at Codex meetings on the lobbying efforts of MNCs, see Sri Ram Khanna, ‘Codex Standards: New Challenges for Developing Countries’ in Sri Ram Khanna and Madhu Saxena (eds), *Food Standards and Safety in a Globalised World: The Impact of WTO and Codex* (2003) 1, 5–6. See also Leslie Sklair, ‘Democracy and the Transnational Capitalist Class’ (2002) 581 *The ANNALS of the American Academy of Political and Social Science* 144, 147–51.

63 *EC – Measures Concerning Meat and Meat Products*, WTO Doc WT/DS26/R/USA (1997) 5 (part II:15) (Report of the Panel) (*‘EC – Hormones’*).

64 *Ibid.*

65 *Ibid* 37–41 (part IV:77).

66 *Ibid* 177 (part VIII:69).

67 *SPS Agreement*, above n 2, annex A(3)(a).

If the standard in *EC – Hormones* that resulted from the internal deliberative procedures of Codex proved problematic for the EU, an entirely separate set of concerns with those procedures apply to developing countries. The initial step in the creation of a Codex standard is the collection of data on risk assessment provided by the Codex membership. Codex, however, often relies on risk assessment based on data generated by only 20 of its 170 members.<sup>68</sup> The eventual adoption of Codex standards has often taken place when large numbers of developing country members from Asia, Africa and Latin America could not attend the relevant meeting.<sup>69</sup> In 2001 for example, only about 49 per cent of developing country members of Codex participated in its biannual meeting.<sup>70</sup> Even then, that participation is typically limited to a group of large or middle-income developing states.<sup>71</sup> The obvious barrier is the cost – often significant to poorer countries – of sending representatives abroad.

The resulting disparities in the workings and end-result of the Codex process are concerning when viewed from a developing country perspective. The limited participation by developing countries in this process can at times lead to absurd results. For example, Codex was about to develop a standard for couscous that defined it as a product made exclusively from wheat despite the fact that couscous is made from other crops in sub-Saharan Africa. If passed and implemented by importing countries, such a standard could have had disastrous effects on exports of couscous by some of the poorest countries in the world. The definition was altered at a late stage to include non-wheat forms of couscous after the intervention of a single representative from sub-Saharan Africa.<sup>72</sup> Even where a given standard is to be passed by a majority of Codex members (rather than the preferred starting point of consensus) there is a significant risk that the voting members are likely to comprise its developed country members.

This imbalance in participation raises concerns as to the legitimacy of the *SPS* and *TBT Agreements* in according a level of deference to standards prepared by those bodies which largely reflect developed country interests. Much of the participatory imbalance in Codex is mirrored in the ISO but with other structural impediments that result in an even higher potential to limit developing country participation.

## **B International Standardization Organization**

Until the 1980s, the work of the ISO focused on harmonising existing domestic technical specifications. Those harmonised standards largely operated in the fields of mechanical engineering, basic chemicals, non-metallic materials, information processing, graphics and photography. However, in 1987, the ISO developed a series of quality control standards that went beyond a simple harmonisation of existing national standards. The ISO 9000 quality control

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68 Khanna, above n 62, 23.

69 Ibid 17.

70 World Bank, *Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports* (2005) 44–5 <<http://www.worldbank.org>> at 22 August 2007.

71 These include Argentina, Brazil, Chile, China, India, Malaysia, Mexico, South Africa and Thailand: Ibid.

72 Khanna, above n 62, 24.



standards applied to a wide range of industries and services rather than to a specific product, process or plant and have become a de facto requirement for doing business in Europe and other parts of the world. ISO certification is required for certain 'regulated products' covered by European Commission directives.<sup>73</sup> These newer standards mark a fundamental shift in focus from technical standards in engineering issues to normative management standards.<sup>74</sup> As with the Codex standards, the newer ISO requirements impose heavy institutional demands on developing countries as they must establish certification and registration systems to implement given quality management systems of ISO 9000.

Despite the broad coverage of its standardisation work, the internal governance mechanisms of the ISO reflect its origins as a technical, expert-driven organisation.<sup>75</sup> The ISO has a total of 158 members in three very different classes of membership:<sup>76</sup>

- i) *Full members* are those national standard-setting bodies that are most representative of standardisation in a given country. These national standard-setting bodies need not be a governmental agency and may comprise either a private body (such as the British Standards Institution in the United Kingdom) or some hybrid (like the American National Standards Institute that, whilst a private body, includes technical government experts). The 103 full members of the ISO are participating members in technical committees and vote on the creation of new international standards.
- ii) *Correspondent members* are standards-related organisations in developing countries that do not have their own national standardisation body. These members do not have the right to vote on

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73 Naomi Roht-Arriaza, 'Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment' (1995) 22 *Ecology Law Quarterly* 479, 500.

