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# The Cancún Experience – Jolting the Pillars of the WTO at its 5<sup>th</sup> Ministerial Conference

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## I. Abstract

WTO members met for the 5<sup>th</sup> Ministerial Session from 10 to 14 September 2003 in Cancún. The meeting took place according to Article IV:1 WTO-Agreement that stipulates that the Ministerial Conference serving as the highest authority of the WTO shall meet at least once every two years. The previous had been in Doha from 9 to 14 November 2001. Cancún marked the midterm-review of the Doha-Round launched in Doha and supposed to be concluded no later than 1 January 2005.<sup>1</sup> Contrary to hopeful estimation<sup>2</sup>, the meeting was not finished successfully. This evoked utterances of a “black day”<sup>3</sup> for international trade politics. Members remained entrenched on all key issues and no substantive improvements could be reached. Even the rather technical question on place and date of the next Ministerial Meeting could not be answered in Cancún after the negotiations miscarried.<sup>4</sup> In order to avoid a complete standstill of the Doha-Round at least the Ministerial Statement<sup>5</sup> concluding the conference assigned the Chairman of the

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<sup>1</sup> WTO, Doha Ministerial Declaration, 14 November 2001, WTO-DN: WT/MIN01/DEC/1, para. 45.

<sup>2</sup> *Barbier*, Vergiftete Pille, Frankfurter Allgemeine Zeitung (FAZ), 12 September 2003 (No. 212): 13; *Mrusek*, Beim Handel nicht zerrüttet, FAZ, 4 September 2003 (No. 205): 10.

<sup>3</sup> *Mrusek*, Der Pyrrhussieg der Armen, FAZ, 16 September 2003 (No. 215): 3.

<sup>4</sup> WTO, Day 5: Conference ends without consensus, WTO Online, Summary of 14 September 2003, 8 October 2003, [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_14sept\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm).

<sup>5</sup> WTO, Ministerial Statement, 23 September 2003, WTO-DN: WT/MIN(03)/20: para. 4.

General Council to convene a meeting of the Council at Senior Officials level no later than 15 December 2003 taking the action necessary to enable members to move towards a successful and timely conclusion of negotiations.

## II. Introduction

Representatives of members<sup>6</sup> described the WTO as sinking into a lack of trust already in advance of Cancún thus hampering optimism for a successful conference. The stranding of the conference deteriorated this situation and was accompanied by accusations among negotiating partners<sup>7</sup>, by querying the right of the WTO to exist<sup>8</sup>, by voices evaluating the organisation as medieval<sup>9</sup> but as well by admonishingly words to get smart in prospective negotiations.<sup>10</sup> The negative result of the 5<sup>th</sup> Ministerial Conference indeed can be described as shocking, disappointing<sup>11</sup> and a severe blow for the relatively young organisation. Following the first regression during the 3<sup>rd</sup> Ministerial Conference in Seattle in 1999, Cancún adds a second black chapter to the WTO history book.

The reasons that have shown to be responsible for the break down in Cancún and the consequences will be analysed in this paper.

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<sup>6</sup> *Schumann*, Der Gipfel der Heuchelei, Der Spiegel, 8 September 2003: 83.

<sup>7</sup> FAZ, WTO-Konferenz scheitert im Eklat, 16 September 2003 (No. 215): 1, 2; *Yerkey*, Support for WTO in Congress, private sector wanes after collapse of Cancún, Bureau of National Affairs, International Trade Reporter, 18 September 2003; *Pruzin* and *Yerkey*, WTO talks crashed when developing nations balked at taking up some 'Singapore issues', Bureau of National Affairs, International Trade Reporter, 18 September 2003; *Zoellick*, America will not wait for the Won't do Countries, US Department of State, 22 September 2003, 9 October 2003, <http://usinfo.state.gov/topical/econ/wto/03092201.htm>.

<sup>8</sup> *Mrusek*, Eine Niederlage der Armen, FAZ, 16 September 2003 (No. 215/38 D): 1.

<sup>9</sup> *Lamy*, 5<sup>th</sup> WTO Ministerial Conference, Press Conference closing the WTO 5<sup>th</sup> Ministerial Conference, Cancún, Mexico, 14 September 2003, DN: SPEECH/03/409, 15 September 2003 [http://europa.eu.int/comm/commissioners/lamy/speeches\\_articles/spla190\\_en.htm](http://europa.eu.int/comm/commissioners/lamy/speeches_articles/spla190_en.htm).

<sup>10</sup> *Lamy*, Results of the WTO Ministerial Conference in Cancún, Speech at the Session of the European Parliament on the Ministerial Conference of the WTO in Cancún, Strasbourg, 24 September 2003, DN: SPEECH/03/429, 24 September 2003, [http://europa.eu.int/comm/commissioners/lamy/speeches\\_articles/spla192\\_en.htm](http://europa.eu.int/comm/commissioners/lamy/speeches_articles/spla192_en.htm).

<sup>11</sup> FAZ, Dem Welthandel droht eine Rechtszersplitterung, (fn. 11), 21.

### III. Starting Positions

The midterm-review conference in Cancún was supposed to denote a cornerstone during the Doha-Round of trade talks. The Doha Declaration<sup>12</sup> summarising the goals of the trade round includes the roadmap to a successful completion. It only plays a tangential role whether the midterm-review could be declared as having been crucial for the continuing trade talks<sup>13</sup> or downplayed in stating it was not a make-or-break meeting<sup>14</sup> for the completion of the round. But, defects and failure in the first term of trade rounds can reduce hopes for success in the second half, evoke additional strenuous negotiating effort and block out additional topics which now possibly cannot be taken into consideration any more due to lack of time. The experience of the Uruguay-Round has shown that poor midterm results can be turned into an outright successful ending at the finishing line. At least, midterm-review conferences can be recognised as being in some way a catalytic converter supposed to additionally push and accelerate trade talks. Such conferences set up a warning sign that negotiating time slowly but surely runs out and more intensive serious generative work needs to be done.

#### 1. Content of the Doha Declaration in Detail

The work programme of the Doha Declaration includes ideas on the improvement of existing trade agreements as well as the possibility of developing new ones.<sup>15</sup>

##### a) Agriculture

With regard to the difficult<sup>16</sup> topic of agriculture policies in international trade negotiators of the Doha-Round still face strong national protectionism. Main results and demands of the recent Agreement on Agriculture (AoA) are the improvement of reciprocal market access<sup>17</sup>, the reduction of domestic support<sup>18</sup> and the obligation to further diminish export subsidies.<sup>19</sup> The Doha Declaration

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<sup>12</sup> WTO, Doha Ministerial Declaration, 14 November 2001, WTO-DN: WT/MIN01/DEC/1.

