Developing Country Coalitions at the WTO:
In Search of Legal Support

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INTRODUCTION

Developing countries account for seventy-five percent of the membership of the World Trade Organization ("WTO") and are increasingly able to use their power to influence negotiations traditionally dominated by developed countries. Although the organization operates on a one-country-one-vote basis and on a consensus mechanism (which formally also considers members on an equal basis), the reality of negotiations and of the decision-making process is much more complex and susceptible to the arbitrage of economic power. As a result, in most instances, developing countries have to act in coalitions in order to gain sufficient leverage and some developing country members have little—if any—voice if they do not ally with others. Despite their increased number and activity in the WTO, developing countries still find themselves in a relatively marginalized position and experience difficulties in linking their development agenda to multilateral trade negotiations. The recent emergence of a multitude of developing country coalitions reflects fundamental changes in the landscape of developing country positions in the General Agreement on Tariffs and Trade ("GATT") and the WTO and shows that such coalitions are beginning to change the organization’s dynamics. For instance, the Hong Kong Ministerial meeting signaled some progress on issues of interest to developing countries largely as a result of a coordinated approach by developing countries under the aegis of larger developing states such as India, Brazil, and Egypt. The increasing heterogeneity of developing countries and their diverging interests also is reflected in the plethora of coalitions. Coalition strategies therefore appear promising for developing countries but they face serious hurdles.

Developing country coalitions have received some attention in the field of political science and international relations (see, in particular, Amrita Narlikar’s empirical and theoretical analysis of developing country coalitions in

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the GATT and WTO, but recent studies on this subject are relatively scarce. More empirical research currently is being undertaken, but the results are not yet available. This Article relies on the existing literature, as well as interviews conducted by the author with WTO negotiators and Secretariat members. The suggestions for reform that it makes hopefully will in turn generate more theoretical and empirical analysis as additional data becomes available both in the legal and international relations fields. This Article argues that developing country coalitions in the WTO are relevant not only from an international relations and political perspective, but also from a legal perspective. Indeed, coalitions both affect and are the product of the organization’s legal and institutional framework. Because it is crucial for developing countries to be able to act through coalitions, it is important to ensure that they have the legal instruments to do so. Yet in many areas, WTO law is not conducive to coalitions, particularly the types of coalitions that developing countries are likely to create. Moreover, the WTO and its members may in fact benefit from being more supportive — as a legal and institutional system — of developing country coalitions, inasmuch as the latter improve the qualitative and quantitative participation of members with limited resources, thereby potentially enhancing the organization’s legitimacy.

Narlikar establishes a typology of developing country coalitions in the WTO and its predecessor, the GATT, with the objective of determining the characteristics of successful coalitions and the impediments to forming and sustaining these coalitions. She takes an essentially endogenous perspective, examining coalitions for their intrinsic features. International relations analysis on coalitions generally focuses on characteristics of coalition members, and some theories have expanded to the interplay between domestic and international politics on the model of Putnam’s two-level game theory. In contrast, this Article seeks to assess coalition strategies in the regulatory context of trade negotiations and in the institutional framework of the WTO. Whereas Narlikar’s work is grounded in an international relations perspective, this Article examines the interaction between coalitions and the legal and regulatory environment in which they operate. Although the much-heralded shift from a power-dominated system to a law-based system with the advent of the WTO in 1995 has not put an end to politics, it has

4. Factors such as power play between actors or policy convergence between members are two traditional matrices of analysis in international relations theory. See, e.g., Ruth L. Okediji, Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement, 17 Emory Int’l L. Rev. 819, 840 (2003).
affected the dynamics of the multilateral trading system by imposing a more pervasive legal framework.\textsuperscript{6} Some international relations scholars also have noted the ability of international organizations to “transform potential or tacit coalitions into explicit ones.”\textsuperscript{7} Indeed, coalitions find themselves at the intersection between political bargaining and the legal and institutional architecture for such bargaining.

The thesis proposed here is two-fold. First, this Article suggests that the ability to sustain developing country coalitions depends in part on the WTO’s legal structure. In some cases, the legal framework supports developing country coalitions, while in other instances, it hinders developing countries’ abilities to sustain coalitions. Second, and correlatively, members whose interests might be more effectively served if they are promoted by a group strategy could benefit from a legal framework that better supports developing country coalitions or groupings.

This Article assesses the impact of the WTO’s legal structure on coalition building and offers some suggestions for evolution. If smaller or poorer developing countries are to participate more fully in multilateral trade negotiations and if this can better be done through alliances, it may well be that the organization will have to adapt its law and practice to become more coalition-friendly or risk further marginalizing a large part of its membership and stalling negotiations for all members. The first part presents an empirical analysis of developing country coalitions in the GATT and the WTO. It elaborates a typology of developing country coalitions. The second part assesses the WTO institutional structure for a coalition objective, analyzing the organization’s impact on each type of coalition identified in the first part. The second part also suggests possible structural adjustments to improve developing countries’ participation through coalitions. The third part looks beyond the organization’s institutional arrangements at how some trade instruments (preferences and bilateral or regional trade agreements) are used within the WTO context to counter coalition strategies.

I. The Practice of Developing Country Coalitions in the GATT and WTO

This Part sets forth the factual foundation of the analysis by identifying the coalitions and group bargaining that have taken place in the GATT and later in the WTO. It relies in large part on the analysis conducted by Narlikar and the relatively few other authors who have inquired specifically into these issues. The objective of this discussion is to identify a typology of

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  \item \textsuperscript{7} Robert O. Keohane & Joseph S. Nye, Jr., \textit{Transgovernmental Relations and International Organizations}, 27 \textit{World Pol.} 39, 52 (1974).
\end{itemize}
coalitions so as to assess how each intersects with the WTO’s institutional and legal framework. It is worth noting that most studies on coalitions in the GATT or WTO date back more than fifteen years and very little empirical or theoretical work has been done in the past decade. As a result, there are substantial gaps in the literature. The present research has supplemented results from recently published works with discussions with WTO delegates from developing countries.

The term “coalition” is used here as a neutral categorical denomination, which comprises several subsets. Coalitions have been described as “any group of decision-makers participating in . . . a negotiation and who agree to act in concert to achieve a common end,” and as “a group of players that seeks to increase its payoffs by group strategy and, perhaps, private understandings on allocating an increased group payoff.” Narlikar distinguishes between two broad types of coalitions. On the one hand, alliances “rest[ ] on the fulfillment of the self-interest of members and their inability to dislodge members from other alliances to form a more beneficial coalition.” They are typical of realist politics driven by power considerations and trade-offs. In the field of political economy, alliance-type coalitions are “among self-interested actors as opposed to collective identities,” are driven by instrumental rather than ideological motives, and are focused on specific issues addressing specific threats in lieu of building an ideological quorum that “hopes to be relevant to all situations.” On the other hand, blocs are based on a common ideology or political vision; they combine like-minded states and emphasize a collective identity. Most coalitions combine characteristics of each type.

Part I.A presents a map of the most important coalitions in the GATT and WTO. Part I.B reviews theoretical conclusions of recent publications on developing country coalitions in the WTO.

A. Mapping Developing Country Coalitions in the GATT and WTO

In the first few decades of the GATT, the place and strategy of developing country members was largely influenced by the political, economic, and strategic context beyond the GATT. As a result, developing country coalitions reflected these external concerns and agendas much more than they have since the Uruguay Round. Part I.A.1 draws a brief history of develop-
ing country groupings up to the Uruguay Round and shows that they operated both in the framework of the GATT and beyond, particularly in the context of the United Nations Conference on Trade and Development ("UNCTAD") and emerging Regional Trade Agreements ("RTAs"). This configuration is also a reflection of the place of the GATT in the international legal system at the time. Part I.A.2 presents developing country coalition strategies in the WTO. As the WTO’s coverage (both in terms of members and in terms of regulated domains) has dramatically expanded compared to the GATT, even more concerns linked to development have converged toward that organization. The polarization in the WTO and the receding role of other agencies, in particular UNCTAD, has resulted in the emergence of coalitions that are active almost exclusively within the WTO. In a peculiar paradox, as WTO law has been mainstreamed into public international law, developing country coalitions have, on the contrary, become more WTO-specific, often paying little regard to activities in other institutions of international law.

1. **GATT Strategies**

Prior to the 1990s, coalitions were influenced in large part by the North-South and East-West relations that characterized the Cold War, either because they were part of the East-West geo-strategic map or because they were in clear opposition to that bipolar division of power (most notably the Non-Alignment Movement). The strategies of developing countries in the GATT in the 1960s and 1970s must be read in the broader context of their activity in UNCTAD, which reflected their desire to promote economic and development interests separately from East-West trade and political positions. Alongside the major movement by developing countries leading to the creation of UNCTAD, some alliances also were motivated by common economic policies and geographic proximity.

The largest and most notable coalition of that era certainly was the Group of Seventy-Seven ("G-77"), formed within UNCTAD, but many of its members also were parties to the GATT. Indeed, developing country coalescence around issues of common interest found its paramount expression in the Joint Declaration of the Seventy-Seven Developing Countries at the conclusion of the first session of UNCTAD in Geneva on June 15, 1964. While the Joint Declaration endorses the outcome of the first UNCTAD conference, it highlights that much remained to be done and that the conference’s

15. A forum created by developing countries seeking an alternative outlet to the GATT for multilateral trade negotiations, the UNCTAD put some pressure on the GATT to better address developing country needs but the resulting legal instruments (Part IV of the GATT on trade and development, adopted in 1964) remain problematic to this day due to their generally non-binding character. Ultimately developing countries retreated on mainly defensive positions in the subsequent decades by seeking exemptions from the general trade regime and limitations to their commitments.

achievements were seen as a beginning rather than an end. The call for international cooperation in the field of trade to solve development problems and for the establishment of an “international machinery” to that effect is very much reminiscent of both the wording and the spirit of the International Trade Organization (“ITO”) Charter. The G-77’s Algiers Charter of 1967 discusses, in technical detail, declining terms of trade, loss of purchasing power and general economic stagnation of developing countries, rising debt problems, insufficient technology transfers, increased protection by developed countries of agricultural products, developed country tariffs on tropical products and quotas on products from developing countries, and increased protectionism in developed countries through economic integration processes.17 Later, the G-77 evaluated the results of the GATT’s Tokyo Round of negotiations (1973-1979) in a Declaration on the Multilateral Trade Negotiations, coming in large part to a negative conclusion.18 The coalition strategy of the G-77 and UNCTAD nevertheless led to the creation of the Generalized System of Preferences (“GSP”) and the Enabling Clause of 1979 that laid the groundwork for special and differential treatment of developing countries, non-reciprocity, and preferential South-South trade. These legal instruments still constitute the core of development-oriented provisions in the GATT and WTO.

Other alignments, though not formal coalitions, were motivated by similarities in economic policies. The import substitution policies followed by many Latin American countries and some Asian countries from the 1960s to the early 1980s are prominent examples of such alignments. These economic policies consisted of inward-looking trade policies and resulted in defensive positions at the GATT. Other countries, such as Brazil, India, and Egypt, led the developing countries’ momentum in obtaining more preferences from developed countries and exceptions to the negotiated agreements as well as derogations to foster preferential South-South trade at the margins of agreements chiefly negotiated by industrialized countries for their own purposes.19 The Informal Group of Developing Countries (“IGDC”) represented an important bloc-type coalition united by a common rejection of the perceived “rich man’s club” aspect of the GATT and a political approach to the issue of international trade.20 Its leadership included Argentina, Brazil, Egypt, India, and Yugoslavia as well as other important members such as Chile, Pakistan and Uruguay. It became one of the most important develop-

20. Narlikar, supra note 1, at 44–45.
ing country groups in the GATT to push for exceptions to trade disciplines (ultimately formalizing as special and differential treatment). It had some success in the mid 1950s when it pushed for an amendment to Article XVIII allowing the use of quotas for balance of payment purposes ("Article XVIII:B") and later, in coordination with UNCTAD and the G-77 for the inclusion of Part IV and the adoption of the Enabling Clause.21 However, the track record of this coalition reflects many of the problems encountered by developing countries in the GATT; aside from a few broad themes, their agenda, like their membership, was too diverse to allow effective bargaining, and the fallback position of seeking exclusions tended to marginalize the coalition’s members in negotiations.

Given the exclusion during the Tokyo Round of crucial developing country exports from further tariff reduction, some developing countries individually sought quotas for their exports on a bilateral basis to secure market access for their products in developing countries. These strategies were pursued, for instance, by Hong Kong, Taiwan, Korea, India, Mexico, the Philippines, Singapore and Brazil with respect to textiles and a few other exports.22 The return to separate bilateral agreements was not conducive to coalition bargaining and was even a divisive factor among developing countries that were competing against each other to secure market shares in large developed countries.

The Association of Southeast Asian Nations ("ASEAN") Geneva Committee, formed in 1973, included Hong Kong, Indonesia, Malaysia, Thailand, Singapore, Philippines, and Brunei. Despite the low-level regional integration of the group as a regional economic organization and the lack of formal institutions, it proved remarkably effective in coordinating issues within the membership. Narlikar credits this success to the group’s relative internal cohesion, common economic interests, and similar geo-strategic concerns arising from their proximity to China.23 This specific identity was likely further enhanced as the Newly Industrialized Countries24 rapidly diverged from the traditional Southern views and interests.

To summarize, developing country coalitions in the first few decades of the GATT were not confined to the GATT itself, but rather, reflected a broader political and economic agenda mindful of international dynamics in other international fora. This accounts for the fact that the GATT was by no means the omnipresent and global organization that it became during and after the Uruguay Round. The relatively small number of active coalitions

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21. Id. at 55–58. The concepts of Part IV and later of preferential systems eventually integrated in the GATT legal system through the Enabling Clause were initially developed at UNCTAD under the aegis of the G-77.
23. NARLIKAR, supra note 1, at 173.
24. Hong Kong, Taiwan, South Korea, Singapore, and later Thailand, Malaysia, and the Philippines are placed within this group.
may also be explained in part by the fact that decolonization was in full swing, so that a large number of “new” developing countries emerged throughout the 1960s and 1970s. This constantly evolving scene of new actors could more easily aggregate around a large and diverse group such as the G-77 than it could form smaller resource-intensive coalitions driven by specific interests.

The Uruguay Round marked a shift from North-South opposition to a pragmatic, issue-based bargaining approach, with many coalitions bringing together developed and developing countries. The mid-1980s marked the heyday of coalitions in the GATT. This evolution was prompted both by dynamics internal to the GATT negotiations with the massive expansion of its field of regulation and the surge in membership (most former Soviet-bloc countries became members by the end of the Uruguay Round bringing membership to 128), and by external factors such as the end of the East-West confrontation, the subsequent realignment of the South, and the re-orientation of economic policies in a number of developing countries in favor of trade-oriented policies.

The divergent positions of developing countries regarding services was perhaps the first and most stark instance of developing countries realizing that their individual interests were not necessarily represented by the traditional Third World stance that had infused the positions of UNCTAD and the G-77, within and outside of the GATT. The IGDC created a forum for exchange of information and the development of research on trade and, particularly, services. This marked an important shift from the earlier political and ideologically motivated involvement in trade negotiations to participation focused on trade regulations. This was accompanied by the recognition that developing countries do not constitute a homogeneous group. For instance, some developing countries realized that they had an interest in the international regulation of services because much of their economy relied on service industries (typically transport and tourism); others planned to use a softer stance on services as a bargaining chip to obtain other concessions; and others perceived no immediate interest in services but used the issue to form alliances.

Some members from the IGDC institutionalized their position as the G-1026 in 1982. The group of Developing Countries on Services also opposed the inclusion of services in the negotiations and focused on development issues. A common problem of both the G-10 and the Developing Countries on Services was that their members brought together a broad range of heterogeneous issues, which made for a relatively amorphous and politically unsustainable agenda. Ultimately, this approach significantly weakened the coalitions. Other developing countries were more open to the inclusion of

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26. Members of the G-10 include the core group from the IGDC (Argentina, Brazil, Egypt, India, and Yugoslavia), Chile, Jamaica, Pakistan, Peru, and Uruguay. Id. at 63, 71.
services in the negotiations and formed alliances with developed countries culminating in the brokerage of a deal between the traditional stance of the South embodied by the G-10 hardliners and the equally hard-line position spearheaded by the United States at the Punta del Este Ministerial Meeting.\textsuperscript{27} The G-20,\textsuperscript{28} also dubbed the “Cafe au Lait” coalition, formed in 1983 during the run-up to the Uruguay Round as another spin-off from the IGDC, later aggregated with the G-9\textsuperscript{29} under the leadership of Columbia and Switzerland. It continued to some extent as Friends of Services during the Uruguay Round. The alliance between the G-20 and the G-9 is one example of coalitions bringing together developed and developing countries, a feature of several important coalitions during the Uruguay Round.

Similar dynamics prevailed with respect to agriculture. While some developing countries emphasized the costs of liberalization through the Food Importers’ Group,\textsuperscript{30} the Cairns Group\textsuperscript{31} represented developing and developed countries wishing to include agriculture within GATT disciplines. The Cairns Group gained significant weight leverage during the round, leverage which has endured because it brought together developed and developing countries that were likely to help bridge the gap between the most extreme negotiating positions.

Finally, several regionally based coalitions emerged during the round. The Latin American Group produced some joint documents and the ASEAN Geneva Committee became a significant player. Despite diverging individual economic priorities (particularly on services) ASEAN members were successful in promoting a coordinated platform emphasizing the opening of commodity markets and some specific demands in certain sub-sectors (such as increased liberalization in telecommunications and financial services). Aside from the European Communities (“EC”), which began negotiating as a group early on in the existence of the GATT, the ASEAN strategy presented a relatively novel configuration.

The nature of the participation of developing countries in GATT negotiations changed quite radically in the run-up to and during the Uruguay Round, with an increase in the quality and quantity of their involvement.