74 Whilst formulated largely in terms of quality management systems for product and process standards, the ISO 9000 series has also been adopted by a variety of service providers from Swissair, a port terminal in Antwerp and a French government printing office: James L Lamprecht, *ISO 9000 and the Service Sector: A Critical Interpretation of the 1994 Revisions* (1994) xii. The expansion in the coverage of the ISO's work has continued with the 1996 ISO 14000 series that establishes a variety of standards in the environmental management area: Paula Murray, 'The International Environmental Management Standard, ISO 14000: A Non-Tariff Barrier or a Step to an Emerging Global Environmental Policy' (1997) 18 *University of Pennsylvania Journal of International Economic Law* 577.

75 Most accounts trace the creation of the ISO to 1946. However, the current ISO was pre-dated by the earlier International Federation of Standardizing Associations ('IFSA') which was established in 1926. Even at this early stage, the membership structure of the IFSA was notable and has carried over to the ISO; it was not comprised of direct governmental representatives but rather of twenty different national standardising bodies. The work of IFSA largely focused on technical questions relating to mechanical engineering. It is possible to characterise the work of this early body within the paradigm of trust in science and technical solutions to common cross-border industrial problems. Indeed, the membership structure itself is representative of this expert-laden emphasis. IFSA's activities came to an end in 1942 but the ISO was established in 1946: ISO, *ISO: How It All Started* <<http://www.iso.org/iso/en/aboutiso/introduction/index.html#four>> at 22 August 2007.

76 ISO, *ISO in Figures for the Year 2006* (2007) <<http://www.iso.org/iso/en/aboutiso/isoinfigures/January2007-p1.html>> at 22 August 2007.

the creation of standards but can act as ‘observing members’ in negotiations. There are currently 46 correspondent members of the ISO.

- iii) *Subscriber members* are standards-related organisations from ‘countries with a very small economy’. The ten subscriber members pay a reduced membership fee and have limited participation rights.<sup>77</sup>

The unique, three-tiered structure of membership of the ISO tends to exclude developing country interests. These states make up the categories of correspondent and subscriber members who do not have the right to participate and vote in the formation of a final ISO standard. Moreover, there is a systemic imbalance in favour of developed country interests even in the category of full members of the ISO. In a study conducted in 1998, it was found that all of the national standard-setting bodies of the then 24 developed country members of the ISO were full members of the ISO. In comparison, only 58 per cent of developing countries had institutions that were full members of the ISO.<sup>78</sup>

Aside from the limited number of full members from poorer countries in the ISO, there are also the familiar informal barriers to participation by such countries. In practice, it is those representatives that attend the various technical meetings and participate in the drafting of the standards that ultimately decide the content of those standards. Thus, even considering the category of full membership, actual attendance at technical committee meetings is heavily concentrated in favour of developed country members. At a May 1994 plenary meeting held in Australia – ironically to facilitate the attendance of developing Asian countries in the formulation of the ISO 14000 environmental management systems – only five of the twenty-six delegations (Brazil, Malaysia, China, Korea and Thailand) came from non-OECD states.<sup>79</sup> In contrast, 14 European states attended.<sup>80</sup>

The obvious barrier to participation by even the developing countries who are full members of the ISO is the cost of attending the often frequent technical committee meetings. There does seem to be some limited recognition of this problem by the ISO itself.<sup>81</sup> It has a Developing Country Committee (‘DEVCO’) that provides resources for developing country officials to participate in technical

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77 As of August 2007, the 10 subscriber members were: Antigua, Burundi, Cambodia, Dominica, Guyana, Honduras, Lao People’s Democratic Republic, Lesotho, Saint Vincent & the Grenadines and Suriname. ISO, *ISO Members* <<http://www.iso.org/iso/en/aboutiso/isomembers/index.html>> at 22 August 2007.

78 Riva Krut and Harris Gleckman, *ISO 14001: A Missed Opportunity for Sustainable Global Industrial Development* (1998) 44–5.

79 Naomi Roht-Arriaza, ‘The International Organization for Standardization: Drafting of the ISO 14000 Series’ in Richard H Steinberg (ed), *The Greening of Trade Law: International Trade Organizations and Environmental Issues* (2002) 251, 256.