<sup>13</sup> Krenzler/Pitschas, Von Doha nach Cancún: Neue Regeln für den Welthandel, FAZ, 9 September 2003 (Nr. 209): 26.

<sup>14</sup> Pruzin, WTO Officials satisfied with Cancún Run-Up, Cite Singapore issues as big question mark, Bureau of International Affairs - International Trade Reporter, 4 September 2003.

<sup>15</sup> WT/MIN01/DEC/1, para. 12-44.

<sup>16</sup> Exemplary: Several disputes between the EC and the USA, e.g. *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, adopted on 25 September 1997.

<sup>17</sup> Article 4, 5 and Annex 5 AoA.

<sup>18</sup> Article 1 (a), 6 and Annex 2, 3, 4 AoA.

<sup>19</sup> Article 8, 9 - 13 AoA.

resumes on all three pillars in order to abate or even phase out completely restrictions and distortions.<sup>20</sup> Modalities for these further commitments should have been established by 31 March 2003.

#### b) Services

The Doha Declaration demands from members to negotiate with a view to achieve the objectives of the GATS as stipulated in the Preamble, Article IV (improving market access and domestic services of developing and least-developed countries) and Article XIX (entering into successive rounds of negotiations to achieve a higher level of liberalization regarding trade in services) of that agreement. Initial requests for specific commitments should have been submitted by 30 June 2002 and initial offers be made by 31 March 2003.

#### c) Singapore Issues

The Ministerial Conference in Singapore took place in December 1996. The four issues: trade and investment, competition policy, trade facilitation, and transparency in government procurement had already been discussed in Singapore. No agreed solution on commencing negotiations could be reached. All four topics are included in the Doha working programme. It declares that negotiations on these topics should take place after the 5<sup>th</sup> Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that conference on modalities of negotiations.<sup>21</sup>

#### d) TRIPS-Agreement

The Doha Declaration also addresses the further development of the TRIPS-Agreement, in particular, the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits (following the mandate of Article 23.4 TRIPS). In addition, the possibilities to include other products in this system should be discussed within the Council of TRIP. Another important item is the access to essential medicine for developing and least-developed countries. In the run-up to the conference sources outside of the negotiations stressed the latter point to be essential for a successful concluding in Canción.<sup>22</sup>

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<sup>20</sup> WT/MIN(01)/DEC/1, para. 13 - 14.

<sup>21</sup> WT/MIN(01)/DEC/1, para. 20, 23, 26, 27.

<sup>22</sup> *Pruzin*, WTO: Group Calls for Focus on Agriculture, Medicines: Singapore Issues can Wait, Bureau of International Affairs - International Trade Reporter, 4 September 2003.

## e) Remaining Issues

Finally, talks on market access for non-agricultural products, DSU-improvements, trade and environment, electronic commerce, trade and transfer of technology to developing countries, technical cooperation and capacity building, WTO-rules, and special and differential treatment of developing and least-developed countries should have been negotiated on following the Doha Declaration. There is no need to explicate them since negotiations regarding these issues were not the cause for the miscarrying of the conference in Cancún.

## 2. Pre-Cancún Negotiation Results

In the following negotiation procedures and substantive matters of negotiations in the run-up of Cancún are described.

### a) Negotiation Procedure of Doha-Round Talks

One could query whether the working procedure and organisation of the Doha-Round talks can be held responsible for the failure in Cancún. The procedure and organisation of the trade talks are stipulated in the Doha Declaration itself. Thereafter, the overall conduct of negotiations is supervised by the Trade Negotiations Committee (TNC) under the authority of the General Council; the TNC established appropriate negotiating mechanisms and supervises the progress of the negotiations.<sup>23</sup> In addition, the negotiations are to be conducted in a transparent manner among participants. This shall facilitate the effective participation of all.<sup>24</sup> The first meeting of the TNC took place on 1 February 2002.

The TNC and its negotiating bodies do not constitute parallel or competing machinery to the existing WTO bodies.<sup>25</sup> Instead they all are linked with each other by the authority of the General Council which also can be recognised in the TNC's obligation to regularly report to the General Council. This results in a chain of authority and reporting. Every single negotiating body reports to the TNC. The TNC reports to the General Council. This method ensures concentrated and flexible work on 'single' topics within each negotiating body. The results of their negotiating work will better be useable within the otherwise overloaded and thus cumbersome TNC and General Council and its consensus decision-making.

Members in the TNC agreed on 1 February 2002 to create two new negotiating bodies: the Negotiating Group on Market Access (non-agricultural products) and the Negotiating Group on Rules (anti-dumping, subsidies and regional trade agree-

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<sup>23</sup> WT/MIN01/DEC/1, para. 46.

<sup>24</sup> WT/MIN01/DEC/1, para. 49.

<sup>25</sup> WTO, Statement by the Chairman of the General Council, WTO Online, 4 February 2002, 11 November 2003, [http://www.wto.org/english/tratop\\_e/dda\\_e/tnc\\_1\\_01feb02\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/tnc_1_01feb02_e.htm).

ments). The remaining trade topics were supposed to be negotiated in 'Special Session' within already established bodies such as the Committee on Agriculture, the Council for Trade in Services, the TRIPS Council, the DSB, and the Committee on Trade and Environment.<sup>26</sup> These bodies met regularly in order to presume and expedite negotiations in every single sector.

Having every member invited to participate in the work of all negotiating bodies represents the overall idea of consensus decision-making<sup>27</sup> regarding amendments and developments of new trade agreements. Each negotiating body met several times between its establishment and the conference in Cancún. Within the two new negotiating bodies the working procedure was newly agreed on, basically copying the rules developed for the General Council.<sup>28</sup> Already existing bodies merely meeting in 'Special Session' used regular rules of procedure already agreed on and practiced within the original negotiating bodies.<sup>29</sup> Generally, at the beginning of each meeting members which made recent submissions to the chairman were requested to introduce these submissions and proposals. After that discussions on these proposals followed until consensus was reached. Looking at the enormously high number of participating members within each negotiating body the applied working procedures have proved to be helpful and adequate. Within the negotiating bodies no substantial criticism on working procedures has been filed. Members had agreed on the procedure and were satisfied with it throughout the negotiations leading to Cancún. The rules of procedure applied in negotiations in the run-up of Cancún proved to be appropriate. Thus, the formal structure and working procedure of the negotiating bodies were no cause of failure in Cancún.