\textsuperscript{27} Draper & Sally, \textit{supra} note 19, at 5.
\textsuperscript{28} G-20 members include Bangladesh, Chile, Colombia, Hong Kong, Indonesia, Ivory Coast, Jamaica, Malaysia, Mexico, Pakistan, Philippines, Romania, Singapore, Sri Lanka, South Korea, Thailand, Turkey, Uruguay, Zambia, and Zaire. Narlikar, \textit{supra} note 1, at 94. This is a different group from the current G-20 formed in 2003. \textit{See supra}, Part I.A.2.
\textsuperscript{29} G-9 members include Australia, Austria, Canada, Finland, Iceland, New Zealand, Norway, Sweden, and Switzerland. Narlikar, \textit{supra} note 1, at 94.
\textsuperscript{30} The Food Importers’ Group includes Egypt, Jamaica, Mexico, Morocco, Peru, India, Nigeria, and South Korea. \textit{Id.} at 37.
\textsuperscript{31} The Cairns Group was formed in 1986 and continues to date. Its membership includes Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji, Hungary, Indonesia, Malaysia, New Zealand, the Philippines, Thailand, and Uruguay. \textit{See generally} R. A. Higgott & A. F. Cooper, \textit{Middle Power Leadership and Coalition Building: Australia, the Cairns Group and the Uruguayan Round of Trade Negotiations}, 44 \textit{Int’l Org.} 589 (1990).
Accordingly, the type of coalitions that they formed evolved from the ideological and political polarization of the previous decade toward a preference for alliances focused on issue-bargaining (most prominently agriculture and services). India and Brazil initially maintained a more traditional stance, but Brazil finally joined the pragmatic approach when it engaged in domestic liberalization in the mid-1990s. However, the active minority of developing countries should not obscure the vast majority of poor members that did not have the resources to participate effectively, either at home or in Geneva. It is also possible that the poorest developing countries were disinclined to use whatever scarce resources they might have had in negotiations that appeared forlorn once it was ascertained that they were unlikely to obtain immediate concessions on agriculture and textiles. This discrepancy between the active participation of some developing countries through coalitions and those that failed to make their voices heard was reflected in the outcome of the round, with the active minority gaining market access concessions in developed countries (particularly for industrial exports from East-Asia). On the other hand, the non-active developing countries did not gain market access to markets for products of interest to them (mostly textiles and agricultural products), saw their tariff preferences eroded, and ended up bound by many new trade rules.

2. Developing Country Coalition Strategies in the WTO

Developing countries fully recognized the importance of pre-round positioning after their experience in the Uruguay Round. Thus coalitions formed, most notably in preparation for the Singapore Ministerial Meeting of 1996, the Seattle Ministerial Meeting of 1999, the Doha Ministerial Meeting of 2001, and the Cancun Ministerial Meeting of 2003. While some developing countries pursued a defensive strategy focused on limiting negotiations and increasing special and differential treatment, others formed smaller coalitions based on common interests in particular sub-sectors or on similar economic conditions. Although the Cairns Group continued its activities, joint developed-developing country coalitions faltered and the G-20, which split off from the Cairns Group, did not include any rich country. Additional regional groupings sought to coordinate their members at the WTO level, often on the basis of an existing regional organization. This
trend is not surprising given the massive expansion in the number of RTAs since the 1990s.

Several coalitions pursued traditional policies on special and differential treatment. The Like-Minded Group was formed in 1996 in opposition to the expansion of the trade agenda to domains such as investment, competition, trade facilitation, and government procurement (the so-called Singapore issues). India continues to support this position. The Small and Vulnerable Economies Coalition, also created in preparation for the Singapore Ministerial Meeting, advocated particular preferential treatment, technical assistance, and flexibility of commitments for its members. Other coalitions, such as the Friends of the Development Box and the African, Caribbean, and Pacific (“ACP”) Group, and individual countries also continued to call for more special and differential treatment.

Some coalition activity continued in the area of services, though less than during the Uruguay Round. Coalitions on agricultural issues such as the Cairns Group continued from the Uruguay Round while others came into existence to prepare for the Seattle meeting. Examples of new coalitions include the Friends of the Development Box (advocating measures of special treatment specific to agricultural products from developing countries and Least Developed Countries (“LDCs”)), the Friends of Fish (promoting the elimination of fisheries subsidies), and the Friends of Geographical Indications (claiming the extension of protection of geographical indications beyond wines and spirits). The Sectoral Initiative in Favour of Cotton, a very small coalition of cotton exporters (a grouping of Benin, Burkina Faso, Chad, and Niger, now simply known as the Cotton-4), presented an interesting challenge during the

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35. Membership includes Cuba, Egypt, India, Indonesia, Pakistan, Tanzania, and Uganda. NARLIKAR, supra note 1, at 180.


37. The Friends of Services remains active and a new G-24 on Services was formed in 1999, including Argentina, Bolivia, Brazil, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Honduras, India, Indonesia, Malaysia, Mexico, Nicaragua, Pakistan, Panama, Paraguay, Peru, Philippines, Sri Lanka, Thailand, Uruguay, and Venezuela. NARLIKAR, supra note 1, at 48.


39. Membership currently comprises Australia, Argentina, Chile, Iceland, Ecuador, New Zealand, Norway, Peru, Philippines, and the United States. Trade Negotiations Committee, supra note 34. This coalition is a rare example of a new alliance that includes both developed and developing countries.


41. World Trade Organization, supra note 36.
Cancun Ministerial Meeting by proposing that cotton subsidies be abolished after a limited transition period in the United States, Europe, and China and that financial compensation be provided to offset the losses incurred by African cotton producers during the transition.\footnote{Ruth Gordon, *Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime*, 8 Berkeley J. Afr.-Am. L. & Pol’y 79, 113 (2006).} While this proposal did not gain the necessary momentum at Cancun,\footnote{Bernard Hoekman, Cancun: Crisis or Catharsis? 2 (Sept. 20, 2003) (unpublished note, on file with the Brookings-Sedman Manchester Trade Roundtable), available at http://www.sed.manchester.ac.uk/idpm/research/events/wbseminar/CancunCatharsisorCrisis.pdf.} its promoters remained in control of that part of the negotiation agenda. The proposal’s incorporation in the final ministerial declaration (limited to the phase-out of subsidies) constituted one of the most positive achievements of the Hong Kong Ministerial Meeting in 2005.\footnote{World Trade Organization, Ministerial Declaration of 18 December 2005, ¶ 11, WT/MIN(05)/DEC (2005) [hereinafter Hong Kong Declaration]. However the agreement in principle embodied in the Declaration is now effectively suspended after the collapse of the Doha Round talks in July 2006. See also Gordon, supra note 42, at 115. Because the negotiations were subsequently suspended, the implementation of the Declaration remains doubtful at the time of this writing.} Negotiations on agriculture are complicated by the divergent interests of developing countries on the issue. In particular, Net Food Importing Countries and LDCs’ interests are not necessarily aligned with those of large agricultural exporting countries; EC preferences also have disparate impacts on agricultural producing developing countries depending on whether they are preference beneficiaries.\footnote{Arvind Panagariya, *Liberalizing Agriculture*, 84 FOREIGN AFF. (WTO SPECIAL EDITION) (2005), available at http://www.foreignaffairs.org/20051201faessay84706/arvind-panagariya/liberalizing-agriculture.html.} Further subtleties emerge when considering the effect of a decrease in EC and U.S. subsidies on the composition of food-importing and food-exporting groups, as some current net food importers could become exporters. Nonetheless, the Cairns Group and later the G-20 took center-stage regarding agriculture issues.

The shift in some developing countries’ negotiation strategy from a defensive stance to a more aggressive and forward-looking position in the WTO is particularly exemplified by the Cairns Group and the G-20. The Cairns Group continued in its prior configuration but several of its developing members became increasingly weary of Australia and Canada’s insistence that negotiations on agriculture be subordinated to reaching a deal between Europe and the United States. As a result, the G-20 was formalized under the leadership of the Brazilian Minister of Foreign Affairs (and former Ambassador to the WTO) Celso Amorim in August 2003 during the final stages leading to the Cancun Ministerial Meeting.\footnote{The group’s objectives and status had emerged a few months earlier with the Brazilian Declaration issued by Brazil, India, and South Africa. See Joint Proposal by Argentina et al., *Brazil–Agriculture Framework Proposal*, WT/MIN(03)/W/6 (Sept. 4, 2003). The G-20 currently comprises twenty-one members: Argentina, Bolivia, Brazil, Chile, China, Cuba, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Tanzania, Thailand, Uruguay, Venezuela, and Zimbabwe. G-20, Members, http://www.g-20.mre.gov.br/members.asp (last visited Mar. 24, 2007).} The G-20 had difficulty
reconciling its members’ heterogeneous agricultural interests. Most notably, Brazil had a liberal approach to further its export interest, whereas India maintained conservative positions with respect to liberalization of the agricultural sector and had a protectionist stance. Brazil’s shift toward a more aggressive stance on agriculture corresponded to its liberalization of the agricultural sector and the increased pressure by domestic investors on the government on this issue both in negotiating rounds and in dispute settlement (particularly in disputes with Europe and the United States). South Africa also became a key player because of its focus on fostering strong developing country coalitions to attempt to balance American and European power, rather than because it had a particular interest in agriculture (agricultural exports amount to only about ten percent of South Africa’s exports). The G-20 maintained a united front despite divisive techniques such as offers to individual members of the group. It bargained as a bloc on the three main aspects of agriculture negotiations: market access, domestic support, and export competition.

While special and differential treatment, agriculture, and services remained very much on the agenda of developing countries, the Uruguay Round also created additional issues, which became the focus of new coalitions in subsequent rounds: implementation issues, investment, Non-Agricultural Market Access (“NAMA”), Trade-Related Intellectual Property Rights (“TRIPS”), and public health concerns are some examples. There again, developing countries learned from the Uruguay Round and now are taking much more defined and active positions, most often using coalitions to gain political leverage. The Least Developed Countries Group (“LDC Group”), formed in 1999 and mostly comprised of African LDCs, has raised implementation and accession issues as well as questions about participation, capacity building, and technical assistance. The inclusion of WTO observers in the group is interesting and denotes, yet again, the recognition by developing countries — and even the poorest among them — of the need for their active involvement in the WTO, even before they become full-fledged members. The LDC Group and the African Group were very active

47. G-20 members represent almost sixty percent of the world population, seventy percent of the world’s rural population, and twenty-six percent of the world’s agricultural exports. See G-20, History, http://www.g-20.mre.gov.br/history.asp (last visited Aug. 14, 2006).
48. Da Motta Veiga, supra note 32, at 110.
49. Draper & Sally, supra note 19, at 44.
51. Members currently include Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of Congo, Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, Zambia, and some observers to the WTO. NARLIKAR, supra note 1, at 46.
52. Together with the ACP Group, the LDC Group and the African Group form the G-90, an umbrella coalition that emerged during the Cancun Ministerial Meeting and opposed negotiations on the Singapore issues. World Trade Organization, supra note 36.
regarding TRIPS and public health, though the negotiations leading to the Decision on Public Health most prominently involved only a few large developing countries (in particular India, South Africa, and Brazil), the United States (as the country of origin of most patent holders), as well as non-state actors. The possibility of extending negotiations to regulate foreign investment also spurred the formation of a coalition of developing countries during the Singapore Ministerial Meeting, but developing countries do not have a united stance on investment. Led by India and Pakistan the coalition strongly opposed the opening of negotiations in the WTO but a number of members yielded to pressure, particularly from the United States, and in the end agreed to the establishment of a working group with a limited mandate. In the run-up to and during the Cancun Ministerial Meeting, developing country coalitions emphasized the generation and sharing of information, as was exemplified most prominently in the regular meetings held by the Like-Minded Group under India’s leadership to that effect. Investment is one area where coalitions coexist with competition dynamics between developing countries as they can themselves seek comparative advantages against other developing countries in the drive to attract foreign investment.

A number of new groupings also arose from regional bases. Some groups such as the LDC Group (with the exception of a few Asian and Latin Ameri-

55. Initially the coalition comprised Bangladesh, Cuba, Egypt, Ghana, India, Indonesia, Kenya, Malaysia, Mauritius, Tanzania, Thailand, Venezuela, and Zimbabwe, with the additional support of Pakistan and Sri Lanka. Developing Nations Oppose Multilateral Investment Norms, TIMES OF INDIA, Oct. 1, 1996, at 19.
58. Beyond the WTO, the aborted negotiations on a Multilateral Agreement on Investment shed light on some of these tensions. While most developing countries wish to attract foreign investment (and hence are willing to compete for it), the issue, rather, is to determine the appropriate forum for negotiating investment rules. See, e.g., Burt, supra note 56, at 1023-28; see also Robert Howse, From Politics to Technocracy—and Back Again: The Fates of the Multilateral Trading Regime, 96 Am. J. Int’l L. 94, 103 (2002) (tracing the shift in policy on investment by some countries to the debt crises).
59. See, e.g., NAMA-11 comprising Argentina, Bolivarian Republic of Venezuela, Brazil, Egypt, India, Indonesia, Namibia, Philippines, South Africa, and Tunisia. A recent summary of positions shows the lack of convergence between developing countries on NAMA. Negotiating Group of Market Access, Toward NAMA Modalities, JOB(06)/200/Rev.1 (June 26, 2006).
can members) and the Paradisus Group\(^\text{60}\) aggregated around similar trade concerns and geographic proximity without any institutional basis, while others developed coordinated WTO action on the basis of a pre-existing regional organization, such as the Mercado Comun del Sur ("MERCOSUR"),\(^\text{61}\) the Caribbean Community ("CARICOM") Regional Negotiating Machinery\(^\text{62}\) (formed in 1997), the South Pacific Forum (coordinating action among its WTO members on development issues and trade in fisheries and marine resources),\(^\text{63}\) and the African Group.\(^\text{64}\) Regional groups, particularly those supported by a RTA, are particularly notable because the GATT and the WTO recognize regional trade groups and give them certain rights. In fact, being a party to a recognized RTA is the only way to gain legal status as a group of members in the WTO. Unlike issue-specific coalitions, these groupings seek to represent the interests of their members across issues. The MERCOSUR encountered some success regarding its agriculture agenda.\(^\text{65}\) The ACP Group’s priority, in coordination with the African Group, was to secure the appropriate waiver after the signature of the Cotonou Agreement in June 2000, which gave them some preferential access to the European Union ("EU") market. The African Group also emphasized research and coordination on issues such as TRIPS and technical assistance; it was particularly active in the periods leading up to the Seattle and Doha Ministerial Meetings. The unprecedented activism of developing countries at Doha was rooted in the extensive preparation for the meeting by various groups, many of which were regionally-based (the South Asian Association for Regional Cooperation ("SAARC") for South Asian countries, the Organization of African Unity ("OAU"), the African Group, and particularly the African LDCs).\(^\text{66}\)

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62. The CARICOM is a regional trade agreement signed in 1991. It includes Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, and Suriname. World Trade Organization, supra note 36.


64. Membership comprises Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Côte d’Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe, and seven observers to the WTO, corresponding to the membership of the Organization of African Unity (organization continued as the African Union after 2002). Narlikar, supra note 1, at 49.

65. Id.

The major exception to enhanced regional bloc participation in recent years has been the fading role of ASEAN in the Doha round, due particularly to diverging positions among its membership:

Singapore and Thailand retain broadly pragmatic stances. They have offensive (export market access) positions, and, in Thailand’s case, defensive (domestic protectionist) positions (hardly any for Singapore); but are generally willing to compromise and trade-off in order to ensure overall progress in the round. Malaysia, Indonesia and the Philippines, on the other hand, have become increasingly defensive in critical areas such as agriculture, Special and Differential Treatment, and the Singapore issues.67

This evolution also explains Indonesia and the Philippines’ participation in the G-20 and distancing from the Cairns Group.

Finally, China, the big new player after the Uruguay Round, appears to be developing an interesting strategy consisting of pressing for regional free trade agreements, not so much as a way to improve its bargaining capacity, but rather to foster its case for market economy status, a crucial element in anti-dumping actions. It has sought agreements with the ASEAN, Thailand, and has engaged in negotiations with Hong Kong, Taiwan, Australia, New Zealand, Japan and South Korea.

Most WTO members participate in coalitions and many of them participate in several groupings. The type of coalitions has also significantly diversified over time, reflecting the more complex and broader agenda of trade negotiations and signed agreements. The changing membership of the GATT and the WTO, as well as the WTO’s evolving relationship with other international entities (for instance UNCTAD), have influenced the style of developing country coalitions. As external geopolitical realignments took place and the Uruguay Round transformed the dynamics of multilateral trade law, coalition types and membership evolved as well, with an increased technical focus and groupings including both developed and developing countries. As one commentator notes: “The sense of solidarity that the developing countries had in the 1970s and early 1980s is no longer extant.”68 The multiplication of regional trade organizations also had an impact on group dynamics within the WTO.

Two broad types of coalitions emerged, each with several sub-categories. First, discussion and research groups are comprised of (i) discussion fora between developed and developing countries with some common interests and priorities; and (ii) discussion and resource platforms for developing countries aimed at increasing capacity and participation of members by pooling re-

67. Draper & Sally, supra note 19, at 31.  
68. Subedi, supra note 66, at 444.
sources and research. The group also formed stronger negotiation-oriented coalitions (such as the G-20, which has a strong research base, bringing together knowledge from government institutions as well as the private sector and non-profit NGOs, but which also became a negotiation platform). Second, negotiation-oriented coalitions may be designed to (i) raise political awareness of certain members (such as the ACP, LDCs, Small and Vulnerable Economies, and Small Island Developing States); (ii) help define the agenda, prior to the actual negotiations (in particular coalitions which wish to bar certain issues from negotiations); and (iii) achieve particular regulatory outcomes on a particular issue or economic sector or sub-sector (such as the G-20, Friends of Services, Friends of Fish, Cotton-4) and defend interests in dispute settlement.

The next Part draws some theoretical conclusions from these facts and from the literature in order to better understand which types of coalitions are effective in the WTO and what future trends might evolve.

B. Theoretical Findings on Coalition Practice in the WTO

As noted in the introduction of this Article, there is still relatively little literature evaluating the mechanisms and efficiency of developing country coalitions in the WTO. This Part discusses the conclusions drawn by the most comprehensive studies published to date. More work is currently being carried out in the field of international relations regarding specific coalitions (such as the Cotton-4), but is not yet published or otherwise available.

Narlikar provides conclusions on the viability of blocs, issue-based, and regionally-based coalitions. First, blocs — particularly those with a large number of members — tend to have more of a blocking strategy rather than a positive negotiating agenda. Catering to the diverse priorities and interests of the bloc’s participants often leads to the adoption of the largest common denominator of negative demands. While this may be effective in stalling negotiations and voicing the dissatisfaction of a large number of members, it does not necessarily lead to a reorientation of the legal regime due to the lack of a positive agenda. Such groups also have a tendency to disaggregate (such as the G-10 at Punta del Este and the Like-Minded Group at Doha), an unsurprising result given that the bloc is in practice unable to serve all the interests of its members, or even some of them, because of the lack of prioritization among often divergent interests. Therefore, it appears that blocs with more homogeneous membership, negotiation priorities, and in-


70. Narlikar, supra note 1, at 203.
terests should be more successful. The LDC Group and the Group of Small and Vulnerable Economies could meet such criteria.