80 Ibid.

81 For example, in 1998 the ISO and UNCTAD established a memorandum of understanding to provide more effective involvement by developing countries in the ISO. See Matthias Finger and Ludvine Tamiotti, ‘The Emerging Linkage between the WTO and the ISO: Implications for Developing Countries’ in Peter Newell, Shirin Rai and Andrew Scott (eds), *Development and the Challenge of Globalization* (2002) 89, 97.

committee meetings.<sup>82</sup> Yet, despite this modest financing effort,<sup>83</sup> most developing countries are still excluded from the process. At the third meeting of the technical committee to develop ISO 14001 in Oslo in 1995 (which led to the vote to move the draft to an international standard), representatives from 92 per cent of developed countries attended in comparison to the 17 per cent of participating developing country members.<sup>84</sup>

Interestingly, the *TBT Agreement* itself seems to recognise the imbalance in participatory opportunities within the ISO. Article 12.6 obliges Members to take 'reasonable measures' to facilitate 'active and representative participation' of all WTO Members but especially taking into account the 'special problems of developing country Members'. A similar emphasis on the desirability of increased participation of developing countries in international standardisation bodies is evident in the Doha Decision on Implementation-Related Issues and Concerns.<sup>85</sup> However, as the foregoing analysis has shown, there appears to be a distinct degree of disparity between the recognition of the problem and attempts, particularly within the ISO, to address the representational imbalance. The reluctance to deal with this issue within the ISO may be tied to its institutional culture and historical evolution. As a body grounded in technicality, the ISO has arguably asserted its legitimacy through its expertise in solving trans-border 'scientific' problems. Yet its recent work has extended far beyond merely technical issues. The ISO Series 9000 and 14000 involve value-laden determinations of regulatory choice by countries that require significant institutional investment.

Participatory processes that marginalise the majority of ISO and WTO Members on issues relating to fundamental regulatory choice have the real potential to impact on the legitimacy of the standardisation efforts of those bodies. At a minimum, two potential reforms should be considered. First, there is the issue of formal participation in the ISO processes. If voting rights are to be accorded within the category of 'formal members' to national standardisation bodies then logically some attention needs to be given to those developing countries that have no such body. The second-best options of correspondent and subscriber members to the ISO are problematic as they give no formal right to vote in the finalisation of standards. Admittedly, there is some recognition of this problem given the creation of initiatives such as DEVCO but analyses to date indicate a limited degree of success on these initiatives. Yet, this type of reform of itself will not address the problem in its entirety. The ISO should also deal with de facto barriers to participation by developing countries. These are the seemingly obvious but very real obstacles of the cost of travel to multiple expert meetings. In this area, a promising start might be to consider harnessing the

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82 ISO, *How ISO Helps Developing Countries: DEVCO* <<http://www.iso.org/iso/en/comms-markets/developingcountries/iso+developingcountries-03.html>> at 22 August 2007.

83 For example, at an ISO 14001 meeting in Kyoto in April 1997, DEVCO was only able to fund the attendance of one developing country representative: Krut and Gleckman, above n 78, 42.

84 Ibid.

85 Doha Implementation Decision, above n 55, [3.5] (*SPS Agreement*), [5.3] (*TBT Agreement*).

benefit of networked technologies such as the Internet to allow on-line exchange of information and scientific perspectives.

## V CONCLUSION

This article has attempted to contextualise the analysis of the *SPS* and *TBT Agreements* against two developments; the dominance of the role for institutional capacity within contemporary development theory and the political economy implications of the impasse to result from the recent WTO Ministerials. It has done so in anticipation of the conventional perspective that the implementation costs in creating an institutional framework under these agreements should be borne by the country concerned as a necessary if painful part of integration into the global economy.

The appeal of this conventional perspective is understandable but mistaken. It risks entrenching the type of power-based dynamic that has contributed to the palpable sense of developing country dissatisfaction with the underlying balance of interests in the WTO. Whilst there are a variety of concessions and issues that can be used to try and break this deadlock, it may be useful to initially focus on the priority given to implementation and capacity-building under the Doha mandate. This feeds squarely into the reality of the significant investment required of many developing countries to facilitate their integration into the world economy. An enlightened rebalancing of the calculus between obligation and assistance within the *SPS* and *TBT Agreements* might assist in re-engaging the reciprocal bargaining processes of the WTO.

More attention also needs to be given to the internal deliberative process of particular international standardisation bodies. The *SPS* and *TBT Agreements* have accorded a significant degree of weight to the work of often anonymous, technical organisations. That degree of deference seems problematic when the internal expert-driven culture of an organisation like the ISO clearly marginalises developing country participation. The answer to this problem is much less clear. Amendment to the formal rules of participation will not affect the de facto barriers to participation by poorer countries such as cost of transportation, language and expertise. No single answer is likely to suffice. A modest starting point might be to, whilst taking into account limitations on Internet penetration in parts of the globe, harness network-driven technologies as a means of engaging relevant parties and building a broader consensus on the standardisation work of these organisations.