## b) Single Trade Topics

Each single trade topic mentioned by the Doha Declaration had been dealt with different success before the conference started. Especially strong differences between members in the sectors of agriculture<sup>30</sup>, services, access to essential medicine for developing and least-developed countries<sup>31</sup> as well as the question on de-

<sup>26</sup> WTO, WTO Members kick off negotiations with decision on organization, WTO Online, 1 February 2002, 11 November 2003, [http://www.wto.org/english/news\\_e/news02\\_e/tnc\\_01feb02\\_e.htm](http://www.wto.org/english/news_e/news02_e/tnc_01feb02_e.htm).

<sup>27</sup> Article IX:1 WTO-Agreement.

<sup>28</sup> WTO, Programme of meetings for the negotiations on market access for non-agricultural products, Negotiating Group on Market Access, 22 July 2002, WTO-DN: TN/MA/3; WTO, Minutes of the meeting held on 11 April, 1 July and 19 July 2002, Negotiating Group on Market Access 30 July 2002, WTO-DN: TN/MA/M/1, para. 2.

<sup>29</sup> Exemplary regarding the Committee on Agriculture in Special Session: WTO, Summary report on the meeting of the Special Session held on 23-24 March 2000, Committee on Agriculture in Special Session 18 April 2000, WTO-DN: G/AG/NG/R/1, para. 3.

<sup>30</sup> Rüb, Zur Not wieder eine Koalition der Willigen, FAZ, 11 September 2003 (Nr. 211 F): 2.

<sup>31</sup> Schumann, (fn. 6), 87.

bating the Singapore issues<sup>32</sup> were considered to endanger a consensus-based completion of the conference.

### (1) Agriculture

Members were not able to meet the above-mentioned deadline on 31 March 2003. At least, after the deadline elapsed individual members were able to reduce some restrictions and approach the line to find some common ground. The member states of the European Communities (EC) agreed on a new Common Agriculture Policy on 26 June 2003.<sup>33</sup> Whether this reform will prove to be sufficient enough in order to satisfy Doha-Round negotiating partners is not clear yet. Anyhow, the EC did set up a much better starting position for the talks in Cancún and rightly, stated that this had to be enough disarmament for Cancún and now others were up to draw.<sup>34</sup> The lines were drawn between developing and developed countries. The latter were blamed by the other for subsidising their farmers with a sum amounting to 300 billion Euro each year<sup>35</sup> while people in developing countries starve and work for one Dollar a day. Not every subsidy shows itself being trade distorting which is recognised in the Agreement of Agriculture that includes different “boxes” justifying subsidies. The developing countries wanted to extinguish such exceptions and demanded to cut these payments and even abolish them wholly.<sup>36</sup> In addition, all export subsidies were demanded by the least-developed countries to be wiped out – a demand which naturally was rejected by the EC as it threatened its certainly improvable but generations-old agricultural system. These problems appeared more precisely in an agricultural issue harshly debated before the conference in Cancún started: subsidies and market access regarding cotton. Cotton-producing least-developed countries<sup>37</sup> complained about unfair trade measures of developed countries that subsidise their cotton-producers by an uncontested amount of 4 billion US-Dollars annually.<sup>38</sup> The representatives of four African countries explained in drastic words the consequences of this subsidy policy at WTO-headquarters in Geneva. More than 10 million farmers in Africa are

<sup>32</sup> Pruzin, WTO: Group Calls for Focus on Agriculture, Medicines: Singapore Issues can Wait, Bureau of International Affairs – International Trade Reporter, 4 September 2003.

<sup>33</sup> *European Communities*, EU fundamentally reforms its farm policy to accomplish sustainable farming in Europe, European Commission Press Release, 26 June 2003, DN: IP/03/898, 1 December 2003, [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/03/898|0|AGED&lg=EN&display=](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/898|0|AGED&lg=EN&display=).

<sup>34</sup> *Fischler*, Die neue, reformierte Agrarpolitik, EU Direkt, ed. Vertretung der Europäischen Kommission in Österreich, 7+8 (Wien: 2003): 3-5.

<sup>35</sup> FAZ, Entwicklungsländer fordern Zugang zu Agrarmärkten, 11 September 2003 (Nr. 211/37D): 1, 2.

<sup>36</sup> FAZ, Nicht nur die reichen Länder erheben hohe Agrarzölle, 13 September 2003 (No. 213): 11.

<sup>37</sup> *WTO*, Poverty Reduction: Sectoral Initiative in Favour of Cotton, 15 August 2003, WTO-DN: WT/MIN(03)/W/2.

<sup>38</sup> *Schumann*, (fn. 6), 82, 83.

directly linked to cotton production and their jobs are in danger due to unfair trade practice by developed countries. The African countries said they could be competitive in a fair market and increased cotton production could make a real contribution to tackling poverty.<sup>39</sup> Thereupon, the cotton-topic was put on the Cancún-agenda, too.<sup>40</sup> This was quite a success for initiating countries. After all, before the conference negotiation matters and aims in Cancún regarding the sector of agriculture had been estimated as difficult but not intractable.<sup>41</sup>

## (2) Services

Between 31 March and 12 June 2003 twenty-six Members had submitted initial offers, including the EC and the USA.<sup>42</sup> One of the last meetings of the Council for Trade in Services<sup>43</sup> showed that opinions of members still differentiated strongly and decreased hopes for catalyst-solutions in Cancún. Many proposals were exchanged bilaterally before entering the WTO institutions causing a certain stage of uncertainty about figures while negotiations forged ahead. For example, in the above mentioned meeting of the Council for Trade in Services diverting opinions were expressed regarding the implementation of Article XIX:3 GATS<sup>44</sup> and in which way the assessment on trade in services should take place. While Poland favoured a separate assessment of all service sectors, other members suggested an overall assessment.<sup>45</sup> Thus, discordance already hindered work on a basic level namely the question on how to define the status quo. Other disagreements appeared referring to the issue of special treatment for least-developed country members. During negotiations a successful outcome was already approached as least-developed countries had presented a revised draft of the modalities respecting comments of developed countries.<sup>46</sup> After the draft was introduced to members, developed countries started to express new concerns on special issues of the

<sup>39</sup> Walker, WTO kickstarts trade talks, British Broadcasting Corporation Online 15 October 2003, 17 October 2003, <http://news.bbc.co.uk/1/hi/business/3192834.stm>.

<sup>40</sup> Schumann, (fn. 6), 82, 83.

<sup>41</sup> Fischler, The Breakdown of the Cancún Ministerial Meeting, Speech at the 5<sup>th</sup> Ministerial Conference of the WTO, Cancún, 14 September 2003, DN: SPEECH/03/408, 15 September 2003, [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=SPEECH/03/408|0|RAPID&lg=EN&display=](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/03/408|0|RAPID&lg=EN&display=).