Second, Narlikar finds empirical evidence suggesting that issue-based bargaining works best for small and very specialized economies. However, the larger the issue and the more diverse the membership, the harder it will be to maintain a coherent, united stance. This problem arose in the case of the Informal Group of Developing Countries on Services and eventually that of the Cairns Group. In such situations, coalitions may be better used as a pool of research resources and a forum for exchanging ideas rather than as a direct negotiating tool. Indeed, the G-20’s explicit purpose was to form a more coherent group on agriculture after rifts appeared in priorities and strategies between some developing countries and Australia and Canada in the Cairns Group. Can the G-20 be expanded to other issues? Da Motta Veiga suggests that such a move would jeopardize the G-20’s integrity and risk losing its focus. The G-20’s experience nonetheless indicates that issue-based coalitions with a strong leadership by a large developing country can achieve legitimacy in multilateral negotiations and gain political leverage. Overall, coalitions focused on specific issues seem more viable since members’ individual agendas are more likely to be aligned with the coalition’s. A subsidiary issue is the potential for coalitions involving both developed and developing countries (“cross-over coalitions”), which usually focus on a particular issue or sub-sector. The Cairns Group is perhaps the formation that set the highest expectations and produced promising results in the Uruguay Round; the Like-Minded Group also offers an example of this type of cross-over coalition. Nonetheless, whether members with such different political and economic situations as Malaysia and Uganda (both members of the Like-Minded Group) can find a common bargaining agenda remains to be seen. Narlikar suggests that developed-developing country coalitions could be effective in areas “less prone to disaggregation or if smaller numbers were involved.” Perhaps areas less sensitive than agriculture and services would allow for effective joint bargaining by some developed and developing countries. That being said, Bjorskov and Lind’s analysis based on “natural alliances” is perhaps more optimistic about the potential for coalitions involving developed and developing countries. One of their main conclusions is that “developing countries seem to be able to gain support in their opinions from players that do not normally maintain a particularly high profile on international development.” They cite as supporting evidence the convergence in trade policy objectives of the main group of African countries, as well as African countries in other groups and most of Latin

71. Id. at 176 and ch. 5.
72. Da Motta Veiga, supra note 32, at 109.
73. NARLIKAR, supra note 1, at 201.
America, with the objectives of the United States and other industrialized Cairns members. Hence, although alliances between developed and developing countries appear difficult to sustain for purposes of direct negotiations, their value as discussion fora should not be underestimated as they can facilitate an evolution in the views of both developed and developing country participants. A common agenda may not exist in a form strong enough to provide a platform for negotiations with third parties but a discussion group may help bring participants’ positions closer or assist in overcoming negotiation deadlocks.

Third, coalitions based on pre-existing RTAs seem the most obvious avenue for group bargaining, but this has not been very successful for developing countries due to the insufficient trading framework for participants, which makes members competitors in substitutable products with little opportunity for intra-industry trade and differentiation (this is in contrast to developed country RTAs which can generate significant intra-regional trade). Regional bloc coalitions were relatively successful in the Uruguay Round but their influence has since subsided (for example, the disappearance of the Nordic Group and the European Free Trade Agreement (“EFTA”) as influential actors and the break-down in ASEAN activism in part due to the Asian crisis). The institutional economies of scale that could have been generated by using pre-existing regional platforms also failed to materialize: it seems that instead of strengthening regional institutions the corresponding coalitions have “inherit[ed] the same flaws” as these institutions. Narlikar concludes that regional coalitions not based on an RTA institutional integration may be more successful, as illustrated by the ASEAN’s experience. The ASEAN has had little influence as a regional economic group but has played a visible role during the Uruguay Round and the early WTO years by developing a joint external bargaining agenda and playing up geographic and interest-based commonalities between its members. Nonetheless, if developing country RTAs become more integrated, the institutional support that they could provide to regional coalitions may be very valuable, particularly in the case of countries with scarce administrative and financial resources.

Draper and Sally focus on coalition leadership and conclude that within the approximately thirty members that will continue to lead negotiations, the EU, the United States, India, Brazil, China, and to some extent, South Africa, will and must play a prominent role. From this perspective, the rising influence of the largest and most powerful developing countries has even led some authors to advocate the formation of a “Developing Country

75. Id.
76. Narlikar, supra note 1, at 165, 174.
77. Draper & Sally, supra note 19, at 12.
78. Narlikar, supra note 1, at 169.
79. Id. at 175.
80. Draper & Sally, supra note 19, at 16.
Quad” on the model of the negotiations strategy pursued by the United States, Canada, Europe, and Japan during the Uruguay Round. Draper and Sally also argue that broad-based, informal coalitions like the “Cafe au Lait” coalition will continue to play an important role as a sounding board and as a platform to share information but that they are too heterogeneous to allow for common positions. However, small issue-specific coalitions comprising both developed and developing countries may play an increased role:

Defensive, one-sided pan-developing-country alliances are wrong in principle and unlikely in practice. UNCTAD/G-77-type alliances were logical in a world of import-substitution policies and old-style S&D. They are illogical and archaic now. Besides, such formations are too diverse and unwieldy. Common-characteristic alliances among second- and third-division developing countries have more utility and are a more important feature in the WTO, especially at Ministerial Conferences and other set-piece events. They bring legitimate issues to light, especially on developed-country agricultural protectionism (cotton subsidies, for instance). They have to be accommodated. But we think they have distinct limits, due to a combination of overwhelmingly defensive positions (on tariff preferences, implementation, aid, and more generally on S&D), lack of negotiating capacity, and, underlying everything, bad policies and weak-to-terrible institutions at home. They can contribute to the WTO’s decline and marginalisation by spoiling and blocking, but we do not think they can be central players in finding constructive solutions.

Draper and Sally conclude that the organization will continue to be led by the Organisation for Economic Co-operation and Development (“OECD”) and “first-tiered” developing countries (large, rich, with substantial institutional capacity), but they note the increased participation of small and poorer members. The latter cannot act alone and therefore form coalitions (African Group, LDC Group, Small Island Developing States, ACP). According to Draper and Sally, these groups had mostly a blocking effect on negotiations at Cancun because they came with a list of demands and no credible bargaining proposal. Additionally, the growing role of India, China, Brazil, and South Africa is undeniable and is likely to continue as these countries consolidate their ability to define common goals for the groups they are leading, most notably the G-20. Their success has also come

81. John Braithwaite, Methods of Power for Development: Weapons of the Weak, Weapons of the Strong, 26 MICH. J. INT’L L. 297, 312 (2004); Peter Drahos, Developing Countries and International Intellectual Property Standards-Setting, 5 J. WORLD INT’L PROP. 765, 784 (2002) (suggesting that India, Brazil, Nigeria, and China could form a “Developing Country Quad” which could form and lead working groups on key negotiation issues and to which other developing countries could rally in the final stages of a round).
82. Draper & Sally, supra note 19, at 9.
83. Id. at 45–46.
84. Id. at 10–15.
in part from the strategic exploitation of rifts between the United States, the EU, and Japan. The so-called “policy-space” created by misalignments particularly between the United States and Europe has enabled developing countries to play one power against the other in the furtherance of their own coordinated agenda, as exemplified by the negotiation of the 2003 Decision on Public Health.85

The weight and leadership role of large medium-income developing countries such as Brazil and India is undeniable but it should not overshadow the steadily increasing and broadening activities of larger coalitions of weaker states such as the African Group and the LDCs. The last two groups (their membership largely overlaps) accounted for two-thirds of the proposals synthesized in the Chairman’s document at Cancun, whereas India tabled only five proposals on its own and a few more as part of a coalition.86

Moreover, while some developing countries strive to promote the interests of other members in the group even if they are not aligned with the leaders’ interests (see for instance the leadership of Egypt vis-à-vis the African Group), some other developing countries are moving toward an increasingly divergent agenda even if they formally support traditional developing country demands (such as Mexico’s position in favor of a commitment-oriented approach, rather than seeking more flexibility and waivers from obligations and disciplines).

Bjornskov and Lind’s analysis on convergence and alignments prior to and during the Doha Ministerial Meeting yields fascinating data on the positions of members within and outside coalitions. A few conclusions may be drawn. First, there is little overlap between officially identified coalitions and the stated agenda and positions of individual countries. This generally confirms results observed by Narlikar and others that there is not as much convergence among coalition members as their grouping would imply and it may explain the relative lack of success of many coalitions. However, the core group of members of the Like-Minded Group, the Cairns Group, and the G-20 seem to have a high degree of convergence within each coalition. Many of the LDCs also have common positions, officially and in practice. Second,

85. Frederick M. Abbott, The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health, 99 Am. J. Int’l L. 317, 344–45 (2005); but see Richard H. Steinberg, Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints, 98 Am. J. Int’l L. 247, 275 (2004) (arguing that transatlantic interests remain generally aligned and that developing country coalitions have generally been unsuccessful even in the face of disputes between the United States and Europe). Steinberg nonetheless acknowledges elsewhere that “coordinated transatlantic action offers a greater probability of successfully resolving trade problems with third countries than is offered by the independent action of either power. Transatlantic cooperation in closing the Uruguay Round attests to that” and even recognizes that “[w]hen transatlantic efforts have been made to solve third-country problems or system-wide problems, cooperation has frequently broken down . . . [T]he differences have often been exploited by third countries to drive a wedge into the transatlantic partnership.” Richard H. Steinberg, Great Power Management of the World Trading System: A Transatlantic Strategy for Liberal Multilateralism, 29 L. & Pol’y Int’l Bus. 205, 218–19, 227–28 (1998).

86. Special Session of the Committee on Trade and Development, Report to the General Council, TN/CTD/7 (Apr. 7, 2003).
there appears to be very little convergence between the most active WTO members, whether developed or developing. This suggests that future negotiations under the leadership of some thirty countries (the Quad and key developing countries) as envisioned by Draper and Sally will not be a smooth undertaking, nor is it headed in any ascertainable direction. The only possible pivotal country is Canada, which has trade policy positions close to the average of WTO membership and is very proactive in terms of aid and relations with developing countries. However, the relative loss of influence of the Cairns Group and the G-20’s exclusion of the Cairns Group heavyweights (Canada and Australia) undermines any serious hope of Canada playing an arbitral role. Thus, in retrospect, the collapse of trade talks in 2006 due to the failure in bringing key players to a commonly agreeable basis for negotiations is not particularly surprising.

Another interesting point is the presence of Eastern and Central European countries in Bjornskov and Lind’s analysis although they were virtually absent from officially formed coalitions studied by Narlikar and Draper and Sally. Bjornskov and Lind’s findings suggest that these countries could promote a common platform. However, it must be noted that this analysis took place before the enlargement of the EC to include any of these countries. The authors’ data reflects a fifteen-member EC configuration. Therefore it could be that the Eastern European countries’ positions are now absorbed by the EC’s common negotiation stand or that for political reasons linked to their EC membership they are not free to form a separate coalition that might reflect their particular interests and priorities better than the EC’s WTO position, which is largely dominated by older members, particularly France. It is also possible that these new members’ agendas shifted with their accession to the EC, particularly regarding agricultural policy and subsidies, and that the access to EC markets now is their primary trade focus.

The findings regarding the EC’s (and to some extent Norway’s) position relative to other WTO members places the EC as a clear outlier, particularly developing countries. This suggests that despite the EC’s political discourse in favor of developing countries, its agenda often is not aligned with developing country priorities.

With 149 members in the WTO, coalitions are crucial not only to strengthen the position of countries lacking the political and economic capacity to negotiate single-handedly, but also, some have suggested, to facilitate negotiations by reducing the number of principals. While the current high number and complex mapping of coalitions may ultimately rebut the

88. Id.
89. Id. at 552–53.
90. Hoekman, supra note 43, at 5. However the author also notes that coalitions may lead to the entrenchment of positions and thus, a higher risk of breakdown in negotiations if groups are less flexible about their positions than individual members would be. Id.
latter claim, groupings may have reinforced the weight and credibility of some medium-income countries which are now established as key players in negotiations. The expansion of the trade agenda within the WTO since the Uruguay Round and the ensuing linkages across trade areas has also fostered the formation of coalitions based on cross-sectoral bargaining positions.

The typology established in Part I.A will be used to examine the interaction between essentially political coalitions and the WTO legal framework in which they operate. Indeed each of the two broad types of coalitions (discussion and research groups, and negotiation-oriented coalitions) raises separate legal and institutional issues within the framework of the WTO and may use different legal tools to pursue their participants’ objectives. The organization’s legal and institutional structure is not a neutral factor in coalition building and sustainability. Part II examines how the WTO institutional mechanisms, as well as specific aspects of the main trade agreements, affect developing country coalitions.

II. Assessing WTO Institutional Structures in Facilitating Coalition Development

The WTO is a platform for political bargaining, but it is also an institution governed by rules and that produces a source of law for its members. The studies examined above largely consider coalitions without placing them in the context of the WTO as a law-based organization. Because coalitions have been studied from an international relations perspective rather than from a legal perspective, this is to be expected. In contrast, this Article shows that the ability or inability of developing countries to form and sustain effective coalitions in the WTO depends not only on the coalitions’ inherent characteristics and the political environment, as previously discussed, but also on the institutional and legal framework in which they operate. Conversely, coalitions, particularly successful ones, have an impact on the organization and the regime’s legal architecture. Abbott and Snidal account for this epistemological difference between the international relations perspective and the legal aspects. The legal recognition of groupings and the availability of legal tools to them are fundamental elements that make a given legal system more or less coalition-friendly. In a domestic setting, the right of association, the standing in court afforded to groups representing collective interests, the ability to defend individual and collective rights as a group (the Civil Rights movement and collective bargaining are obvious examples), and the ability for a community to choose representa-

91. Draper and Sally note that the proliferation of smaller developing country coalitions focused on specific issues has made negotiations more complex. Draper & Sally, supra note 19, at 11–12.


atives are examples of some rights and institutions that provide legal support for group activities. They facilitate the participation of a large number of individuals in the legal and political process through indirect representation. They also are used to make the political process accessible to groups that would otherwise be excluded. Although domestic law and the international legal system have different underpinnings and dynamics, the rationales for legal recognition of groups and coalitions are similar.

This analysis raises fundamental questions regarding the structure of public international law. The entities that make up the WTO are — like in other international organizations — states and, to some extent, other international organizations. The EC is a distinct case, as both its members and itself are parties to the WTO, but the number of votes of the EC cannot exceed the number of its members.94 It is the only supra-national grouping of states that benefits from full legal recognition in the WTO. The WTO also provides for some recognition for regional trade organizations through the Article XXIV notification process and rights. Yet the WTO’s legal framework has an impact on these entities and coalitions, which in turn influences the development of WTO law and practice. While supra-national groupings without formal legal existence, such as coalitions, are not recognized in WTO law any more than they are in general public international law, other international organizations have developed mechanisms to ensure some degree of regional or other group representation in addition to individual state participation.95 Beyond the traditional “monopoly” of states as subjects of international law, supra-national groups have found some recognition in the international legal system as necessary segments to ensure a better representation of states.

This Part will use the typology elaborated in Part I to assess the interaction between each category of coalition and the WTO legal framework.

A. Discussion and Research Groups

Coalitions focusing on sharing information and pooling research resources help develop common platforms and negotiating positions for their members. They also may act as liaisons between the WTO and the coalition’s members. Keohane and Nye have recognized the importance of these interconnections for the formation of coalitions.96

94. EC members have participated in the GATT both as legally separate parties and as a group entity with a single spokesperson and united agenda since the 1960s and the European Commission participates in WTO bodies as a sui generis entity (though Article IX of the WTO Agreement specifies that the number of votes allocated to it cannot exceed the number of EC states that are members to the WTO). WTO Agreement art. IX.

95. See infra, Part II.B.2.

The WTO’s technical assistance and training activities support this type of coalitions and foster connections between the organization and participating members and groups of members. A number of programs are regionally focused and aim at building capacity, synergies and networking within regional groups. Some activities are specifically offered to particular coalitions. LDCs are also identified as a group and given particular consideration as such. The 2007 Technical Assistance Plan, like the 2006 Plan, acknowledges that the geographical balance of the WTO’s activities in this area serves not only to provide support at the national level but also features “considerable reliance on regional activities so as to ensure an equitable coverage of beneficiaries.”\textsuperscript{97} The Technical Assistance Plan’s consideration of regional and supra-national groupings is reflected both in the activities it offers and in the way the plan was devised with input from regional groupings and organizations.\textsuperscript{98} Indeed, the activities offered are designed to reflect existing patterns of collaboration between members and to further strengthen these groupings in a two-way flow of information and institution building.

Regional seminars play an important role in the WTO’s training activities, with seventy sessions offered during the year (compared with single-digit numbers of sessions for other types of training activities). The Technical Assistance Plan acknowledges that regionally based activities “allow WTO [sic] to reach a homogeneous audience based in the region and interested in the same subject matter . . . . It also facilitates exchange of information, sharing of experiences and networking among participants” at the regional level.\textsuperscript{99} These programs, particularly those for government officials, give priority to topics under negotiation and are meant to be immediately useful to participants in regional and international trade negotiations.\textsuperscript{100} Similarly, regional trade policy courses explicitly aim at "build[ing] capacity at the regional level."\textsuperscript{101}

Regional coordinator internship programs are even more focused on coalitions, rather than on generic regional groupings. Internships are offered for the following groups: the ACP, the African Group, the CARICOM, the Group of Latin American and Caribbean Countries ("GRULAC"), the SAARC, the WTO LDCs Consultative Group, the IGDC, the Arab Group,
and the Pacific Islands Forum. Several of these groups have been identified in the first Part of this Article as key coalitions. Other internships are aimed at LDCs and Small and Vulnerable Economies. This is a remarkable feature of the WTO’s capacity building activities as it fully recognizes the existence and relevance of developing country coalitions and supports these coalitions by providing specific training.

The WTO Secretariat has also undertaken a role in servicing regional groups by “provid[ing] assistance to regional groupings in support of their meetings and organiz[ing] briefings on specific WTO-related topics in light of negotiations.” Here again, the organization aims at empowering groups of members on the subject matter of negotiations, implicitly acknowledging that negotiations are in part driven by these groups. Additionally, unlike other activities sponsored by the organization that are targeted at predefined regions, the Secretariat does not limit or predetermine the types of groups that it will support in this part of the program. Member states are free to request support for groups that they have formed independently. The process is a bottom-up strategy, rather than a top-down approach. The Secretariat’s support was particularly germane to the African Group’s increased participation in the Doha Round. The assistance enabled the Group to meet on a regular basis in the run-up to the Round to formulate a coordinated negotiation plan. In that case, the Secretariat’s training and capacity building activities were instrumental in bridging the gap between a discussion group and that group’s participation in negotiations as a coalition. The Secretariat’s support to the African Group continues to date.

Additionally, the WTO has been involved in fostering ties between groups of developing countries and donor members, which generally are rich countries or other international organizations. Research and discussion groups that involve both developing and developed countries have gained importance in recent Ministerial meetings, which is reflected in the Secretariat’s technical assistance and training programs. For example, the Joint Integrated Technical Assistance Programme covering sixteen African countries in 2006 is administered jointly by the WTO, the UNCTAD, and the International Trade Center with a strategy focusing on “partnerships among the executing organization, the participating countries and the donor community . . . [and] building networks and synergies among participating countries.”