<sup>42</sup> WTO, Services: The new negotiations, WTO Online, 10 October 2003, [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_14sept\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm).

<sup>43</sup> WTO, Report of the Meeting held on 19-22 May 2003, Council for Trade in Services, WTO-DN: TN/S/M/7, 30 June 2003.

<sup>44</sup> As well mentioned in the Doha Declaration, WT/MIN(01)/DEC/1, para. 15.

<sup>45</sup> TN/S/M/7, para. 6-18.

<sup>46</sup> WTO, Draft Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services, Council for Trade in Services Special Session, 7 May 2003, WTO-DN: TN/S/W/13.

draft. Japan was concerned regarding the proposal of movement of unskilled or semi-skilled workers.<sup>47</sup> Switzerland *inter alia* pointed out that the revised draft proposed discriminatory safeguard actions in favour of least-developed countries and that would contradict Article X GATS.<sup>48</sup> More examples could be mentioned but the above shall sufficiently picture the situation: Many obstacles remained regarding the mandate of the Doha Declaration for trade in services. In addition, the topic of trade in services immerses in dozens of service sectors which made and makes negotiations more difficult and burdensome than in other topics of the Doha Declaration. Still, Cancún was recognized as a good opportunity to advance negotiations in this sector.

### (3) Singapore Issues

The text of the Doha Declaration clearly stipulates that negotiations on all four issues should take place 'after' the 5<sup>th</sup> Ministerial Conference. But, 'during' the conference an explicitly consensus-based decision should have been adopted outlining and framing the negotiation modalities. Despite the existence of such a clear statement it became more and more obvious that in the run-up of Cancún members disagreed on the need of debating these issues. While some members, for example the USA and the EC, argued for the importance of pushing these topics towards commencing negotiations,<sup>49</sup> other members warned of overloading negotiations. They wanted to get straight on the implementation of existing trade agreements first instead of creating new ones.<sup>50</sup> Resisting members presented mainly two lines of arguments supporting their stance. First, they were scared of once again being swamped by new topics (administrative burden). They alleged scarce financial and human resources and limited capacity to meaningful negotiate these new issues. Due to this shortage they were afraid of not adequately being heard regarding their views and concerns during negotiations. They argued developed countries would be able to take the biggest piece of the cake for themselves by formulating rules on these new issues mostly in their favour – just as some voices have suggested had been true with regard to the TRIPS-Agreement.<sup>51</sup> Secondly, those countries believed that such new agreements would too strongly reduce their freedom concerning national economy politics (content-related argument).<sup>52</sup> At

<sup>47</sup> TN/S/M/7, para. 26.

<sup>48</sup> TN/S/M/7, para. 31. Article X:1 GATS refers to the principle of non-discrimination with regard to safeguard actions.

<sup>49</sup> *Yerkey*, USTR Zoellick plans to seek agreement in Cancún on 'ambitious' WTO trade, Bureau of International Affairs - International Trade Reporter, 11 September 2003.

<sup>50</sup> *Krenzler/Pitschas*, (fn. 13), 26; *WTO*, Proposals on Singapore issues for inclusion in the draft text for Cancún, Communication from Botswana on behalf of several other states, 23 August 2003, WTO-DN: WT/GC/W/513.

<sup>51</sup> *Schumann*, (fn. 6), 87, 88.

<sup>52</sup> *Krenzler/Pitschas*, (fn. 13), 26.

least the EC seemed to recognise the danger of inflexibly insisting on the stance of pushing the Singapore issues.<sup>53</sup> The EC proposed to drop some Singapore issues (investment and antitrust policy) in order to find a compromise. Still, this new flexibility was qualified by a ‘critical mass’ of WTO members that would have to sign off on these issues.<sup>54</sup>

Despite of the clear statement of the Doha Declaration with regard to initiating the set-up of negotiating rules for the Singapore issues and although the EC showed willingness to compromise, this matter more and more showed up to be a serious hurdle for Cancún participants.<sup>54a</sup> After the conference it became obvious that this hurdle even had taken shape of a stumbling block leading to the breakdown.

#### (4) TRIPS-Agreement

Talks also proceeded in the TRIPS sector while trying to reach the Doha mandate. In his report<sup>55</sup> dated 4 July 2003 the chairman of the Council for TRIPS in Special Session outlined the results and standings of the negotiations. The committee met seven times and prior to the meeting in April 2003 the Chairman circulated a “Draft text of multilateral systems of notification and registration of geographical indications for wines and spirits”.<sup>56</sup> The draft was discussed in the April meeting of the committee but it was not possible to conclude a second draft due to diverting stances of members regarding the key issues of legal effect and participation. The conference in Cancún was supposed helping to align remaining differences.

The problem and prospective goal of the Doha Declaration<sup>57</sup> regarding access to existing medicines, research and development into new medicines proved to bring up another obstacle threatening to consensus among members during the conference.<sup>58</sup> The discussion developed with regard to interpretation and consequences of Article 31 (f) TRIPS-Agreement. This provision declares that any use of the subject matter of a patent without the authorisation of the right holder shall be pos-

<sup>53</sup> *Yerkey*, EU open to allowing countries to ‘opt-out’ of WTO talks on investment and antitrust policy, Bureau of International Affairs – International Trade Reporter, 14 August 2003.

<sup>54</sup> *Yerkey*, *ibid.*

<sup>54a</sup> *Schott*, Comment on the Doha Declaration, *JIEL* 5 (1) 2002: 192.

<sup>55</sup> *WTO*, Report by the Chairman of the Special Session of the Council for TRIPS to the Trade Negotiations Committee, Trade Negotiations Committee, 4 July 2003, WTO-DN: TN/IP/8.

<sup>56</sup> *WTO*, Draft text of multilateral systems of notification and registration of geographical indications for wines and spirits, WTO-DN: JOB(03)/75.

<sup>57</sup> WT/MIN(01)/DEC/1, para. 17.