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105. Technical Assistance Plan 2007, supra note 97, ¶ 153; Technical Assistance Plan 2006, supra note 97, ¶ 120.
coalitions, this program acknowledges the existence of discussion groups involving developed and developing countries and seeks to reinforce the trend by providing a forum and institutional support for such cross-over discussions and networking.

Thus, the WTO as an institution and its organs (primarily the Secretariat) have taken heed of the existence of discussion and research coalitions identified in Part I. Moreover, it has created tools and devoted resources on an ongoing basis to support and even foster the creation, sustainability, and activism of these groups. Hence, at least in the context of technical assistance, the WTO has found it within its mandate and function to support not only developing members individually but also in coalitions. While some programs are targeted at clearly identified groups within WTO agreements (for example the LDC Group), a number of other activities focus on formal or informal groups that do not have a specific legal standing in the WTO architecture.

B. Negotiation-Oriented Coalitions

The typology elaborated in Part I identified different types of negotiation-oriented coalitions: coalitions designed to raise the profile of certain members, coalitions designed to influence the organization’s agenda, and coalitions designed to pursue specific results in the negotiations. Each category acts at a different level of the organization’s structure; its activity calls for different types of legal tools. However, they share an underlying theme of increased participation among members and, correlatively, increased transparency. These two issues have become of primary concern as the WTO and its members consider the adequacy of the organization’s institutions and processes. It is therefore natural that these issues would emerge in a discussion on developing country coalitions. This Article suggests that increased legal support for developing country coalitions may be one way to improve poor members’ participation in, and access to, negotiations. Legal recognition of, and support for, each type of negotiation-oriented coalition will be addressed in turn.

Coalitions designed to raise the profile of members that would otherwise be under-represented would need to be taken into account in the organic structure of the organization. At the other end of the spectrum, developing countries also form coalitions to pursue specific regulatory outcomes, ultimately triggering the organization’s decision-making procedures (con-
sensus and vote).\textsuperscript{108} Between these two extremes lies the soft belly of the bargaining process. In legal terms, the cornerstones of that process include setting the negotiation agenda and defining the modalities for negotiation. Ministerial meetings since the events at Seattle in 1999 show that developing countries have taken the full measure of the importance of these activities; they have recognized the necessity of asserting their presence at these stages and have increasingly done so through coalitions. Part II.B.3 suggests some ways to ensure better participation in negotiations through coalitions, though it recognizes that this process remains essentially political and that the potential for institutionalization of coalitions is limited.

1. \textit{Supporting Coalitions to Increase Participation of Under-Represented Members in the Organization}

As developing countries became increasingly diverse, they organized into groups of members sharing common profiles and common interests. ACP members, the LDCs, the Small and Vulnerable Economies, and the Small Island Developing States are some examples of that trend. These coalitions are valuable because they tend to be stable over time and in their membership. As such, they are better candidates for institutional and legal support than ad hoc issue-based coalitions. Nevertheless, recognizing the distinct needs of specifically identified groups has far-reaching implications at a time when the blanket application of special and differential treatment is increasingly called into question by some members and when some negotiators, policy-makers, the Appellate Body, and scholars are suggesting that the WTO’s provisions and the application therein should be better tailored to the needs of different segments of developing members. Indeed, it seems logical that the larger medium-sized developing countries, such as Brazil or India, do not need the same type of differential treatment as Small Island Developing States or African LDCs, for instance. This issue is highly controversial, and the suggestion of differentiation between developing countries generally is met with staunch resistance from developing members. In any case, WTO agreements already recognize LDCs as a distinct group with special needs that must be addressed as a subset of special and differential treatment. This has allowed for a dynamic process enabling LDCs to better identify and formulate their needs, and to negotiate and gain specific advantages as a group. Graduation policies associated with preferential treatment by developed members have also been a way through which the WTO's legal regime differentiates between developing countries, albeit a politically charged one. As we rethink the content and application of special and differential treatment and the role of developing countries in negotiations, the identification of particular groups of countries with common needs would be a crucial and powerful tool to raise the profile of these members.

\textsuperscript{108} \textit{See infra} Part II.B.2.
Currently, the only category of developing countries recognized by the WTO as such is the LDCs. They benefit from some institutionalization through the Subcommittee on LDCs in the Committee on Trade and Development. The 1947 GATT Agreement did not identify developing countries as a group; the addition of Part IV on Trade and Development in 1964 mentions “less-developed members” but does not distinguish between developing countries generally and the poorest amongst them. The United Nations created the LDC category in 1971. In response, Yugoslavia proposed building into trade negotiations elements that would specifically benefit the “the least developed among the developing countries”\textsuperscript{109} and, later that year, the IGDC formally proposed the creation of a special group for LDCs and the possibility of special provisions for LDCs.\textsuperscript{110} Ultimately, the Enabling Clause established the legal framework for special and more favorable treatment for LDCs in 1979.\textsuperscript{111} This process is interesting because it shows that the legal regime was changed by identifying a specific need by then-influential developing countries acting individually and through coalitions on behalf of poorer and less powerful members (in particular the IGDC, which examined the issue in several meetings supported by the GATT Secretariat in a way similar to the type of institutional support for discussion and research groups). The WTO eventually gave an institutional home to LDCs with the creation of a Subcommittee on LDCs in the Committee on Trade and Development.

Defining a set of members as a group at the institutional level is an explicit acknowledgment of these members’ shared circumstances and interests. Giving them a platform allows the identification of common negotiation objectives and concerns and creates incentives for collective action. While many LDCs likely would not have much or any individual voice, making it difficult to organize and sustain a coalition without any institutional support, the anchor that the WTO agreements gave them as a group has raised their profile and influence. Ostensible initiatives in their favor at the Hong Kong Ministerial Meeting in 2005 are a recent example of that phenomenon, even if the substance of these initiatives (in particular duty-free, quota-free access) remains in large part undefined.\textsuperscript{112} Of the fifty

\textsuperscript{109} GATT Trade Negotiations Committee of Developing Countries, Proceedings of the Tenth Meeting, ¶ 17, TN(LDC)36 (Feb. 12, 1971).

\textsuperscript{110} GATT Secretariat, Minutes of the Meeting of the Informal Group of Developing Countries Held on 16 December 1979, ¶ 6, LDC/M/101 (Dec. 29, 1971).

\textsuperscript{111} Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, ¶ 2(d), (L/4903) (Dec. 4, 1979) [hereinafter Enabling Clause].

\textsuperscript{112} Hong Kong Declaration, supra note 44, ¶ 8; see also id. ¶ 47 (“Building upon the commitment in the Doha Ministerial Declaration, developed-country Members, and developing-country Members declaring themselves in a position to do so, agree to implement duty-free and quota-free market access for products originating from LDCs as provided for in Annex F to this document.”). Annex F specifies that duty-free, quota-free access will cover “at least 97 per cent of products originating from LDCs, defined at the tariff line level, by 2008 or no later than the start of the implementation period” but this leaves a number of crucial issues unresolved. Special and Differential Treatment, Dec. 18, 2005, Ministerial Declaration of 18 December 2005, Annex F, WT/MIN(05)/DEC (2005). In particular, there is no actual
listed LDCs, thirty are WTO members, and several more have observer status. As such, they represent a certain political force even though their share of international trade remains minimal. LDCs account for 20 percent of WTO membership, almost as much as developed members. Introducing safeguards into the WTO’s law and architecture has remedied in part the problem of their under-representation and under-participation as individual members.

The mechanism, however, could be further reinforced. LDCs could be specifically represented as a group in virtually all committees and councils, in addition to the existing Sub-Committee of the Committee on Development. Because all aspects of trade regulation in the WTO affect LDCs in a particular way, it would be logical that the group be consistently represented throughout the organization’s activities. The effect would be twofold. First, the group representation would ensure that the interests of LDCs are better and more systematically represented in the various WTO organs and trade issues. Second, it would help build capacity for the group’s members as they would gain leverage through access to a more central and streamlined channel of information (through the group representation) and in turn be able to better formulate their own policy positions. Both the organization as a whole and individual members would benefit directly from this type of institutionalized group representation. It may be argued that, in practice, informal mechanisms already provide for the presence of LDC members in the various committees and that these members act as channels of information for other LDCs. Such informal group representation, however, will not always achieve the results that an institutionalized representation mechanism would provide because it would not be automatic,
systematic, transparent, and coherent throughout the organization’s activities.

Other groups of countries suffering from structural insufficiencies due to their domestic political and economic circumstances would benefit from a similar institutional representation to ensure a minimal threshold of participation. For example, in the same fashion that the United Nations defines LDCs, it sets criteria for Small Island Developing States. Small Island Developing States also are active in the WTO as a coalition to raise awareness on the particular trade issues that they face. Much like LDCs, they have limited institutional capacity and little bargaining power to push forward their demands, keep them on the trade negotiation agenda, or obtain concessions. Providing an institutional umbrella as was done for LDCs could allow the organization to better serve their needs.

Specific committees and councils may find that official and systematic presence of relevant groups would help elaborate proposals that better take into account interests of various segments of the membership. For example, the Committee on Agriculture (both in its permanent activities and as part of the Trade Negotiations Committee) could include a formal permanent representative of the group of Net Food-Importing Countries. Given that many members of that coalition are amongst the poorest in the WTO (and therefore have little capacity to participate next to powerful developing and developed members) but have a vital interest in agriculture negotiations, a representative would ensure that their interests are represented even if they are not all individually present at all times. At the same time it would ensure from the outset that agriculture negotiations balance the interests of food exporters and less vocal and poorer food importers. Even though such a process may already exist to some extent in practice, a greater formalization would improve transparency and the participation of members with

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115. The United Nations maintains a list of Small Island Developing States (U.N. and non-U.N. members) and has recognized the need for special measures in favor of these countries since 1994, calling particular attention to these countries’ vulnerabilities in the context of the Uruguay Round. G.A. Res. 49/100, U.N. Doc. A/RES/49/100 (Feb. 24, 1995). The United Nations also has defined a list of Land-locked Developing Countries. See generally Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries, and Small Island Developing States, http://www.un.org/ohrlls/ (last visited Mar. 22, 2007) for a survey of U.N. undertakings for LDCs, Small Island Developing States, and Landlocked Developing States. A number of countries belonging to these three groups have joined the coalition of Small and Vulnerable Economies at the WTO, even though the issues of each group are quite different.

116. The EC has an incentive to bring attention to the issue of Net Food Importing Countries to support its own position on the continuing subsidization of agriculture. See, e.g., Report of the Inter-Agency Panel to the General Council on the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, WT/GC/62 (June 28, 2003). As such, Net Food Importing Countries have found support among much more powerful members of the WTO, but there are important political risks attached to this type of proxy representation by an interested third party. Some rich members also are food importers, such as Japan. However rich members are not under the same type of economic pressure as poor food importers, as the latter lack a significant source of currency income that would decrease their sensitivity to rising world prices.
limited institutional and financial capacity, increasing the organization's legitimacy.

The existence of an external composite set of criteria for defining membership in groups would make the identification of these groups more politically acceptable to WTO members at large. In recent years the self-defining mechanism for consideration as a developing country in the WTO has generated controversy as some members felt that certain countries should not benefit from that status even though they still had a low income. China's position on this issue particularly lent itself to debate by developed as well as developing members, and Russia's accession to the WTO led to similar discussions. In fact, it is often the case that a developing country member shows wide disparities in the development of the various sectors of its economy. Therefore, differentiation based on a single arbitrary criterion, such as Gross Domestic Product ("GDP") per capita, would not adequately reflect the broader state of a country's economy. In contrast, the definition of least developed members is perceived as objective and less open to manipulation. On this perspective a group of Small Island Developing States similarly would not be particularly controversial. Objective definitions of groups also allows for a fluid membership depending on the economic, social, and political evolution of the members. This is important in light of the continued pressure to strengthen so-called graduation policies, whereby developing countries reaching a certain level of wealth can no longer benefit from certain preferential programs or concessions, a process often open to political interpretation. Graduation was introduced as a result of pressure by developed members as a counterpart to the Enabling Clause and was built into the latter to some extent. Because "developing country" is self-defining, graduation has been applied unilaterally by developed members through their GSP programs based on largely political criteria. The recognition of more specific groups of developing countries based on transparent and uniform criteria would allow for a shift in graduation policy toward predetermined, objective criteria. Such an evolution also would correspond to the Appellate Body’s recent insistence on the non-discriminatory character of

117. In 1998 and 1999 Chinese representatives declared that China would enter the WTO only with developing country status, prompting complaints from the United States and resulting in a compromise whereby China generally undertook full obligations as a developed country but benefited from some leeway in certain areas, particularly agriculture. Yet, China considers itself as a developing country member. See e.g., Long Yongtu, Vice Minister and Head of the Chinese Delegation, Address at the Eleventh Session of the Working Party on China (July 27, 2000, Geneva), http://www.fmprc.gov.cn/ce/cgw/eng/gjhyfy/hy2000073629.htm; Raj Bhala, An Essay on China’s WTO Accession Saga, 15 AM. U. INT’L L. REV. 1469, 1474 (2000); Special Session of the Dispute Settlement Body, China–Responses to Questions on the Specific Input of China, TN/DS/W/57 (May 19, 2003). A similar debate arose regarding Russia’s application for membership in the WTO. See e.g., Colin B. Picker, Neither Here Nor There – Countries That Are Neither Developing Nor Developed in the WTO: Geographic Differentiation as applied to Russia and the WTO, 36 GEO. WASH. INT’L L. REV. 147, 169–71 (2004).
118. Enabling Clause, supra note 111, ¶ 7.
the Enabling Clause’s provisions. In turn, this would improve the maneuvering room available for weak states in their negotiations with more powerful members, as they would not need to waste bargaining chips on negotiating graduation. In other words, it would account for economic disparities between members while decreasing the political impact of these disparities to the benefit of a better-tailored legalization of the organization’s processes.

2. Institutionalizing Groups in the Decision-Making Process

Political scientists have recognized the impact of institutional frameworks on the outcomes of decision-making processes. Members’ activities in the WTO translate into legal rules through a determined decision-making process. As such, the results that developing countries may obtain at the WTO, both individually and collectively, are affected by the organic rules regarding decision-making. If developing countries are to participate collectively through various groupings and coalitions, the decision-making process must, de facto and de jure, allow for it. This Part examines the WTO’s decision-making rules and concludes that despite facially guaranteeing equal treatment of members, they do not in fact provide many developing countries equal access to the decision-making process. It then suggests that providing an additional layer of approval by groups after committee negotiations, but before seeking approval of the full membership could provide a safeguard for countries or regions that currently are disempowered in the WTO. While this proposal would not consist of a generalization of EC-type bloc voting (where EC members automatically participate as a group), it would provide a mechanism for ensuring that the various segments of the membership have an affirmative voice. As such, it would institutionalize some of the current activities by large coalitions such as the African Group.

At first sight the rules for decision-making at the WTO appear deceptively simple. Article IX:1 of the WTO Agreement provides that, by default, decisions are made by consensus in line with the practice developed during the GATT years, meaning that a decision will be adopted if no member present formally objects. Only if no consensus can be reached may a decision be submitted to the members’ vote. A majority of the votes cast will generally suffice to adopt the decision and bind all members; each member is entitled to one vote at the ministerial meetings and the General Council. Similar provisions governed the GATT.

121. WTO Agreement art. IX:1.
122. GATT art. XXV:3–4.
tion has been put to vote since the advent of the WTO (except for accession decisions), and voting was seldom used during the GATT, 123 significant decisions nonetheless have been made at the ministerial level. 124

Although the WTO’s decision-making procedure differs in many ways from traditional public international law practice, 125 the organization still relies on the principle of formal equality of member states in line with the basic principle of the legal equality of sovereign states. 126 A closer examination of the WTO’s decision-making procedures shows that the rules are not, in fact, neutral, ultimately raising some concern of bias against developing countries generally. In an organization where power plays have historically been prevalent and where the underlying economic disparities between members translate fairly directly into political inequality, reliance on formal equality in decision-making procedures comes in sharp contrast with the increased recognition of the need for rules and commitments commensurate with members’ differing positions. 127 Some authors have argued that “invisible weighting” pervades international organizations where decision-making formally respects sovereign equality but allows powerful countries to dominate while respecting procedural rules. 128 In this context formal equality is very much a double-edged sword, on the one hand allowing — in theory — weaker states to voice concern and break the consensus in a quasi veto power, but on the other hand having a chilling effect on these same states because of the political cost of breaking the consensus. 129 The fact that no decision has been put to vote since the creation of the WTO (with the ex-

123. Richard H. Steinberg, In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO, 56 Int’l Organization 339, 344 (2002) (noting that only decisions on waivers and accessions have been taken by vote since 1959 and discussing the United States’ strategic role in reinforcing consensus practice after the accession of most developing countries in the 1960s).

124. Among decisions affecting developing countries, see the Enabling Clause, adopted as a Ministerial Decision. Enabling Clause, supra note 111.

125. Silence generally is insufficient to constitute acquiescence in international law where concerns over respect of state sovereignty generally require the explicit agreement of the state for it to be bound. Consensus decision-making as it is practiced at the WTO does not require express consent. Majority decisions at the General Assembly of the United Nations do not result in binding resolutions in contrast to the reinforced procedures of the Security Council. Additionally decisions at the WTO by majority of votes cast mean that a numerical minority of members could adopt a decision binding on all members. Nonetheless, some other international organizations also provide for decision by majority of the votes cast. See ILO Constitution, art. 17(2).

126. Steinberg, supra note 123, at 344–45 (stating that “U.S. policymakers thought it would be impossible to reach an agreement on a weighted voting formula and expand the GATT into a broad-based organization that could attract and retain developing countries. Moreover, decision-making rules that were consistent with the principle of sovereign equality carried a normative appeal, particularly for less powerful countries.”).

127. As noted by Kelsen, “equality does not mean equality of duties and rights, but rather equality of capacity for duties and rights.” Hans Kelsen, The Principle of Sovereign Equality of States as a Basis for International Organization, 53 Yale L.J. 207, 209 (1944); see also Gerhart & Kella, supra note 6, at 528.


129. Diplomatic practice also has developed ways to stall a consensus decision procedure while avoiding the stigma of formally breaking the consensus.
ception of decisions on accessions), and even since much longer before then, suggests that developing countries have not felt able to voice their concern at this stage of the decision-making process. As a result, the power given to each member through the equal vote/voice system, which could play in favor of developing countries (as it does at the General Assembly of the United Nations) remains purely theoretical and is overshadowed by upstream political processes.

Although this remains an academic question at this time (given that no votes have taken place), the limitation to a majority of votes cast also plays disproportionately against developing countries. Indeed, an endemic problem is the inability of many developing countries to support a permanent (or sometimes even an occasional) diplomatic representation at the WTO or in Geneva. Hence developing countries, particularly the poorest among them, are much more likely to be unable to attend a vote than developed nations. Article IX does not even provide for a quorum, which means that a decision could be validly adopted by a small number of members, with no assurance of adequate representation of least-developed and developing countries. The appearance of formal equality of the one-country-one-vote system therefore does not stand the test of empirical practice or even of theoretical construction and plays out against a particular group of members.

One notable exception to the general rule of Article IX:1 is the specific provision for voting by the EC. Article IX states, “Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are Members of the WTO.” Hence the EC may vote as a group. It is the only regional organization authorized to do so. This has been a significant tool for the EC to gain considerable collective political weight at the WTO, where each EC member state taken individually would have not been on par with the United States in terms of economic and political power. One could argue that EC members could have agreed informally to act together at the General Council and the ministerial meetings, as a strong coalition, but the legal recognition of their status as a quasi-state entity in the WTO Agreement takes such a coalition to a different level and has an important impact beyond voting. First, it displaces coordination problems between members to the “domestic” (intra-EC) sphere so that the EC presents a united front at the WTO. Correlatively, it eliminates the possibility of bilateral dividing tactics from

130. WTO Agreement art XII:2.
131. Decisions up for adoption by consensus by the full membership normally have been negotiated in smaller groups. Practice shows that this stage generally is considered too late to engage in further negotiations.
132. It is generally known that absence or abstention (formal or informal) due to lack of capacity is compounded by power plays whereby poor members may be given incentives to refrain from intervening or from attending meetings on particular issues.
other members in an attempt to break the coalition. Because the aggregated EC vote is indivisible, luring individual countries away from the group’s position in the WTO forum will have no effect on the decision outcome (dividing tactics must be implemented upstream, at the time of the internal negotiation of the EC's position amongst members and need to target enough members to ensure defection of the entire group from the undesirable position). Second, it multiplies the number of votes of an entity that, in terms of external trade, works as a single unit. Since the EC has one common external tariff, foreign trade is within the jurisdiction of the EC and members are therefore legally bound to speak with one voice, giving the EC twenty-seven votes seems logically inconsistent. This would be the functional equivalent to giving one vote per U.S. state. It follows, still from a logical point of view, that either the EC should be granted only one vote, or any regional trade organization that has a single external tariff and conducts external trade matters with a single voice should be recognized as a separate entity allowed to vote as a bloc but be given a number of voices equal to the number of its members that are parties to the WTO. This brings us back to the empirical analysis on RTAs (Part I) as the only legally sanctioned type of grouping in the WTO.

Article XXIV:1 of the GATT provides that "[e]ach such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party." Customs territories are defined as "any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories." Customs unions consist of the "substitution of a single customs territory for two or more customs territories" so that "substantially all the trade between the constituent territories" is eliminated and "substantially the same duties and other regulations of commerce are applied" to trade from other countries. In the EC, all the external tariffs and all trade regulations are common to all member states. However, a customs union is not treated as though it were a single contracting party (except the EC), to paraphrase Article XXIV:1, even though it is a "substitution" of several customs territories. Free-trade areas have a similar requirement regarding elimination of trade barriers within the area,

133. See infra, Part III.B.
134. Given that EC members remain sovereign states and that the EC is stopping short of becoming a federation, it would be politically difficult to cease giving each EC member one vote.
135. GATT art. XXIV:1.
136. Id. art. XXIV:2.
137. GATT art. XXIV:8(a) (defining customs unions as the "substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and, (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.").
but do not require a common external trade regulation. The agreement also provides for a formal review mechanism of proposed free trade areas and customs unions to ensure that the proposed scheme satisfies the conditions of Article XXIV and is not used to circumvent or reduce trade commitments undertaken by members.

Even if the legal recognition of RTAs under GATT Article XXIV is incomplete it remains the only way that a group of countries legally can exist in the WTO, which suggests that it could be a good tool to support coalition negotiation. Yet the empirical studies discussed in Part 1 show that regional coalitions of developing countries have been relatively ineffective in practice. As discussed in Part I, this weakness is in part due to characteristics endogenous to developing country RTAs, which tend to rest on shaky economic and institutional grounds. Nonetheless the opportunities for regional recognition in the WTO could play a role in reinforcing regional agreements by giving them legitimacy at the supra-regional level, and conversely, could support the bargaining positions of their members at the WTO. Article XXIV review procedures should they be reformed as is regularly suggested in the WTO need to be carefully examined for their impact on regional trade groups of developing countries. Regionalism is sometimes seen as a stepping stone toward multilateralism; given institutional and economic difficulties in developing countries such an intermediate step could be highly beneficial to the improved integration of these members in the WTO.

Beyond the basic decision-making procedure outlined above, the WTO Agreement provides additional procedures for specific decisions. Binding interpretations of the WTO agreements are made by a majority of three-fourths of the members. It is noteworthy that, unlike Article IX:1, this paragraph requires a super-majority of members, and not simply of votes cast; additionally there is also no default preference for consensus. The problems outlined above in terms of developing country participation therefore would be limited here.

Last, Article IX specifies decision-making procedures to grant a member a temporary waiver of some of its obligations. This is particularly relevant to developing countries, which are more likely to request such waivers. A three-fourths majority of the members generally is required for granting a

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138. GATT art. XXIV:8(b).
139. GATT art. XXIV:7. The overwhelming number of free-trade agreements in recent years has led to a collapse of this procedure, as most of them have not been reviewed, while a number were never even submitted for review in proper form. The effectiveness of this procedure is largely called into question and efforts to reform it into a more manageable process are on the organization’s agenda.
141. Nottage & Sebastian, supra note 140, at 1001–02.
waiver,\textsuperscript{142} except that waivers to obligations under the WTO Agreement may be granted by consensus during a set period not to exceed ninety days after the request. A similar waiver was available in the GATT under Article XXV:5, but the voting requirement was limited to a two-thirds majority. The increase in the majority requirement in the WTO is interesting when compared with the evolution of the membership over the same period. By 1994, there were 129 signatories to the GATT, 26 percent of which were developed members. With the continuing increase in developing country accessions to the WTO, the proportion of developed country members continued to decline, amounting to less than a quarter of the membership by 2006. At the time of the Uruguay Round, it had become apparent that developed members could keep a blocking power in voting procedures only by increasing the super-majority requirement from two-thirds to three-quarters. Procedures for amendment to the WTO Agreement similarly reflect a shift from a two-thirds majority requirement (for the equivalent procedure under the GATT) to a three-fourths majority requirement.\textsuperscript{143}

It may be argued that voting rules matter little since decisions are taken by consensus, a procedure seen as more conducive to political negotiation and the search for common positions, flexibility and compromise, in contrast with the crystallization of positions that often results from formal voting. Despite having complex voting structures meant to ensure a more practical representation of members (as opposed to the formal equality of one-country-one-vote), other large international organizations tend to make decisions by consensus.\textsuperscript{144} Two responses may be made to this argument. First, from a political science standpoint, the mere existence of certain formal decision-making rules have an impact on the actual process because they affect the type of consensus that tends to be reached,\textsuperscript{145} they influence the power balances with respect to decision-making, and they bear on the amount of political capital required to break the consensus and insist on formal decision-making. Second, from a legal perspective, the existence and the nature of the rules constrain the options of WTO members. If the system is to maintain its legitimacy, it must provide a framework corresponding to its constitu-

\textsuperscript{142} WTO Agreement art. IX:3 (meaning that waivers to the major multilateral agreements, such as the GATT, the GATS, and the TRIPS must be first examined by the relevant Council, which then reports to the members assembled in the Ministerial Conference per Article IX.3(b)).

\textsuperscript{143} GATT art. XXX; WTO Agreement art. X. The procedures are tiered and do not necessarily require a vote.


\textsuperscript{145} Stephen Zamora, Voting in International Economic Organizations, 74 Am. J. Int’l L. 566, 568–69 (1980) ("[F]ormal [voting] procedures may profoundly affect the de facto decision-making process. Even where decisions are often taken informally, the resort to formal voting procedures remains a possibility and may have a profound effect on the willingness of members to arrive at a consensus, as well as on the type of consensus or compromise reached.").
ents’ needs and capabilities. If a one-country-one-vote representation is inadequate (and the fact that voting is virtually never used seems to be an implicit recognition that it is an unsatisfactory decision-making procedure), how does consensus play out, and does it ensure a more appropriate representation of WTO membership’s interests? The impact of, and incentives generated by, the legal rules as they currently stand must be examined along with the possible alternatives that might better account for the actual practice while correcting some of its deficiencies.

Zamora provides an interesting overview of different decision-making mechanisms in international economic organizations, understood broadly to include commodity agreements and product cartels such as the Organization of Petroleum Exporting Countries (“OPEC”). The variety of combinations is astonishing, as many organizations or treaties have strived to create procedures that reflect the particular interests at stake (producers and exporters, amount of financial contribution, relative population size, mitigated by political factors, economic development and political-economy system, geographic representation, etc.). With respect to “task-oriented” organizations, such as the GATT, the author finds a tension between ensuring that decisions have enough support to be put into practice, while at the same time maintaining an efficient decision-making process. The first element requires, inter alia, support by members that are powerful in the organization’s subject matter, while the second element favors informal decision-making procedures, such as consensus, rather than strict voting rules. Hence, consensus can satisfy the two elements only if there is a high degree of convergence amongst its constituents on the organization’s activity. Zamora considers it an anomaly that the most powerful industrialized nations did not reserve some kind of decision-making safeguard, through a weighted vote or a unanimity requirement in the GATT and he explains it by the fact that no directly enforceable measure is taken by the governing body. As discussed above, some important safeguards were nevertheless reserved and even reinforced in the WTO Agreement (super-majority requirements), and the GATT’s Contracting Parties, acting as a governing body, do make binding decisions. The trend has gained even more momentum in the WTO with high impact decisions being taken by the General Council and the Ministerial Conference. Even if they do not translate into immediate obligations binding upon members, Ministerial Declarations issued from periodic Ministerial Meetings set the organization’s fundamental agenda and have become the subject of high-stake political battles. In fact,

146. Kelsen, supra note 127, at 211–12 (“Members of the society of nations may be presumed to be equal as a general principle; but when it appears that in certain aspects of legal equality they are organically unequal, it would seem that the law must either take cognizance of the facts or else admit its unreality.”).  
147. Zamora, supra note 145.  
148. Id. at 589.  
149. Id. at 591.
consensus decision-making at the WTO has become tantamount to weighted voting where the largest industrialized members of the WTO have a dominant voice and some of these members (the EC members) are able to aggregate their voices into a sum larger than its parts. Moreover, the “soft” nature of the consensus rule and the lack of transparency it involves make it impossible to renegotiate the balance of each member’s voice. This is in sharp contrast with a weighted voting system, where the respective shares of votes are clearly apparent. Hence, the decision-making system becomes relatively untouchable because it cannot be adjusted without a complete overhaul of the WTO, which is politically unrealistic.

In effect developing countries find themselves caught between a practice of consensus that under-represents them, and a disaffected majority system that would likely make the organization entirely unmanageable (and where they would still not be able to be properly represented because of insufficient capacity) and therefore is not a useful alternative.

Other decision-making structures have been used over time. Developing countries built a practice of bloc voting in the 1970s in many international organizations in which they participated alongside more powerful members. They also carried over coalitions from one organization to another. When the UNCTAD was created in 1964 as a way for developing countries to put pressure on the GATT and share concerns in a forum where they were empowered, the decision-making structure presented an interesting contrast with the GATT’s rules. Although most decisions are adopted by consensus at the UNCTAD, the voting system calls for bloc voting after a common position has been agreed within each bloc (Groups A and C comprising the G-77, Group B comprising developed market economies and Group D including socialist countries). In practice, developing countries voted according to the G-77 position. This system is heavily biased in favor of developing countries and has shown its political limitations. With the diversification of developing country interests and their increasingly divergent positions over the past decade, this type of categorical bloc voting by developing countries is no longer as prevalent and it would be surprising to see it at the WTO. Nonetheless, as we have seen, some coalitions not only are fairly stable over time, but they represent interests of developing countries that otherwise would have little or no access to deliberations at the WTO due to lack of capacity.

While the current system is unlikely to be abandoned for practical and political reasons, some adjustments could improve developing members’

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150. See, e.g., Osieke, supra note 144, at 400–02 (noting that the G-77, which had its home at the UNCTAD, voted as a bloc in the International Labor Organization on certain issues, and developing countries generally voted as a bloc on political issues).

151. The difficulty to amend WTO law is a serious obstacle. See generally Nottage & Sebastian, supra note 140. As an illustration, the amendment to the TRIPS Agreement mandated by the Doha Decision on Public Health has been open for signature for about three years, yet only six members have signed (the EC members’ signature is expected soon), a far cry from the 100 signatures required for the amendment.
representation through group participation in decision-making. Leaving aside particular anomalies outlined above, such as the EC bloc voting, systemic changes could provide for a more balanced decision-making process. Since reaching a consensus will most realistically remain the end-goal, efforts must focus on giving procedural guarantees to developing nations, improving their participation and increasing transparency upstream. The WTO has, since the Seattle Ministerial, focused on ways to improve procedural safeguards and transparency. These laudable efforts continue to date. This Part proposes a mechanism for improved participation by developing members building on coalition practice.

Since a major bottleneck is members’ insufficient capacity to participate directly and even to remain apprised of ongoing negotiations, one avenue for improvement would be to develop quasi proxy mechanisms whereby individual countries could participate as part of a group in addition to their own individual participation. This obviously is an imperfect, second-best approximation but it could at least ensure that members with little capacity gain a better knowledge and understanding of negotiations. Groups could be defined, and proposed decisions would need to be approved by the groups before being submitted to full-membership for approval. Such a procedure would allow small or weak countries to negotiate within their group, where they would be relatively more powerful. To a large extent, practice already reflects this type of discussions within groups on an informal basis. This process would also make the flow of information back to individual members more transparent. Although adding a step in the decision-making process appears at first to be a burden on the process, it may in fact streamline negotiations by quickly reducing the number of principles and therefore increasing efficiency.

The crucial question then would be how to define the groups. UNCTAD-style blocs no longer reflect the diversity of developing country interests. Regional groups could ensure a more balanced geographic representation of WTO constituents, particularly since a number of coalitions already fall along regional or continental geographical lines. While imperfect, geographical bloc representation has proved successful in other organizations. For instance, the United Nations informally uses geographical allocation to ensure an equitable representation of member states at the International Court of Justice ("ICJ"). Modified continental mapping could be a starting point. Africa forms the basis for several existing coalitions. Latin American countries also seem to find common positions on a regular basis. Asia presents a more difficult case, with members as diverse as India and Japan. The same issue would arise for North America, where Mexico would find itself alongside the United States and Canada, although the North American
Free Trade Agreement ("NAFTA") has contributed to bringing the trade policies of these countries closer, to a certain extent. The formation of two Asian groups, one comprising China and Far Eastern Asian countries, and the other including South and Central Asia would allow for greater coherence and would also limit the size of the group by disaggregating the Asian giants of India and China. If economic disparities within blocs are perceived to be an obstacle to reaching a consensus within the groups, or if groups comprising both developed and developing countries are not politically acceptable, separate groups could be formed for industrialized members on the one hand and LDCs on the other hand. Forming a separate group of industrialized members worldwide (using, for example, a high threshold of GDP per capita as a benchmark) would eliminate some of these disparities. At the other end of the economic spectrum, LDCs are specifically identified as a group in many provisions of WTO agreements and they also form an active coalition; as such, they could form another group. A problem arises for countries that would qualify for several groups (African LDCs, for example, or countries at the border of two regions). If membership is based on self-designation, members could choose to participate in either group. Modified geographical-based groups would result in the following blocs: a bloc including the Americas, an African bloc, two Asian groups (one including China and Eastern Asian countries and the other one comprising South Asian and Central Asian countries), and a Middle Eastern bloc, and possibly a bloc of industrialized members and an LDC bloc. Membership in specific blocs would have some measure of fluidity, as members crossing the GDP per capita threshold set for members of the industrialized group would join that group, and similarly, members no longer designated as LDCs by the United Nations would join the relevant geographical group. If each group carries equal weight in the formal decision-making (one group, one vote), poorer and less powerful members would gain a comparatively greater weight, but the quality of the consensus may be improved and the decision perceived as more legitimate and equitable.

Such a mechanism would give each group a veto power, which may cause opposition from the traditionally more influential members. However, because the procedure is aimed at cementing a stronger and more legitimate consensus, it ultimately seeks to strengthen the organization. In the current context of blocked negotiations, a common realization that interests of all segments of the membership must be taken into account before any global deal may be reached may provide a helpful way forward.

152. However, it must be stressed that the proposed mechanism for improving decision-making procedures is separate and distinct from the debate over special and differential treatment and differentiation.
3. **What Role for Coalitions in Trade Negotiations?**

Although some large cross-cutting groups, such as the African Group, are very active at the negotiation level, members are increasingly affiliated to small issue-based or sector-specific groups. Hence, a more difficult question is the institutional treatment of such issue-based groups that pursue specific negotiation objectives.

As discussed in Part 1, many developing country groups focus specifically on products (such as fisheries and cotton) or on specific sectors. Should committees and councils in these cases be open to institutionalized representation of issue-based coalitions? For example, should the Friends of Fish, the Cairns Group, and the G-20, to name a few, have designated seats on the Committee on Agriculture? What of nominally regional groups that really address only one specific sector, such as the South Pacific Forum, which primarily coordinates positions between its members on fisheries and marine products trade? Institutionalization of these types of groups would be extremely difficult, particularly given the concurrent membership of many countries in several groups, raising questions of over-representation. Fluid membership and the lack of objective criteria for determining membership is another difficulty. Membership in issue-based coalitions generally represents a broad spectrum of country sizes, economic and political power, weight in world trade, etc.

Although it may be neither politically desirable nor feasible to formalize the participation of issue-based coalitions in the negotiation process — after all, this is a political process and these coalitions are a healthy reflection of that process — some aspects of the negotiations may lend themselves to the institutionalization of some groups of developing countries. The objective would be to provide a stronger procedural framework, rather than to constrain the substance of the negotiations directly. Indeed, a country with limited resources is likely to get involved only with negotiations in areas of immediate interest, even if other issues being negotiated without it would have a major impact on its domestic policies in the near future. The concern here is much the same as in the two preceding sections: providing more adequate access to members that otherwise find themselves marginalized or absent from the process. First, agenda-setting is a crucial step in the negotiations, and although it is formally open to all members, practice suggests that reinforced legal support for developing countries organized in groups could enhance developing countries’ participation. Similarly, the so-called Green Room process has generated much controversy due to the real or perceived exclusion of developing countries. At the same time, if a Green Room is to be maintained, inclusion of representatives from all WTO members defeats the purpose of facilitating negotiations by reducing the number of principals. Here, group representation might ensure that all members are represented and that information flows with sufficient transparency while keeping the number of persons in the room to a manageable size. Second,
certain modalities of negotiation also call for an examination of the role of coalitions, such as the principal supplier principle of negotiation for trade in goods.

a. Agenda-Setting and the Green Room Process

Steinberg has analyzed the WTO agenda-setting process as “three overlapping stages: (1) carefully advancing and developing initiatives that broadly conceptualize a new area or form of regulation; (2) drafting and fine-tuning proposals (namely, legal texts) that specify rules, principles and procedures; and (3) developing a package of proposals into a ‘final act’ for approval upon closing of the round.” He notes that this process has been dominated by power-plays by the United States and the EC even though developing countries have made the utmost use of the legal tools at their disposal to ensure that issues of interest to them would be placed on the agenda.