<sup>58</sup> See also *Herrmann*, Historischer Wendepunkt für den internationalen Patentschutz? Der internationale Patentschutz für Medikamente nach der Ausnahmeregelung der WTO für Exportzwangslizenzen vom 30. August 2003 published within this issue of ZEuS, 599-627.

sible predominantly for the supply of the domestic market of the member authorising the use. Therefore, it hardly does permit countries that are unable to produce medicines themselves to import drugs made under compulsory licensing by another member. On 30 August 2003, following negotiations a compromise was reached in order to give way for “smoother” negotiations in this sector in Cancún. Members agreed on legal changes that should make it easier for poorer countries to import cheaper generics made under compulsory licensing if they are unable to manufacture the medicines themselves.<sup>59</sup> The decision<sup>60</sup> dated 30 August 2003 waives countries’ obligations under Article 31 (f) TRIPS-Agreement. As a result the decision allows textually defined ‘exporting members’ to provide ‘eligible importing members’ with drugs and generics if specific conditions are met. Critics pointed to an inherent risk in labelling “only for export in developing countries” because this cannot be controlled effectively fearing the slow infiltration of patent protection.<sup>61</sup> This paper cannot be the appropriate place to debate on that opinion. The future is going to show whether these concerns will prove valid. At least, the issue of access to medicines could be defused successfully ahead of Cancún. Conditions for negotiations on other issues regarding the TRIPS-Agreement thus were improved.

### c) Alliances and Strategies

There is nothing new about forming alliances during multilateral negotiations in order to strengthen positions of single negotiating partners. Ahead of the conference in Cancún mainly two new developments could be recognised in this regard.

First, the exceptional situation that the USA and the EC together with other developed countries, in general, announced to fight for common aims and intentions. Of course, there would be contrary stances with regard to certain aspects of trade topics. But, in order to encounter demands of developing countries both trade powers saw the need to pull together.<sup>62</sup>

The second interesting development was already described with regard to the negotiations improving the TRIPS-Agreement. Stronger than ever before developing and least-developed countries have tried to form groups or alliances in order to commonly promote their opposing views vis-à-vis developed countries. The most obvious example ahead of Cancún had been the cotton-initiative of African countries. The Director-General of the WTO encouraged these members to show lead-

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<sup>59</sup> WTO, Decision Removes final Patent Obstacle to Cheap Drug Imports, WTO Online, 30 August 2003, 14 October 2003, [http://www.wto.org/english/news\\_e/pres03\\_e/pr350\\_e.htm](http://www.wto.org/english/news_e/pres03_e/pr350_e.htm).

<sup>60</sup> WTO, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS-Agreement and Public Health, General Council, 2 September 2003, WTO-DN: WT/L/540.

<sup>61</sup> *Barbier*, (fn. 2), 13.

<sup>62</sup> *Mrusek*, (fn. 2), 10.

ership in Cancún.<sup>63</sup> The developing countries extensively made use of this invitation and besides this initiative a group of 21 members formed in order to promote common ideas.<sup>64</sup> The group was headed by important trading nations like China, India and Brazil. Due to these relatively new constellations the meeting in Cancún was considered to face another dimension of difficulties.

### 3. Role of Non-Governmental Organisations

The contribution of the Non-Governmental Organisations (NGOs) to the conference in Cancún already started before the conference began. Dozens of organisations had prepared papers on issues to be debated in Cancún.<sup>65</sup> These papers were presented to the WTO asking to be noticed by negotiators. During the conference itself the NGOs were not allowed to participate in the negotiations. Members did not decide yet to allow NGOs access to negotiation bodies. Being sovereign states, members are free to decide on who can pick a chair on the negotiating table. The influence of NGOs is reduced to pre-conference comments, papers and symposia. Still, showing peaceful and constructive presence at the venue can influence negotiating members. Nevertheless, procedure, decision-making and negotiating are up to members alone during WTO meetings.

Already before the conference in Cancún started it was clear that it would become the most-visited Ministerial Conference with regard to representatives of NGOs. And indeed, 795 NGOs represented by 1578 participants<sup>66</sup> were present at the venue. By comparison, seven years earlier in Singapore 108 NGOs represented by 235 participants showed interest in the conference.<sup>67</sup> Looking at these figures the WTO and its members must admit that prospective work will be influenced by these organisations.<sup>68</sup> A constructive dialogue with NGOs indeed will complicate the negotiations in trade rounds but might as well help to take other points of view into consideration leading to a better outcome.

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<sup>63</sup> *Panitchpakdi*, Speech at Meeting of African Union Trade Ministers, World Trade Organisation 9 September 2003, 17 October 2003, [http://www.wto.org/english/news\\_e/spsp\\_e/spsp17\\_e.htm](http://www.wto.org/english/news_e/spsp_e/spsp17_e.htm).

<sup>64</sup> FAZ, WTO ringt um Kompromiß, 15 September 2003 (No. 214): 11.

<sup>65</sup> WTO, NGO position papers received by the WTO Secretariat, WTO Online, 11 September 2003, 12 November 2003, [http://www.wto.org/english/forums\\_e/ngo\\_e/posp35\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/posp35_e.htm).

<sup>66</sup> WTO, NGO participation in Ministerial Conference was largest ever, WTO Online, 6 October 2003, 17 October 2003, [http://www.wto.org/english/news\\_e/news03\\_e/ngo\\_minconf\\_6oct03\\_e.htm](http://www.wto.org/english/news_e/news03_e/ngo_minconf_6oct03_e.htm).

<sup>67</sup> WTO, *ibid.*

<sup>68</sup> See as well *Jeffords*, Turning the Protestors into a Partner for Development: The need for Effective Consultation between the WTO & NGOs, *Brooklyn Journal of International Law* 28 (2003): 937-988.

## IV. Progression of Negotiations in Cancún

The conference started as planned and continued in accordance to the schedule until the last day. During this last day, 14 September 2003, it became obvious that divergent opinions could not be converged.

### 1. Carrying out and Procedure of the Conference

The chairperson headed the conference. On the first day of negotiations he announced that he had invited five ministers to act as “facilitators” to help him with negotiations on various subjects. Facilitators lead consultations in working groups on certain trade topics. They tried to assist the chairperson in splitting up work among each other in order to lead parallel talks. The facilitators were assigned with the topics: agriculture, non-agricultural products, Singapore issues, development issues and other issues. On the second day the WTO Director-General himself became the sixth facilitator observing and managing all talks of the cotton-initiative.

The conference was designed to take place on four levels that can be described as having a ‘pyramid structure’. While on the top three levels all members were represented, the fourth level (ground level) covered bilateral or multilateral exclusive talks between certain members either alone or in presence of a facilitator. The top three levels moved on in a parallel time frame throughout the conference.

The Plenary Sessions can be called the ‘first level’ on top of the pyramid. The meetings took place every day and dealt with general statements by members, accessions and other non-negotiating topics. The Plenary Session on the last day of the conference was supposed to adopt the proposed and negotiated Cancún Ministerial Declaration.