While the initial mandate for negotiations traditionally tends to include members’ proposals broadly and is formulated in vague terms, developing countries have shown more caution in recent times. Argentina, Brazil, Egypt, India and Yugoslavia led the opposition to the launching of the Uruguay Round until some topics of interest to developing countries were included in the negotiation mandate, such as trade in tropical products and textiles, the issue of Voluntary Restraints Agreements, and the demand that developed countries would not raise their tariffs and non-tariffs barriers (standstill agreement). The battle led by India over the new issues at the Singapore ministerial meeting is a more recent example of the efforts by some developing members to attempt to exclude certain items from the negotiation mandate. While a reluctant compromise was reached on investment and competition, the trade-labor linkage was more resolutely excluded as a result of pressure by developing countries generally. The launching of the Doha Round presents similar characteristics. The United States supported a narrow round at the Seattle ministerial meeting while the EC wanted to include a large number of topics including the environment, labor, trade remedies, investment, and competition, all of which the developing countries opposed. Developing countries wanted to emphasize agriculture, trade in manufacture and tropical products, implementation issues relating to the Uruguay Round agreements, issues related to debt, technical assistance and capacity building, and the reform of the decision-making procedures. Newly admitted China and the G-77 led the movement

153. Steinberg, supra note 123, at 354.
154. See Ministerial Declaration, L/5424 (Nov. 29, 1982), GATT B.I.S.D. (29th Supp.) (1983). The Ministerial Declaration includes several paragraphs on the trade interests of developing countries generally. Id. at 5–6, 15–16. It also requires negotiations to take into account interests of developing countries. Id. at 4, 12 (textiles and clothing); id. at 9–10 (tropical products); id. at 10 (other tariff negotiations with a special mention of the problem of escalation clauses).
155. See infra Part I.A.2.
in favor of developing countries’ agenda at the 2001 ministerial by threatening to block the consensus. The ministerial resulted in a very broad “Doha Work Program” that includes virtually all the issues raised, particularly those issues raised by developing members.

While developing countries appear to have been relatively successful at getting their issues on the agenda since the Uruguay Round, prioritizing and actually getting to the negotiating stage on the issues of interest to developing countries has been more difficult. Moreover the organization remains opposed to the institutional recognition of groups even for the purposes of elaborating modalities for negotiation.\footnote{Hong Kong Declaration, supra note 44, ¶ 21, 41 (“We note the concerns raised by small, vulnerable economies, and instruct the Negotiating Group to establish ways to provide flexibilities for these Members without creating a sub-category of WTO Members.”).}

The second step in the negotiating process, which involves refining proposals to be submitted for approval by all members, is less law-based and more power-based. Not surprisingly, it tends to be dominated by the more influential players, particularly the United States and the EC. The Green Room process epitomized this shift from law to power until the practice collapsed under pressure from developing country members and non-governmental organizations at the Seattle meeting in 1999. Green Room negotiations consist of informal caucuses between a limited group of members, usually around twenty to twenty-five, to refine a package of proposals in advance of ministerial meetings. Green Room meetings have always included the powerful members of the WTO and some other members meant to represent the WTO membership generally and are convened by the powerful members. As such, the Green Room resembles an informal version of the Security Council, with quasi “permanent members” and other members purporting to represent the full membership. One important difference is that the non-permanent members are elected to the Security Council by the full U.N. membership based on several criteria including geographic representation,\footnote{U.N. Charter art. 23, para. 1 (“The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.”).} whereas participation in the Green Room is by invitation from the main powers on arbitrary political criteria. Packages negotiated in the Green Room generally have been adopted by the full membership by consensus with only minor amendments.\footnote{Steinberg, supra note 123, at 355.} Issues brought to the table by developing countries tend to be treated as negotiable side-payments. In fact many members, particularly those with smaller delegations, have felt excluded from the Green Room process. As a result, they felt marginalized by
a powerful decision-making process that essentially bypasses formal mechanisms for consultations. Because packages finalized in the Green Room are presented to members on a take-it-or-leave-it basis as the deadline for closing the ministerial draws near, it leaves virtually no room for negotiation or amendments. Nor does it allow delegates to examine in much detail the implications of the proposed deals for the economies of their countries. When some delegations from developing countries tried to access Green Room negotiations at the Seattle ministerial, they were forced away from the room by security guards, exposing the process as one undermining the WTO’s legitimacy and preventing meaningful participation by many members.\footnote{somewhat ironically, an alternative procedure to the Green Room was first used at Seattle with negotiations taking place in small open-ended working groups, but when deadlocks remained as the deadline for closing the meeting approached, the U.S. Representative convened a Green Room meeting with the powerful members and some developing countries, including Egypt and Brazil. John Burgess, Green Room’s Closed Doors Couldn’t Hide Disagreements, \textit{WASHINGTON POST}, Dec. 5, 1999, at A4; Narendar Pani, Seattle Fails to Find Common Ground for Fresh Talks, \textit{ECONOMIC TIMES OF INDIA}, Dec. 5, 1999 (noting that representatives from developing countries were forced away from the room by security forces); African Countries Complained Friday, \textit{XINHUA GENERAL NEWS SERVICE}, Dec. 4, 1999 (citing the South African representative: “If African delegates are unable to make their positions known through the formal structures of the WTO, then they stand little chance of making sure that these real issues are addressed.”).}

In the aftermath of the Seattle events, the General Council examined the issue of internal transparency and effective participation in the multilateral negotiations during meetings throughout 2000.\footnote{General Council, \textit{Minutes of the Meeting held in the Centre William Rappard on 17 and 19 July 2000}, WT/GC/M/57 (Sept. 14, 2000) (hereinafter General Council July 2000 Meetings).} While members generally agreed on the need to ensure transparency and increase participation by weaker members, different views emerged regarding the modalities for managing the negotiation process. Some developing countries were reluctant to agree on the principle of negotiations in working groups.\footnote{\textit{Id.} ¶ 138–42 (comments by Bulgaria); \textit{id.} ¶ 147 (comments by Saint Lucia); \textit{id.} ¶ 157 (comments by Bolivia); \textit{id.} ¶ 159–60 (comments by Egypt explicitly referring to the Green Room process and to the Seattle failure); \textit{id.} ¶ 162 (comments by Barbados); \textit{id.} ¶ 165 (comments by Pakistan).} Others saw them as a valid mechanism so long as the groups were open-ended, and all members were notified early and given an opportunity to participate. In addition, these members mandated that the group discussion be disseminated to all WTO members and that the work-product of the groups would in no instance be considered as formal consultations or up for adoption by consensus.\footnote{\textit{Id.} ¶ 149–53 (comments by Mexico, Singapore on behalf of the ASEAN group, Mauritius on behalf of the African Group, Colombia, and Jamaica).}

The discussion of working groups is ongoing within the WTO, with most members recognizing that not all issues can be discussed by all members at all times and thus smaller working groups may be inevitable, but also require assurances regarding transparency and participation. Forming open-ended working groups on specific issues with members free to participate shifts the burden to each member to manage its own participation.
Ideally this participation would be based on each member’s priorities and interests; in practice it would largely be constrained by the member’s institutional capacity and delegation size and whether a particular issue is a negotiation priority at the time. Their participation in this type of open-ended groups may translate into relatively shallow participation in the negotiations at large. That solution therefore may not be sufficient to achieve the goal of affording all members a genuine opportunity to participate. Additionally, the fluidity of membership in each group may impede the continuity and consistency of the group’s work.

Some members already participate in negotiations through submissions by coalitions. Representatives from individual members regularly speak on behalf of groups such as the Paradisus group, the African Group, and the ASEAN in working groups, committees, and even at the General Council. Members, including developing countries, recognize that consultations among individual members or among groups of members are part of the negotiation process and should not be eliminated. At the same time, they insist that decision-making belongs to the membership as a whole, through the consensus procedure, and that the latter must take its full effect, instead of becoming a last-stop rubber-stamp for decisions already made by a limited number of members. Hence, the question is how to bridge the gap between discussions in open-ended, fluid, issue-based working groups that are indeed valuable to the process, and the finalization of a legitimate package of proposals for approval by the full membership. In constitutional terms, could participation by members with limited resources be enhanced by combining individual representation (i.e., direct representation) at the working group level with some form of legitimate formal group representation (i.e., indirect representation) at the stage of putting together a package?

One way to achieve this would be to create an advisory body that adequately represents the membership, but is small enough to function efficiently as an active synthesizer of proposals emerging from the working groups and could suggest ways to achieve a consensus in a similar way to the role of Chairpersons at the committee levels. Its position would give it a comprehensive view of all aspects of negotiations, which in turn would allow it to propose some trade-offs to lift potential deadlocks. It would act as a liaison between working groups where members participate on an opt-in basis and the Contracting Parties acting as a single decision-making body. In line with the position that many developing countries established during the 2000 discussions, it would be advisory because it would not have any decision-making power. The composition of such a body could be geographically-based, with a periodic rotation of elected members, as are many other bodies designed to equitably represent members of large international organizations.163 This body would have a duty to disseminate its work-product

uniformly and systematically to all members, which would increase transparency and perhaps even contribute to capacity building of some members. While such a structure would not eliminate power-plays by the WTO’s most influential members, it would alleviate most of the problems related to the Green Room. Its functioning would be more transparent — it would constitute a more legitimate representation of the membership, it would be accessible to members on a non-discriminatory basis, and it would have a more specific mandate. At the same time, it would preserve a large amount of flexibility, which is a necessary ingredient to successful negotiations, and it would allow members with limited institutional resources to gain a better perspective on the negotiations as a whole.

b. Modalities for Negotiation

The WTO agreements set the principles for multilateral trade negotiations but more detailed modalities are themselves bargained for among members as part of the launching package for a round. This Part will examine the two major modalities for negotiation (request-and-offer and formula-based) used under the GATT and the General Agreement on Trade in Services (“GATS”), and their effect on the ability of developing countries to negotiate in coalitions.

In a request-and-offer system, countries list the concessions (on tariffs or market access) they would like to obtain and offer other concessions in exchange. However, because of the extension of concessions to all members through the Most Favored Nation (“MFN”) system, a protocol typically determines which country can participate in negotiations regarding a particular product. Although the GATT leaves it to members to decide on the modalities for negotiations, tariff negotiations historically have been conducted between the principal supplier of a commodity and the importer.164 Under Article XXVIII of the GATT, members can renegotiate their tariff commitments with the member with whom the concession was initially negotiated and “with any other party determined by the Contracting Parties to have a principal supplying interest . . . and subject to consultation with any other contracting party determined by the Contracting Parties to have a substantial interest.”165 The determination of initial rights holder (the party with whom the tariff concession was first negotiated), principal supplying interest, and substantial interest remains rather vague, but some guidelines have been elaborated over time. The identification of these negotiation partners has important bearings on members’ individual and collective bargaining position. An individual country might not reach the threshold for

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165. GATT art. XXVIII.1.
principal supplying interest, but the top two or three producers, if their interests are aligned, might be better off joining in and negotiating as a group.

The Interpretative Note ad Article XXVIII specifies that “[t]he object of providing for the participation in the negotiation of any contracting party with a principle supplying interest . . . is to ensure that a contracting party with a larger share in the trade affected by the concession than a contracting party with which the concession was originally negotiated shall have an effective opportunity to protect the contractual right which it enjoys under this Agreement.”\(^{166}\) The Note further provides that in some exceptional cases the Contracting Parties acting jointly may determine that a “contracting party has a principal supplying interest if the concession in question affects trade which constitutes a major part of the total exports of such contracting party.”\(^{167}\) The definition of principal supplying interest was expanded during the Uruguay Round to include any “[m]ember which has the highest ratio of exports affected by the concession (i.e. exports of the product to the market of the Member modifying or withdrawing the concession)”\(^{168}\) if it does not already have access to the negotiations under Article XXVIII. The provision was to be reviewed five years later with particular attention to the effect on the negotiation rights of small and medium-size exporting members.\(^{169}\) The review undertaken in 2000 did not result in any amendment to this Understanding and the Secretariat noted that the provision apparently had never been invoked.\(^{170}\)

Substantial interest is even less defined in WTO law. The Interpretative Note ad Article XXVIII recognizes that the expression “is not capable of a precise definition” but should include “only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have a significant share in the market of the contracting party seeking to modify or withdraw the concession.”\(^{171}\) In practice, if a party has at least a 10 percent share in the market of the member seeking to modify or withdraw the concession it will be considered to have a substantial interest.\(^{172}\)

This mechanism takes into account individual members’ shares in exports or imports of a commodity (although here again the EC aggregates the trade


\(^{167}\) Id. ¶ 1.5 (emphasis added).

\(^{168}\) Understanding as the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade, ¶ 1, LT/UR/A-1A/1/GATT/U/6 (April 15, 1994) (emphasis added).

\(^{169}\) Id.

\(^{170}\) Committee on Market Access, Minutes of the Meeting of 23 March 2000, ¶ 4.6, G/MA/M/23 (May 12, 2000).

\(^{171}\) Interpretative Note ad Article XXVIII, supra note 166, ¶ 1.7.

\(^{172}\) Petros C. Mavroidis, The General Agreement on Tariffs and Trade — A Commentary 92 (2005) (citing Committee on Tariff Concessions, Minutes of Meeting held on 19 July 1985, ¶ 55.10, TAR/M/16 (Oct. 4, 1985)).
of its members, which is an enormous advantage). Nevertheless, the emphasis clearly is on the relative importance of share in the importing member’s market, rather than the weight of a particular commodity in the exporting member’s economy. This has a particular impact on small developing members relying on exports of one or two commodities but that have a volume of exports too small to mount to a significant market share of any importing member’s market. The notification process for principal suppliers and parties with substantial interests, as well as efforts by the GATT and later the WTO to list initial rights holder makes it possible for various members having an interest in a particular commodity to identify each other and to bargain together. However, the absence of mechanism for aggregating trading power between countries on a given product and making joint demands as a single “principal supplier” makes it easier for a powerful member to break potential coalitions by making side-payments or separate offers to weaker members. The aggregation practice developed by the EC is not embodied in the law but is a powerful tool. Other regional groupings or product-based coalitions could similarly benefit from such a mechanism, but that would require elaborating rules and formalizing the existing practice to ensure transparency and non-discrimination.

The negotiation modalities discussed above are based on request-and-offer and therefore are biased toward bilateral or restricted plurilateral bargaining dominated by the individually powerful countries. Another mode of negotiations developed in the GATT consists of formula-based tariff cuts and increased market access. In contrast to the request-and-offer system, formula-based concessions require a multilateral agreement (of all members) on the type of cut, its level, and its application. Historically, market access for goods was negotiated mostly by formula cuts in the Kennedy and Tokyo Rounds, but the Uruguay Round reverted to a request-and-offer system at the United States’ insistence.173 Negotiations under the GATS proceed on a request-and-offer basis.

The saga of cotton negotiations in recent years provides an example of the different strategies involved in a formula-based negotiation and their impact

on developing countries. With American and European domestic support programs for agriculture deadlocking multilateral negotiations in the Doha Round, four West African countries (the Cotton-4) proposed the “Cotton Initiative” in an attempt to move negotiations forward. The Cotton-4 include Benin, Burkina Faso, Chad and Mali; all except Benin are LDCs and, in 2001, cotton amounted to more than 50 percent of each country’s total agricultural exports.174 The Food and Agriculture Organization (“FAO”) of the United Nations estimates that U.S. cotton farmers (around 25,000 persons) benefit from US$3 billion to US$4 billion per year in direct support, which corresponds to more than the entire GDP of Burkina Faso, where two million people depend on cotton production.175 Between 1998 and 2001, cotton production in the United States increased by 40 percent and the volume of exports doubled, but the ensuing collapse in world prices cost West African producers (eight countries) approximately US$200 million in lost annual export revenues.176 Because of their large share of cotton exports, the Cotton-4’s total exports may have qualified the group as a principal supplier under the exception clause of the Interpretative Note ad Article XXVIII, but that would have been conditioned upon approval by the Contracting Parties acting jointly. It is unlikely that they could have made the argument that absent U.S. domestic support they would have made up a share of U.S. imports sufficient to reach the threshold for substantial interest on an individual basis, but they would have come closer on a collective basis. Instead, they proposed modalities for negotiation that would keep the bargaining at a multilateral level where their power as a cohesive coalition would continue to play out in their favor. Indeed, agreement in principle on the Cotton-4 initiative was one of the principal achievements of the Hong Kong Ministerial Conference in December 2005 and a successful step forward for developing countries that export cotton.177 The Cotton-4, acting within the framework of the Sub-Committee on Cotton, then proposed specific formula-based modalities for negotiation.178

Several lessons emerge from the Cotton-4 experience. First, developing countries (and in this case LDCs) that would be marginalized in a particular negotiation as individual members can gain significant leverage and visibility as a coalition. Second, a coalition with an institutional home, in this case, the Sub-Committee on Cotton, is reinforced in its bargaining position and its work-product has a higher impact. As defining formula tend to push the negotiation process upstream to technical councils, committees, and subcommittees, it is more favorable to coordinated group action, but only if a

175. Id.
176. Id.
177. Hong Kong Declaration, supra note 44, ¶ 11–12.
representative of the coalition has access to the negotiation forum (council or committee) and has the credibility or authority to speak for the coalition. Access to the forum where the formulae are elaborated therefore becomes the crucial issue. Procedural rules regarding access and participation in working groups are the sole safeguards in an otherwise strictly political process. The procedural framework (including notification rules and document dissemination) therefore must be considered very carefully. In the case of the Cotton-4, coalition members were part of the Sub-Committee on Cotton. Third, multilateral formula-based modalities for negotiations may give better access to the process to weaker countries than bilateral-oriented request-and-offer systems. However, they may be more complex from a technical point of view. It is notable that NAMA negotiations, another issue of great concern for developing countries in the Doha Round, were also set to proceed on a formula basis after the Hong Kong Ministerial.\textsuperscript{179}

In contrast, the request-and-offer system of the GATS has been interpreted by some commentators and negotiators as a development-friendly feature of the agreement as it leaves members free to make commitments when and where they feel ready to do so.

The choice of modalities for negotiation has a significant impact on developing countries’ ability to negotiate through coalitions and has become an increasingly sensitive issue as developing countries’ participation in negotiations and level of commitments has increased.\textsuperscript{180} That is not to say that one type of system is always more development-friendly than another. Formula-based modalities have yielded positive results in some areas of the GATT, but in other areas, developing countries have preferred a request-and-offer system.\textsuperscript{181} Careful consideration must be given by developing countries to the modalities for negotiations in terms of the impact they will have on coalitions. On the one hand, formula-based negotiation calls for more multilateralism and may result in less flexible results. On the other hand, request-and-offer negotiation may put countries at the mercy of bilateral divide-and-rule tactics, but they are not forced to make an offer in the first place.

\textsuperscript{179} Hong Kong Declaration, supra note 44, ¶ 14.
\textsuperscript{180} Hoda & Verma, supra note 173, at 20 (discussing negotiations on modalities in the Doha Round). Some developing countries have submitted proposals regarding formula-based tariff negotiations in the Doha Round. \textit{Id.} at 25–26, 31, 35–36.
\textsuperscript{181} Developing countries also have chosen a request-and-offer mechanism in other fora. Such is the case, for example, in the Global System of Trade Preferences, a forum for South-South market access negotiations system operating on the basis of request-and-offer. UNCTAD.org, Global System of Trade Preferences among Developing Countries, http://wwwunctad.org/templates/News___1723.aspx (last visited Apr. 2, 2007).
III. Trade Law Instruments Impact on Developing Country Coalitions: Preferences, Bilateralism, and Regionalism

We have seen that the WTO as an institution, with governing rules and practices, has an important impact on the formation and sustainability of developing coalitions, that the impact can be either positive or negative, and that legal mechanisms could be envisioned to support developing country coalitions. However, the analysis does not stop there. Trade law instruments, both within the framework of the WTO and at its margins, also have an impact, and perhaps even an overriding one, on developing country coalitions. Part III first examines how competition for trade preferences awarded by developed countries (most importantly the United States and the EC) has been an increasingly important source of competition between developing countries and led to the formation of groups of developing countries opposing each other on this issue. Several cases brought to the Dispute Settlement Body (“DSB”) bear witness to this, and an analysis of these cases yields important insights on developing country coalition dynamics. This Part also discusses how bilateral trade agreements (and RTAs) between developing countries and rich industrialized countries have affected the sustainability of developing country coalitions. The United States, in particular, has played the bilateral card, alongside — or as an alternative to — the threat of unilateral sanctions, to create incentives for individual countries to defect from coalitions that the United States viewed as promoting agendas contrary to its own interests. Two recent episodes have brought these dynamics to the limelight: negotiations on TRIPS and on the Decision on Public Health in 2003, and discussions on investment during the Singapore Ministerial Meeting.

A. Competing for Preferences: A Polarizing Factor for Developing Country Coalitions

Preference systems are unilateral programs whereby a country (typically rich and industrialized) grants more favorable treatment to products originating from other countries (often former colonies or countries with which the grantor wishes to foster privileged trade and political relations) than it gives to other trade partners. This is normally prohibited by the GATT under the MFN clause. GSP were formally legalized under the GATT as a derogation to the MFN clause on a temporary basis in 1971 and the provision was made permanent in 1979 through the Enabling Clause as a result of pressure by developing countries in the GATT and the UNCTAD.182 Despite the Enabling Clause’s requirement that preference

programs be generalized and non-discriminatory, grantors simply continued their programs or implemented new ones without further scrutiny from the GATT until the recent case opposing India to the EC.

Although the final word on the exact value of preferences to beneficiaries is still to be determined, it has been established that the policy has benefited some countries while imposing costs on others.\(^\text{183}\) Some non-beneficiaries therefore want either to gain access to the regime, or want the regime amended so that it will not place them at a comparative disadvantage. In particular, medium-income developing countries which have gained relatively more than their poorer counterparts from the multilateral trade process have increasingly found themselves adopting positions divergent from those of ACP and LDCs on the question of preferential access to rich country markets.\(^\text{184}\) Initiatives on duty-free access to exports from LDCs were greeted with skepticism by some developing countries in the Doha Round.\(^\text{185}\) The EU and the United States have the two largest programs of that type.\(^\text{186}\) Regarding the U.S. program\(^\text{187}\) one author observed that “[b]y creating incentives that often place former ideological allies at economic odds, multilateral trade agreements, like the African Growth and Opportunity Act (“AGOA”) (footnote omitted) test Pan-African coalitions that have historically championed the convergent interests of embattled minority groups around the globe.”\(^\text{188}\) Recent disputes arising from developed countries’ preference schemes have crystallized competition between groups of developing countries. Two cases will be discussed in some detail here: the dispute between India and the EC on the latter’s preference program, and the dispute between the United States (effectively acting as a proxy for some Central American countries) and the EC on the importation of bananas under the latter’s preferential program. A third case, on shrimp imports to the United States, will be briefly addressed because it involves a unilateral regime allowing market access to some developing countries but not all, as with traditional preferential schemes.

In the recent case between India and the EC, India challenged the legality of the EC’s new GSP programs,\(^\text{189}\) specifically the programs that offered

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185. Subedi, supra note 66, at 431. A prominent example of such a duty-free program is the EC’s Everything But Arms Initiative. Yet, blanket provisions granting duty-free access to exports from LDCs tend to be less contentious than other programs.
186. Other generalized preference programs are in place in Japan, Canada, Norway and Switzerland. See UNCTAD Secretariat, Quantifying the Benefits Obtained by Developing Countries from the Generalized System of Preferences, UNCTAD/ITCD/TSB/Misc.52 (Oct. 7, 1999).
189. Council Regulation 2501/2001, O.J. (L 346) 1 (applying a scheme of generalised tariff preferences from January 2002 to December 2004); see also Gerhart & Kella, supra note 6, 542–45.
supplemental preferences to countries that met certain standards on environmental protection, labor rights, or that the EC found to fight drug trafficking (so-called Drug Arrangements). India argued that restricted eligibility for these programs constituted an impermissible discrimination in violation of Article I:1 of the GATT, but it ultimately restricted its complaint to the Drug Arrangements. Aside from the legal dispute and the political undertones in the context of post-September 11 geo-strategic alignments, India also may have been concerned that Pakistan, a beneficiary under the Drug Arrangements, would gain an advantage in its exports of textiles to the European market to the detriment of India’s competing industry. The EC argued that the scheme was consistent with the Enabling Clause authorizing preferential schemes or, alternatively, with the general health exception of Article XX(B) of GATT 1994. The panel found in India’s favor and concluded that “because the Drug Arrangements are inconsistent with Article I:1 of GATT 1994 and not justified by Article 2(a) of the Enabling Clause or Article XX(B) of GATT 1994, the EC has nullified or impaired benefits accruing to India under GATT 1994.” The EC appealed and the Appellate Body upheld India’s victory, albeit on slightly different grounds. Specifically, it found that the Enabling Clause’s mention of non-discrimination nonetheless allowed a differentiated treatment of developing countries on the basis of objective criteria corresponding to the development objectives mentioned in the Enabling Clause. According to the Appellate Body, the Drug Arrangements failed the non-discrimination test on that basis.

The legal grounds for this case illustrate the problem of competition between developing countries for preferential treatment, and their fear that more favorable access by a competitor might lead to trade diversion. An examination of third country participants gives further insights into the dynamics of coalitions and competition. Twenty-five countries participated, in addition to India and the EC.

190. The only beneficiaries under the Drug Arrangements were Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru, and Venezuela. Council Regulation 2501/2001, supra note 189, col. 1, Annex I. In contrast with the environmental and labor rights schemes, the Drug Arrangements did not include criteria for additional countries to request participation in the scheme. Id. art. 2, 4.


192. Id., ¶ 8.1(f).

193. Conditions for Tariff Preferences Appellate Report, supra note 119, ¶ 159–63. The Enabling Clause requires that special treatment awarded by a developed country “be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.” Enabling Clause, supra note 111, ¶ 3(e).

194. The EC is now faced with unanimous criticism regarding its proposed implementation scheme. It proposes to grant the preferences to countries that are parties to certain listed treaties. Although this appears to be an objective criteria for selecting beneficiaries, in line with the Appellate Body’s requirement, the list of treaties is arbitrary and in fact built to include only the beneficiaries that the EC had previously designated.
The Andean Community (a term used by the Panel to describe the joint participation of Bolivia, Columbia, Ecuador, Peru and Venezuela) submitted a brief arguing that the Drug Arrangements properly fell within the scope of preferential systems contemplated by the Enabling Clause and that the Enabling Clause was not a waiver or exception to the MFN obligation of GATT Article I:1, but rather constituted a self-standing regime. On appeal the Andean Community reiterated its interpretation of the Enabling Clause as a self-standing regime and argued in the alternative that the reference to non-discrimination only prohibited discrimination between similarly situated developing countries. The Central American beneficiaries of the EU scheme also participated as a group in written and oral proceedings. Their argument in support of the Drug Arrangements emphasized that support for their efforts to combat drug trafficking addressed an important development need as contemplated by the Enabling Clause. Costa Rica, despite being a member of the Central American Free Trade Agreement along with the other members of the Central American group, filed separately in favor of the EC. Its argument, particularly on appeal, also differed from the Andean Community’s position in that Costa Rica rejected the need to rely on drafting history to interpret the relevant portions of the Enabling Clause. Panama (also a beneficiary of the Drug Arrangements) participated individually. Its position on the legal status of the Enabling Clause as a stand-alone regime is similar to the Andean Community’s argument, but its non-discrimination argument is policy-based, rather than legally-based.

Pakistan, as noted above, is a beneficiary of the Drug Arrangements, but its geo-strategic and economic positions vis-à-vis India were equally at stake in the dispute. Its brief responds to India’s claim that Pakistan was included in the Drug Arrangements as a matter of EC politics, rather than in response to Pakistan’s development needs. Pakistan apparently did not make additional submissions on appeal.

Mauritius presents an interesting case, as it is a frequent beneficiary of EC preference schemes, but is excluded from the Drug Arrangements. Nevertheless, it argued that the Drug Arrangements were “consistent with the provisions of the Enabling Clause, as they provide for non-discriminatory

198. Id. ¶ 5.65–5.71.
199. Id. ¶ 5.59–5.61.
201. Id. ¶ 64–67.
202. Conditions for Tariff Preferences Panel Report, supra note 191, ¶ 5.82–5.84. American and European political priorities after September 11, 2001 may account for the renewed interest in fostering ties with Pakistan, but this could not be argued at the Dispute Settlement Body.
treatment to products originating from developing countries where the same conditions prevail" and also reiterated the EC’s argument regarding Article XX(B). Political alignment with the EC, rather than self-interest in the issue at stake, could explain this position.

The United States limited its participation in the case to technical matters, a somewhat surprising approach given the possible implication of the case for the United States’ own preferential programs with political components. On appeal, the United States supported the EC’s arguments on the relationship between the Enabling Clause and GATT Article I:1, as well as on the meaning of non-discrimination.

In contrast, Paraguay sided with India, so much so that they both were represented by the same counsel. Much as including Pakistan in the Drug Arrangements exacerbated the regional rift with India, excluding Paraguay generated political tensions with neighboring Andean countries that were beneficiaries of the arrangements, such as Bolivia. Without specifically referring to its regional situation, Paraguay argued that it “has suffered and continues to suffer from the discriminatory treatment accorded by the European Communities” to certain developing countries and that the cost of preferences granted to others is borne by those countries that are excluded from the schemes. The argument is explicitly framed in terms of competition between developing countries for preferences and the ensuing disadvantages borne by excluded countries. Like India, Paraguay appears concerned about trade diversion. Paraguay also makes the political argument that under the European practice “the GSP would be an instrument to exercise undue influence toward developing countries by granting tariff preferences selectively. This in turn would transform the GSP from an instrument of generosity of developed countries into a perversion of the GSP that is detrimental to the developing countries.”

The number and diversity of these briefs shows that political and regional alignments between countries with similar interests can falter in the face of legal issues that affect their own trade position vis-à-vis powerful partners.

203. Id. ¶ 5.72.
204. Howse, supra note 195, at 403–04.
207. Paraguay argues that it is plagued by drug trafficking problems similar to those of other countries that were included in the Drug Arrangements. See id. ¶ 5.132. Although Paraguay’s main trading partners are Argentina, Brazil and Uruguay (with which it forms MERCOSUR), its exports to the EU market represent 13.7 percent of Paraguay’s total exports. Europa, The EU’s Relations with Paraguay, http://ec.europa.eu/comm/external_relations/paraguay/intro/index.htm (last visited Mar. 10, 2007).
209. Id. ¶ 5.106, 5.117, 5.126.
210. Id. ¶ 5.124; see also id. ¶ 5.125 (“Paraguay posits that the implication of the European Communities’ approach is that developed countries could manipulate the GSP system so as to pursue their own political agenda and that the rule-based character of the multilateral trading system would be completely undermined.”).
The banana-related dispute was primarily between the United States and the EC, but it also involved competition among developing countries for access to the EC market. ACP countries gained preferential access under the Lome IV Convention (setting out elements of the EC’s preference program). Several non-ACP banana producers joined the United States as complainants at various stages of the dispute, with similar and additional legal arguments. These included Ecuador, Guatemala, Honduras, and Mexico. The dispute raised many issues but the present analysis will be limited to the position and arguments of developing countries vis-à-vis each other.

Ecuador, Guatemala, Honduras, and Mexico (as co-complainants with the United States and in separate proceedings) challenged the European preference scheme on various grounds, not limited to trade in goods. Ecuador was the largest exporter of bananas to the EC; Latin American countries accounted for 2.1 million tons of European imports, whereas bananas originating from ACP countries (benefiting from preferences) amounted to 727,000 tons. The complainants argued that the application of differential tariffs depending on the country of origin of the product was impermissible under GATT Article I:1 and that the allocation of market access violated GATT Article XIII:2. Beyond the U.S. interests, this complaint is a good example of preference beneficiaries and non-beneficiaries competing for access to a rich market.

Belize, Cameroon, Côte d’Ivoire, Dominica, the Dominican Republic, Ghana, Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Senegal, and Suriname participated in the dispute as ACP third parties in support of the European preference scheme. Whether they were engaged in the production of bananas or not, they recognized the importance of the broader principles at stake concerning the Lome waiver’s application (al-
following the European preference regime established under the Lome conventions in derogation to GATT obligations) and the scope and compatibility of preference schemes with WTO law generally. The ACP group contrasted the production and market structures for bananas in their countries with Latin American countries where the banana industry is highly concentrated, vertically integrated, and dominated by multinational companies.217

Colombia, Costa Rica, Nicaragua and Venezuela, non-ACP and non-beneficiaries, participated as third parties in opposition to the European preference scheme. They emphasized, inter alia, that the EC had negotiated certain quota access to its market for principal banana suppliers such as themselves.218 The preference scheme therefore needed to be assessed specifically for its compatibility with those market access commitments.219 India intervened in favor of ACP countries, arguing that the stability and predictability associated with the Lome waiver was critical to ACP countries.220 However, India’s concern with the dispute related to its internal market, rather than to potential access to the European market. Indeed, India was at the time the world’s largest producer of bananas, but the demand was primarily domestic. Along similar lines, the Philippines (non-ACP) joined as a third party because they were concerned about the impact of European preferences on other markets and the potential global market disruption generated by the dispute.221

The Shrimp-Turtle case provides a slightly different picture of competition and cooperation between developing country producers for lucrative developed country markets. In this case India, Malaysia, Pakistan and Thailand complained about a U.S. law that banned imports into the United States of shrimp that had been harvested without the use of Turtle Exclusion Devices (“TEDs”) ostensibly meant to protect against depletion of protected species of sea turtles.222 Only a limited number of countries had been certified as complying with the harvesting requirements, thereby gaining access to the U.S. market: Belize, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Fiji, Guatemala, Guyana, Honduras, Indonesia, Mexico, Nicaragua, Nigeria, Panama, the People’s Republic of China, Thailand, Trinidad and Tobago,

217. Id. at 266.
218. Id. at 285.
219. Id. at 286. This group’s position therefore differed from the complaint brought by the United States that challenged the validity of the banana regime under the EC’s general GATT obligations. Id. at 294.
220. Id. at 287.
221. Id. at 290.
222. Appellate Body Report, United States–Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R (Apr. 27, 1998); Panel Report, United States–Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998). The Appellate Body found that the application of the U.S. measure restricting imports of shrimp harvested without TEDs was a violation of WTO law and was not justified under the general exception on the conservation of natural resources (Article XX(G) of the GATT of 1994) because it was unjustifiably arbitrary and discriminatory. Id.
and Venezuela. The complainants, all South Asian countries, some of which were among the largest shrimp exporters to the United States, found their shrimp exports banned. Additionally, Vietnam, another major shrimp supplier to the United States, was unable to join the dispute because it was not a WTO member at the time.

A number of countries, both developed and developing, joined as third parties, raising arguments both on the specific aspects of the dispute on shrimp trade and on systemic issues of the interaction between WTO law and public international law. Australia, Ecuador, Japan, the Philippines, and Singapore were concerned by the specific effects of the measure on shrimp exports to the United States. El Salvador and Guatemala argued that allowing the measure would set a dangerous precedent for a WTO member enacting a unilateral protectionist measure under the guise of (in this instance) environmental conservation. Australia, the EC, Hong Kong, Nigeria, Singapore, and Venezuela submitted systemic arguments on the intersection of domestic policy, international environmental law, and the scope of WTO regulation. Colombia, Costa Rica, Mexico, Senegal, and Sri Lanka also joined as third parties. Hence in this case, in contrast to the banana and GSP cases, the breakdown of participants to the dispute did not occur along the lines of members benefiting from the contested measures. Ecuador, El Salvador, Guatemala, Nigeria, Thailand, and Venezuela were certified and could export shrimp to the United States but they nonetheless argued against that country as complainants (Thailand) or third parties. The Panel Report does not reflect any submission in support of the American position by countries benefiting from the certification scheme. A possible explanation is that many aspects of the Shrimp-Turtle case were influenced by the intervention of non-governmental organizations acting through state parties.

What is the legal framework for coalition strategies at the DSB? Article 4.11 of the Dispute Settlement Understanding (“DSU”) provides:

Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of the GATS, or the corresponding provisions in other covered

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223. Id. Although Thailand was certified by the United States, it stated in the proceedings that none of its fishing vessels used the TEDs. Other countries were determined to harvest shrimp in a manner or in waters that did not pose a risk to the conservation of sea turtles. Id.