‘Level two’ were the meetings of all heads of delegations. Those meetings were informal and supposed to ensure that consultations and negotiations were transparent and included all members. Participants of these meetings were the chairperson, the facilitators and the heads of all delegations. During the meetings the facilitators were asked to report on their results in the working groups and the chairman was asked to motivate members regarding further talks in the working groups. Thus, level one and level two combined all members and all topics. Therefore, they were quite cumbersome and only could have been successful if level three and four had functioned reliably.

‘Level three’ combined the working groups headed by the facilitators. As mentioned, during the conference in Cancún six working groups were created. Though each working group combined all members it only dealt with one trade topic. This was an important advantage of working groups since overload was avoided. Talks could concentrate on one matter. This was supposed to evoke a greater chance of success in given time.

Finally, on 'level four' consultations between the facilitator of a working group and individual members or a small group of members took place. Thus, this last level not only dealt with only one trade topic but in addition offered the possibility of small group talks in order to straight out differences. In a negotiating meeting including all members compromises would be harder to reach than in small groups. Throughout most of the Ministerial Conferences such levels of negotiations have proved to be helpful.

Finally, regarding the content of the talks not only the Doha Declaration served as guideline to the negotiations but in addition the Draft Cancún Ministerial Text. This draft<sup>69</sup> was already published before the conference started. Besides being declared as a workable framework for negotiations<sup>70</sup> it also was supposed to be the manageable foundation of the Cancún Ministerial Declaration to be announced after the conference.

## 2. Negotiation Days' Results

The plenary sessions of the first day were characterised by announcing the facilitators, setting up procedural timetables framing the conference and debating the above mentioned cotton-initiative in the evening. The complaining countries in this matter presented a proposal containing ideas tackling the problem of subsidies.<sup>71</sup> At this, the negotiation routine of countries like the USA became obvious. The USA tried to complicate the topic by diffusing the simple Yes-or-No-question whether subsidies shall be reduced. They demanded to look at other factors influencing this matter, e.g. the weather or other trade distortions like high tariffs.<sup>72</sup> The problem could not be solved.

The third day marked the halfway point of the conference. Regarding the cotton-initiative no satisfying solution had been achieved. Regarding the Singapore issues three opinions remained: launching negotiations in Cancún, referring them back to the working groups in Geneva or exploring solutions between these opinions.<sup>73</sup> The meeting of the working group for agriculture contained less progress but endless repeating of stated opinions without stepping towards each other.<sup>74</sup> The facil-

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<sup>69</sup> WTO, Draft Cancún Ministerial Text, WTO Online 24 August 2003, 12 November 2003, [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/draft\\_decl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_e.htm).

<sup>70</sup> WTO (fn. 69).

<sup>71</sup> WT/MIN(03)/W/2.

<sup>72</sup> WTO, Day 1: Conference kicks off with facilitators named and cotton debated, WTO Online, 10 September 2003, 19 November 2003, [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_10sept\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_10sept_e.htm).

<sup>73</sup> WTO, Day 3: Facilitators Start Work on new Draft Declaration, WTO Online, 12 September 2003, 8 October 2003, [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_12sept\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_12sept_e.htm).

<sup>74</sup> WTO, *ibid*.

itators prepared proposal documents representing the results of the discussions in the working groups. These documents outlined a possible consensus, which could be accepted by all negotiating partners. The texts were presented to the chairperson who finished a new version of the Draft Cancún Ministerial Text during the night.

On the fourth day of negotiations this new draft was circulated to members. After studying the proposal, ministers were invited to criticise the text. Once again, quite counterproductive to improvements, members stated their already known opinions. There seemed to be a lot of disappointment in the lack of cooperation of members to show at least rudiments of compromise.

Consultations on the 5<sup>th</sup> day started immediately following the end of the previous heads of delegations meeting at 1 a.m. The consultations ended at 4 a.m. revealing that the question on Singapore issues was the most difficult one.<sup>75</sup> There was no chance for progress anymore. The time had run up – the threat of failure could not change members' minds towards giving away. The attempt to avoid failure had come to nothing.

## V. Analysis and Consequences of the Failure

The success of negotiations mainly depends on two important elements. First, there is the procedural way of organising the talks. Secondly, the willingness of all negotiation partners to concede on one end in order to receive something else on the other is important. Both elements include the creation of an undisturbed and multi-directional accepted atmosphere as well as the aptness of a skilful chairperson. Chairperson and facilitators in Cancún not recognisably had been a problem causing disturbance in negotiations. As well, in comparison to Seattle the conference proceeded without external disturbances except for a few appearances and one tragic event.<sup>76</sup> The following remarks analyse to what extent negotiation procedures on one hand and the unwillingness of members to compromise in substantive matters on the other can be held responsible for the failure in Cancún.

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<sup>75</sup> WTO, Day 5: Conference ends Without Consensus, WTO Online, 8 October 2003, [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_14sept\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm).

<sup>76</sup> WTO, Mexican Government, WTO Secretariat express regret at death in Cancún, WTO Online, 10 September 2003, 22 October 2003, [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_13sept\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_13sept_e.htm).

## 1. Critical Remarks with Respect to Negotiation Procedures

The procedure of organising negotiations of 146 states surely needs to be well thought-out. It was developed and improved throughout every Ministerial Conference and meetings in Geneva. For example, in Singapore members felt to be skated around and to be confronted with *faits accomplis* negotiated by only a small circle of members.<sup>77</sup> This problem had been solved properly since now all members can participate in almost every meeting during the conference. Nevertheless, members should always feel encouraged to improve on working procedures.

For example, the possibility of announcing facilitators ahead of the conference and using permanent facilitators who take part in each Ministerial Conference of one trade round dealing with the same subject matter could be helpful. This happened in Doha and Cancún with regard to the group on Singapore issues and the group on agriculture.<sup>78</sup> The rule could be implemented regarding all negotiating working groups. This way a reliable, skilled and experienced person accompanies the members in finding common ground. The facilitators could as well be the chairpersons of the working groups negotiating throughout the trade round. Doing so, the facilitator will be up to date on all details governing the issue. The conditions of leading the discussions during the conference would be improved.

Members as well could think about negative effects of a Draft Ministerial Declaration submitted ahead of the conference. Such a document surely helps to lay down the goal of negotiations and to frame the working programme. On the other hand, the draft in Cancún already draw conclusion on topics, which still showed strong diverting opinions. For example, regarding all four Singapore issues the conclusion said that negotiations should commence.<sup>79</sup> This might cause disturbance hindering negotiations because a certain negotiating stance is emphasised too much. Members holding an opposing opinion might feel to be disparaged. Thus, such draft declarations carefully need to be formulated with a certain reserve to conclusions on topics still strongly unclear regarding the outcome.

Understandably, members like to repeat their opinion as often as they can during negotiations. As sovereign states, members are free and even invited to participate in discussions. They are free to say what they want. On the other hand, members might think about problems caused by this repetition. The problems became obvious during the conference in Cancún as facilitators and the chairperson worried about this behaviour. Although the repetition keeps the conference going it takes away time. In Cancún, very often listening members already knew the repeat-

<sup>77</sup> *Blackhurst*, Reforming the WTO decision-making – lessons from Singapore and Seattle, The World Trade Organization Millennium Round, Routledge Studies in International Business and the World Economy 24, Ed. Klaus Günter Deutsch and Bernhard Speyer, (New York: Routledge, 2001) 295.

<sup>78</sup> *WTO*, Doha WTO Ministerial 2001 – Summary of 12 November 2001, WTO Online, 20 November 2003, [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/min01\\_12nov\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_12nov_e.htm).

<sup>79</sup> *WTO* (fn. 69).

ed opinions. Therefore, it might prove to be helpful for progress and result of conferences in the future to refrain from too much repeating opinions in order to save time. This time could be used for suggesting improvements in negotiating stances as well as explaining and understanding remaining problems.

Nevertheless, changes in working procedures or organisation of the conference only can be decided on by all members. They should recall the meeting in Cancún and look for improvements. A possible working group on improvements in working procedures could take care of that.

## 2. Critical Remarks with Respect to Substantive Matters

The mentioned details in working procedure had no substantial influence on the failure. Rather the incapability to compromise in substantive matters was responsible for the collapse of the talks. Members only showed little effort to move forward from their own stances. With every day striding ahead the facilitators more and more became concerned because no progress was reached. For example, already at the end of the third day of the conference, the facilitator of the working group on non-agricultural market access summarised his task as ‘mission impossible’ seeing no change to positions held in Geneva before Cancún.<sup>80</sup> It must be queried why members were not able to find at least some common ground in Cancún.

### a) Will to Compromise

The incapability to compromise was not due to lack of will. As shown above, severe substantial disagreements and hence obstacles for the talks already appeared in the run-up of the conference. Although they threatened the conference, members showed willingness to remove some obstacles in order to pave the way to better negotiations in Cancún. Such examples are the decision to debate on the cotton-initiative as well as the compromise regarding the import of cheap drugs.<sup>81</sup> Regarding the sector of agriculture the EC created a new policy in order to approach the position of developing countries. These developments clearly underline that there has not been a lack of willingness to close Cancún successfully.

### b) Incapability to Handle Singapore Issues

Further, the next thesis explaining the failure could be stipulated by alleging that the WTO and its members are not sufficiently prepared yet to commence negoti-

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<sup>80</sup> WTO (fn. 73).

<sup>81</sup> WTO, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS-Agreement and Public Health, General Council, 2 September 2003, WTO-DN: WT/L/540.

ations on the Singapore issues. The question can be divided into two problems. Are the members on one hand and is the organisation on the other hand capable in bearing this additional burden?

The first point cannot be answered quickly. All members agreed on one position in Doha since a clear consensus decision was made regarding the negotiation on rules of procedure in Cancún in this topic. But, some members, mainly developing countries, changed their mind due to developments after Doha. They had expected certain responsiveness regarding other items of the Doha Declaration (e.g. services and agriculture).<sup>82</sup> They might as well simply have expected to reach own technical and financial ability to start negotiations on the Singapore issues in September 2003. In addition, Doha urgently had to turn out as a success after the disaster of Seattle. A new trade round was needed in order to keep negotiations going ensuring trust in the WTO. Due to these points, all countries voted in favour of deciding on modalities in negotiations on Singapore issues in Doha.

One might query whether this decision legally bound members in Cancún.<sup>82a</sup> This could turn out of Article IV:1 WTO-Agreement that stipulates, “The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect.” The function of the WTO was agreed on in the Preamble of the WTO-Agreement and reads *inter alia* “[...] to develop an integrated, more viable and durable multilateral trading system [...]” which includes the development of new trade agreements helpful to reach this goal. Once members agree in consensus on the level of Ministerial Conference to start negotiations on a new trade issue they might have obliged themselves to indeed negotiate.<sup>82b</sup> In Doha, all members agreed to decide on rules of procedure by explicit consensus in Cancún. That could have meant such a decision all members had to agree on in Cancún. On the other hand, an obligation to decide in Cancún could not have been created. First, because the Doha agenda is titled being a “declaration”, not a “treaty”. Declarations usually are of political and not legally binding character. Secondly, there is no recognisable way of enforcing a possible right of decision-making. The Doha Declaration is not within the scope of Article 1 DSU. Finally, the Doha Declaration itself states that the decision on modalities of negotiations had to be taken by ‘explicit’ consensus in Cancún. The word ‘explicit’ points to the foreseen possibility that the decision as well could not have been taken if such an explicit consensus simply could not be reached. Hence, it appears rather unlikely that the Doha Declaration legally bound members to take a decision on modalities of negotiations on the Singapore issues in Cancún.<sup>82c</sup>

<sup>82</sup> WTO, ACP Declaration on the fourth Ministerial Conference, 9 November 2001, WTO-DN: WT/L/430, para. 20, 21.

<sup>82a</sup> Charnovitz, The Legal Status of the Doha Declarations, JIEL 5 (1) 2002: 207-211; Schott, (fn. 55), 192.

<sup>82b</sup> Charnovitz, (fn. 82a), 210.

<sup>82c</sup> Undecided: Schott, (fn. 55), 192.

Regardless of this question, negotiations on Singapore issues will only start if members agree in consensus to do so. In Cancún not only a decision on modalities of negotiations was not agreed on but also negotiations leading to a possible decision in this matter did not even start at all. The key for consensus is not a statement of willingness to commence negotiations, but the capability of each member to do so. Many developing countries claimed in Cancún that they still lack sufficient technical, financial and human resources to deal with these new issues. This situation indeed cannot be queried. It becomes obvious by looking at the extensive financial and technical help provided to them by WTO institutions.<sup>83</sup> They better need to be prepared by other members in this matter. In addition, it was emphasised by some negotiators that already existing WTO agreements should further be implemented and improved before new issues will be tackled.<sup>84</sup> Those members that talked in favour of the Singapore issues in Cancún might evaluate the situation again before continuing the trade round talks. Looking at the simple technical incapability of some members to deal with these issues a consensus cannot be reached at the moment. This must be paid attention to. Therefore, it could be seen favourable to postpone discussions on the Singapore issues to the next trade round and use the present round to further implement already existing agreements.