226. Id.

227. Id.

228. Id.
agreements, such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations . . . of its desire to be joined in the consultations.\textsuperscript{229}

If the member to whom the request for consultations is addressed finds it well-founded, it may notify the DSB and the Member can, presumably, then join the ongoing consultations. Otherwise, consultations must be initiated de novo by the requesting Member. That procedure is not necessarily adequate for developing countries: notification of consultations is not often cursory and may be insufficient for a Member to identify that its interests may be affected. Moreover, the large number of consultations makes it difficult for members with limited capacity to vet all procedures in the required ten-day time limit. Article 9 of the DSU provides for the consolidation of panels “related to the same matter” but does not provide a time frame or legal standard limiting the DSB’s discretion in implementing that provision.\textsuperscript{230}

Alternatively, members may be able to participate in groups as third parties. However, if developing countries join a case because their interests and rights may be affected similarly to those of the named party, they may also want to have recourse to enforcement mechanisms. Yet, third parties that are required to have a substantial interest in the case cannot avail themselves of the remedies that a winning party has under Articles 21 and 22 of the DSU.\textsuperscript{231} In fact, the procedures set forth by the DSU impose important impediments to coalition participation in disputes.

In the GSP case, although Paraguay is situated similarly to India, it will be unable to join forces with India to retaliate against the EC should the latter fail to comply with the decision. Because of the requirement of initial consultations prior to the establishment of a panel, a country may not be able to jump on the bandwagon of an existing case as a co-complainant or co-respondent once a panel has been established. As a result, a country wishing to become a co-complainant would have to institute parallel proceedings on the same legal issue. Such was the case in the disputes between the United States and India on patent protection and the subsequent case between the EC and India on the same issue.\textsuperscript{232} The EC could have recourse to enforcement mechanisms (if it prevailed on the merits) only if it joined the initial proceedings as a co-complainant with the United States, but it could not do so because it first had to consult with India.\textsuperscript{233} Therefore, the EC instituted separate proceedings against India. India unsuccessfully argued


\textsuperscript{230} Id. art. 9.

\textsuperscript{231} Id. arts. 21–22.


\textsuperscript{233} Id. ¶ 7–16.
that it was very burdensome for it to deal with these two parallel proceedings.

The lessons of these experiences are two-fold. First, the current procedures impose a significant burden on developing countries that find themselves in the respondent’s position and are faced with multiple cases on the same claims by countries with much larger technical and financial resources than themselves. A reasonable stay in the first proceedings giving an opportunity to any other Member state to join as a co-complainant after expedited consultation would allow other interested parties with similar claims to join as co-complainants and preserve access to the enforcement mechanisms. The possibility of a waiver of the requirement for consultation by the respondent developing country could also resolve the problem. Such adjustments would allow for a more efficient allocation of resources in a consolidated case by developing country respondents. Second, if developing countries find themselves in the complainant position these proposed procedures would also alleviate the burden of litigating multiple cases on the same issue. More significantly, if they prevail, it would allow them to combine their economic weight in potential enforcement measures. Indeed, one of the problems often mentioned with respect to the WTO’s dispute settlement procedure is the insufficient leverage of developing countries at the enforcement level due to their limited potential for trade countermeasures against large economies. A procedure allowing developing countries to retaliate collectively as a bloc of co-complainants may be a step toward alleviating that concern.

B. Bilateralism as a Coalition-Breaking Strategy

Leaving aside the case of unilateral preference programs, plurilateral trade law instruments within the framework of the WTO and at its margins (such as bilateral and regional agreements) also have an impact on developing country coalitions. Regional and bilateral trade agreements are technically concluded outside of the WTO, but they must be compatible with the WTO’s legal regime. In practice the linkage between WTO negotiations and bilateral or regional negotiations is very strong; an analysis of the WTO framework for developing country coalitions therefore must take into account dynamics resulting from outside trade deals. In particular, bilateral agreements between a rich and a poor country have had divisive effects on coalitions to which the poor country may have been a part. In the same way that developing countries have used misalignments between the WTO’s most powerful players to press their own agenda forward, the latter have used much the same tactic to divert individual developing countries from coalitions of which they were members. Offering separate individual deals, either in the form of concessions within the WTO framework or in the context of bilateral trade agreements, has been a recurrent strategy to pull
apart coalitions, starting in the Uruguay Round.  Negotiations on TRIPS, public health, and the so-called “Singapore issues” offer repeated examples of this strategy to divide the unusually united front that coalitions of developing countries presented.

Braithwaite roots the trade negotiating power of the United States in part in its ability to move back and forth between multilateral and bilateral negotiations:

The United States manages to concentrate its power in trade negotiations by moving backwards and forwards between its multilateral agenda and, when that is momentarily thwarted, its bilateral negotiations, which include the individual picking off of politically and economically significant States. These bilaterals progressively lock more States into the preferred U.S. multilateral outcome until the point is reached where the United States can attempt to nail that multilateral agenda again.

This reasoning begs the question of why the United States and other powerful countries are pursuing similar strategies in the bilateral and regional contexts rather than at the WTO. Presumably they must offer terms more favorable to developing countries bilaterally, otherwise there would be no inducement for the latter to defect from multilateral coalitions. Indeed, more favorable concessions may be obtained on a bilateral basis because they would not automatically extend to all WTO members through the MFN channel, thereby reducing the economic cost for the concession-granting country. Yet some authors find that the isolated developing country is less able to define a negotiation strategy than when it can consult and coordinate with its counterparts in Geneva. This would point to the positive role of discussion and research coalitions within the WTO, not only in improving collective outcomes, but also in improving the capacity of individual members of the coalition.

Recent multilateral trade negotiations offer several instances of developed countries making strategic use of bilateral trade deals to induce defection from developing country coalitions. Braithwaite argues that a number of bilateral or regional Free Trade Agreements (“FTA”s) (such as the Central American Free Trade Agreement (“CAFTA”)) were proposed and negotiated between the United States and members of the Cairns Group and the G-20 Group in an attempt to divert key players from these coalitions. He finds that a developing country’s membership in these coalitions significantly in-
creases its chance that the United States will propose a bilateral deal. He concludes that only a networked, coordinated strategy will allow developing countries to maintain their positions, and that the G-20 must offer a constructive prospective vision to its members (as opposed to simply a blocking strategy) to keep them united.

The negotiation of the Doha Decision on Public Health shows both developing country coalitions and defection inducements at play in what some commentators see as the test-case the G-20 has built on for negotiations on agriculture.

Historically, developing country positions in international intellectual property negotiations have prompted negotiations to move from one multilateral forum to another, ultimately ending up with the negotiation of TRIPS during the Uruguay Round. At that point the United States used the threat of unilateral sanctions (under Section 301 of the U.S. Trade Act of 1974 and subsequent amendments) to pressure individual developing countries into cooperating in TRIPS negotiations and to break the coalition led by Brazil and India.

Despite these past failures and continuing disagreements between developing countries on the definition of protection of intellectual property, they identified a strong common interest regarding access to medicines to fight large pandemics prevailing in poor countries. The 2003 Decision on Public Health was a developing country initiative aimed at counteracting actions by the United States and the pharmaceutical industry hindering manufacture and distribution of generic AIDS medicines. Arguably the 2003 Decision does not affect pre-existing legal rights, yet it was heralded as a negotiating success by developing countries. This was partly because it gave

238. Id. n.4. The correlation is not perfect and some agreements pre-dated the country’s activism in the Cairns Group or the G-20 (Mexico’s membership in NAFTA, for example). Moreover, certain key players in the G-20, such as Brazil, are not recorded as having been offered a bilateral free trade agreement. United States Trade Representative, Brazil and Offer of Bilateral Trade Agreement, http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited March 25, 2007).

239. Braithwaite, supra note 81, at 314–15. See also Drahos, supra note 81, at 784–85 (noting that loose groups are “more susceptible to divide-and-conquer tactics of strong States”).


243. The TRIPS Agreement already provided for compulsory licensing, which allows a developing country to license the manufacturing of patented drugs by other than the patent holder, effectively creating generic drugs under certain conditions in cases of public health emergencies. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments–Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].
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high visibility to the issue and thwarted U.S. and European retaliatory threats, by giving legitimacy to developing countries’ recourse to the tools available in the TRIPS Agreement244 for access to cheap drugs in cases of public emergencies.245 Although the final draft adopted in 2003 was less favorable to developing countries than the version proposed in 2001 due to intense lobbying by the pharmaceutical industry, it opened the way for several groups of developing countries to negotiate directly with pharmaceutical firms.246 After deals were secured with India and Brazil, some U.S. pharmaceutical firms gave comparable terms to African countries.247 Developing countries were then able to leverage their united position in the context of the WTO negotiation of the 2003 Decision to secure both the political and legal success of the Decision as well as immediate practical implementation.

The United States responded with a belated attempt to rollback the effects of these developments through bilateral deals. In fact, the number of bilateral deals increased after the adoption of TRIPS.248 Free trade agreements negotiated after the adoption of the 2003 Decision include provisions limiting the use of the tools provided by TRIPS and reinforced by the Doha Declaration regarding pharmaceutical products.249 The United States introduced heightened intellectual property protection provisions (sometimes called “TRIPS-plus”), or incentives for reinforced TRIPS compliance in free trade agreements it concluded with developing countries.250 Additionally, the combination of the threat of sanctions through the “Watch List” under Special 301 and negotiation of bilateral agreements continued to be used to

244. Id. The Declaration reiterated and reinforced the availability of compulsory licensing but it failed to provide a clear position on parallel importing, which would enable developing countries lacking production capacity to have access to cheap drugs produced in a third country. Id.


246. Id. at 43.

247. Id. at 28. A coalition of Caribbean countries first concluded a deal to obtain AIDS drugs at a discount price and a group of middle-income Latin American countries led by Brazil later secured a deal with Abbott Laboratories, Inc., a U.S. pharmaceutical firm, in October 2005. The authors note that large middle-income developing countries could gain leverage in part because they represent a relatively attractive market for drug manufacturers and have the capacity to produce generic drugs if they are not offered terms acceptable to them. Id. However, Benvenisti and Downs raised doubts as to whether the prices these coalitions obtained were more advantageous than those secured by individual countries. Id. at 44–45.


249. These include agreements signed or negotiated with Australia, Bahrain, Chile, Morocco, Singapore, Thailand, members of the Andean Community, the Southern Africa Customs Union (“SACU”), and the plurilateral CAFTA agreement. Regarding CAFTA, see Carlos M. Correa, Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines, 36 CASE W. RES. J. INT’L L. 79, 85–94 (2004) (reviewing how U.S. negotiations with CAFTA have resulted in increasing the intellectual property standards of CAFTA members).

splinter coalitions. Restrictions include limitation on generic production of drugs that would be possible under TRIPS and the 2003 Decision, restrictions on parallel imports, restriction on the use of information contained in the patents so as to limit the development of generic drugs in the country where a patent is held as well as in third countries. The EC similarly has introduced “TRIPS-plus” provisions in bilateral trade agreements. The use of bilateral and regional agreements to limit the effect of WTO instruments regarding public health has raised concern within the WTO, with other member states, and within the U.S. Trade Representative’s office. As a result side letters of understanding were drafted to accompany some bilateral free trade agreements with a view to ensuring that the agreement did not impair the use of rights under TRIPS, the Doha Declaration on public health and the 2003 Decision. The legal validity of these side letters remains uncertain.

Developing countries' negotiation success on access to drugs and public health suggests that a coordinated and united approach enables them to balance out more powerful members. The coalitions can place and maintain issues of interest to them on the agenda and to obtain concessions in the face of bilateral incentives offered by trade partners to induce developing countries to defect from coalitions. In relation to the Doha Declaration on Public Health developing countries have combined coalition strategy with dividing tactics to splinter powerful domestic pressure groups. However, some authors have questioned whether such coalitions, while growing in number and importance, can be successful in reorienting the legal regime.

Negotiations on the so-called “Singapore issues” present a less clear-cut case than the negotiating history of TRIPS or the 2003 Decision on Public Health in large part because developing countries were far from united in their positions. Although the overall balance tended to place developing countries against expansion of negotiation to these issues, South American countries were not entirely opposed to it and were willing to concede in exchange for concessions in the agricultural sector, whereas Asian and African members were more firmly against the new issues.

251. Thelen, supra note 248, at 540, 544.
253. This includes trade agreements with the Palestinian Authority, South Africa, and Tunisia. See Correa, supra note 249, at 80.
254. See Abbott, supra note 85, at n.255 (noting the limitations of CAFTA provisions and the U.S.-Morocco FTA).
255. Id. at 352–53.
256. Benvenisti & Downs, supra note 245, at 45.
257. See, e.g., Gary G. Yerkey, Developing Countries Block U.S. Plan to Include Labor Issue in Work Agenda, 13 INT'L TRADE REP. (BNA) 1925 (1996) (noting that the trade-labor issue was blocked even before the Singapore ministerial meeting).
258. Gordon, supra note 42, at 119.
India spearheaded opposition to the introduction of rules on investment.\textsuperscript{259} Prior to the Singapore ministerial meeting India had formed a coalition with Bangladesh, Cuba, Egypt, Ghana, Indonesia, Kenya, Malaysia, Mauritius, Tanzania, Thailand, Venezuela, and Zimbabwe (with Pakistan and Sri Lanka joining informally) to resist the extension of negotiations to regulation of foreign direct investment, competition, and labor within the WTO.\textsuperscript{260} However that group dwindled to a fewer number of supporters as the ministerial meeting progressed, with only India, Indonesia, Malaysia, and Pakistan remaining steadfast members and Egypt, Venezuela, Tanzania, and Southern African Development Community (“SADC”) states strongly cautious.\textsuperscript{261} African members’ defections ultimately were secured in exchange for the Lome waiver, which enabled some of them to benefit from European non-reciprocal preferential programs. Some South-East Asian countries also defected when it became clear that India would continue to pursue a firm opposition strategy regardless. Those various group defections resulted in India bearing the bulk of the weight of opposing the new issues, and ultimately agreeing to the establishment of working groups on investment and competition.\textsuperscript{262} Remaining developing country opposition to investment, competition and government procurement rules within the WTO will likely be overcome by offering individual countries concessions in exchange for their support or acquiescence, as was done in negotiating the Agreement on Trade-Related Measures (“TRIMS”) agreement.\textsuperscript{263}

Cases involving quantitative access to rich country markets also provide opportunities for bilateral slicing away of collective positions through bilateral agreements. For example, shifting from a multilateral quota allocation to bilateral quota allocation creates competition between exporting countries on allocation of imports under multilateral agreements, as was the case for certain products under the U.S.-CAFTA agreement. The now defunct Agreement on Textiles also presented such a case as the bilateral agreements

\textsuperscript{259.} India—Statement by Minister of Commerce, WT/MIN(96)/ST/27 (Dec. 9, 1996) (opposing negotiations on investment at the WTO and raising issues regarding the trade-labor linkage).

\textsuperscript{260.} Burt, \textit{supra} note 56, at n. 282.

\textsuperscript{261.} See Malaysia—Statement Minister of International Trade and Industry, WT/MIN(96)/ST/64 (Dec. 11, 1996); Indonesia—Statement by Minister of Industry and Trade, WT/MIN(96)/ST/22 (Dec. 9, 1996); Pakistan—Statement by Minister of Commerce, WT/MIN(96)/ST/29 (Dec. 9, 1996) (referring to the work by UNCTAD on foreign investment and questioning the issue of trade and labor). Other countries had more ambivalent positions, agreeing on principle to the examination of investment and competition issues within the WTO but also referring to UNCTAD’s work in the area and referred to the competence of the International Labor Organisation regarding labor and trade. See, e.g., Venezuela—Statement by Permanent Representative to the United Nations, WT/MIN(96)/ST/100 (Dec. 12, 1996); Nigeria—Statement by Minister of Commerce and Tourism, WT/MIN(96)/ST/111 (Dec. 12, 1996); Egypt—Statement by Minister of Trade and Supply, WT/MIN(96)/ST/75 (Dec. 11, 1996); Tanzania—Statement by Minister of Industries and Trade, WT/MIN(96)/ST/50 (Dec. 10, 1996) (speaking on behalf of the Southern African Development Community (SADC) state members of the WTO, which include Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe).


\textsuperscript{263.} Burt, \textit{supra} note 56, at 1052–53.
negotiated after the latter expired in January 2006 may perpetuate the problem.264

The combination of multilateral and bilateral strategies therefore could be used successfully by developing countries as it is used by more powerful members of the WTO, with the nuance that bilateral developing country strategy is unlikely to have the necessary weight or credibility if it is not backed by a solid coalition.

It should come as no surprise that preferences and bilateralism, two major issues affecting the current Doha Round of negotiations and the future of the multilateral trading system more generally, turn out to be central elements of an analysis on the ability of developing countries to bargain in groups. While these two issues pervade current debates regarding the WTO system, their impact on developing country coalitions provides another element to be taken into account as policy-makers in the WTO and in member states deliberate on future action.

CONCLUSION

With a multipolar international system and a membership ranging from micro-states to superpowers, the WTO is faced with many challenges in ensuring adequate representation and participation of its members. Coalitions have been one tool that small and poor countries have used to increase their power and participation. Given the economic and political weakness of some members, forming alliances with other — possibly more influential — members is a necessary step. The question then is whether the organization which is, after all, supposed to serve its members, provides the appropriate legal tools to allow for coalition participation.

This Article has shown that, with the exception of research and discussion group support, where the Secretariat has been very active in recent years, the WTO legal and institutional framework tends not to be supportive of developing country coalitions but that it would be both desirable and feasible to provide mechanisms for coalition participation. While technical assistance and capacity building, both individual and collective, are necessary elements to improve the access and participation of developing countries in the process, a more systemic approach seems appropriate. Current roadblocks re-


Meanwhile, India and Pakistan united their efforts, in a rare political common move, to push for greater liberalization in textiles and clothing trade during the Doha Ministerial meeting. See Joint Statement of the Commerce Ministers of the South Asian Association for Regional Co-operation, Sri Lanka—Statement on the Forthcoming Doha Ministerial Conference, WT/L/412 (Aug. 23, 2001) (calling for “a more meaningful integration of the textile and clothing sector, in view of the very limited liberalization of trade, affecting items under specific quota restraints”).
garding the Green Room process could be alleviated by making more room for coalitions. The under-representation of particularly vulnerable groups of members could be remedied in part and these members’ participation increased with the formalization of these groups at various levels of the organization. The participation of developing countries in the dispute settlement process also could benefit from relatively minor amendments to the DSU that would lessen the burden associated with having recourse to the procedures or when they are in the respondent position.

The short and long-term prospects of the WTO depend in large part on the organization’s capacity to address the challenges raised by developing countries — most of which are raised collectively. Improved participation of developing countries in negotiation rounds and in the functioning of the WTO may be enhanced by a reconsideration of this framework in light of a coalition objective.

Finally, it must be noted that much of the empirical data regarding the workings of developing country coalitions in the WTO and their legal impact remains in the shadows. The relatively recent interest in the topic combined with the fact that this is a quickly moving area on the ground suggests that more information and analysis will transpire in the years to come, which will no doubt allow scholars to revise and build on current analyses.