The second point regarding the incapability to deal with Singapore issues scrutinises whether the structure and the bodies of the WTO are prepared for dealing with rules on the Singapore issues. This question demands for an extensive assessment of the present administrative, technical and financial situation of the WTO bodies. Such an assessment would go beyond the limit of this paper. At least it can be said that if members are willing and ready to negotiate and implement rules on trade and investment, competition policy, trade facilitation, and transparency in government procurement they will ensure that the organisation is capable in administrating and enforcing such rules.

Thus, the core demand and one experience of Cancún should be the cognition that all members sufficiently need to be prepared feeling capable in negotiating new trade topics. Quite a lot of members are potentially not ready to deal with the Singapore issues and hence could just not dare to start negotiations referring to this. Because this seems not to have been analysed intensively in the run-up of Cancún it turned out to appear as an important reason leading to failure.

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<sup>83</sup> WTO, WTO assistance for developing countries, WTO Online, 13 November 2003, [http://www.wto.org/english/tratop\\_e/devel\\_e/teccop\\_e/tct\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm).

<sup>84</sup> WTO, Minutes of the meeting on 9 May 2003, Trade Negotiations Committee, 24 July 2003, WTO-DN: TN/C/M/9, para. 182, 190, 210; WTO, Report by the chairman of the TNC to the General Council, 23 July 2003, WTO-DN: TN/C/3, para. 63.

### c) Linkage of Trade Topics

During negotiations in Cancún some members tended to link trade topics which can be seen as normal strategy in international negotiations. Willingness to contribute to progress on one topic depended on progress offered by other members in a second topic. In Cancún, the most obvious demand referred to the linkage of agriculture and Singapore issues. Developing countries said they would make concessions regarding Singapore issues if developed countries substantially cut export subsidies for agricultural products. In addition, developing countries demanded the immediate and complete elimination of subsidies<sup>85</sup> in the sector of agriculture. Such a strong position was unlikely to be agreed on in Cancún.

The strategy to link topics during Ministerial Conferences never appeared as pronounced as in Cancún. During negotiations in Doha goals within each negotiating body were reached without noting any dependence on progress in other topics.<sup>86</sup> The same can be said about the meeting in Seattle.<sup>87</sup> Compared with these meetings, the talks in Cancún also stopped because of this linkage. Lacking progress on agricultural matters meant no progress regarding Singapore issues. Surely, such a linking strategy allows a greater flexibility in negotiations and can be helpful to keep the talks going. But, this advantage only appears if all negotiating partners agree to link topics. In Cancún, developing countries failed to recognise that all members did not follow this strategy. Therefore, it would have been better to refrain from creating interdependence between topics because it was another reason for failure.

### d) Results

The conference failed due to substantive disagreements. The working procedure only contributed minimal effect. The inaptitude to drop at least some Singapore issues and the disunity in linking trade topics among members lead to the negative outcome.

## 3. Consequences

The consequences of the conference should not be underestimated. It might cause a dangerous development shaking the pillars of the WTO even more than the events of Seattle had done. The incapability of finding compromises among members puts them into a defensive position, because they need to straight out technical deficits first before negotiations on substantive matters can continue.

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<sup>85</sup> FAZ, EU und Mercosur sprechen über Handelsliberalisierung, 12 November 2003 (No. 263): 14.

<sup>86</sup> WTO, Doha WTO Ministerial 2001 - Summary of 12 November 2001, WTO Online, 20 November 2003, [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/min01\\_12nov\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_12nov_e.htm).

<sup>87</sup> WTO, Seattle WTO Ministerial 1999 - Summary of 2 December 1999, WTO Online, 20 November 2003, [http://www.wto.org/english/thewto\\_e/minist\\_e/min99\\_e/english/about\\_e/resum02\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/resum02_e.htm).

## a) Fragmentation of International Trade Law

Members question<sup>88</sup> whether they should further intensively call on an organisation not being able to reach purposed goals. Of course, one could say that regarding other organisations working programmes sometimes just do not reach their goals and the success of previous WTO-years cannot be undone by one meeting of failure. But, this statement underestimates the impact of Cancún. Not without any reason voices emphasised the danger of growing fragmentation of international trade law instead of negotiating for more liberalisation after Cancún.<sup>89</sup> The WTO and the GATT were created to eliminate discriminatory treatment in international trade relations, thus liberalising the trade in goods and services and related topics. This should be done by entering into reciprocal and mutually advantageous arrangements. Bilateral agreements should be avoided as much as possible because they rather create the danger of fragmentation and isolated markets than multilateral agreements. Article XXIV GATT that generally favours multilateral custom unions and free-trade areas also promotes this idea. Even if these unions and areas only are of bilateral character, they are supposed to increase the freedom of trade among members.<sup>90</sup> Many announcements of returning to bilateral trade agreements after the failure in Cancún could be heard.<sup>91</sup> This should alert members and officials of the WTO. If the Doha trade round miscarries, the WTO will severely be damaged and endangered to fail completely. It would cost very intensive work to launch a new trade round. The failure of Seattle did not interrupt an ongoing trade round; it just could not start a new one. Therefore it was not as problematic as Cancún. In addition, substantive differences in Cancún have been much stronger than in Seattle where procedural issues, lack of time<sup>92</sup> as well as outside disturbances of protesters proved to be problematic. The understanding that the WTO is needed seems not to be lost – many countries do not doubt the importance of the organisation including least-developed and developing countries.<sup>93</sup> They rightly have the point of view that this organisation proved to be the

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<sup>88</sup> *Zoellick*, Confrontations Doomed WTO Cancun Meeting, Financial Times, 22 September 2003, available at: [http://www.usembassy.it/file2003\\_09/alia/a3092222.htm](http://www.usembassy.it/file2003_09/alia/a3092222.htm), 8 October 2003. FAZ, Asiatische Staaten setzen auf bilaterale Handelsabkommen, 15 October 2003 (No. 239): 15.

<sup>89</sup> FAZ, Dem Welthandel droht eine Rechtszersplitterung, (fn. 11), 21.

<sup>90</sup> Article XXIV:4 GATT.

<sup>91</sup> *Yerkey* (fn. 7); *Zoellick* (fn. 88); FAZ, Peru zieht sich aus G 22 zurück, 13 October 2003 (No. 237): 6; FAZ, Asiatische Staaten setzen auf bilaterale Handelsabkommen, 15 October 2003 (No. 239): 15; FAZ, EU und Mercosur sprechen über Handelsliberalisierung, (fn. 85), 14.

<sup>92</sup> *WTO*, Seattle Ministerial Session, 3 December 1999, WTO Online, 20 November 2003 [http://www.wto.org/english/thewto\\_e/minist\\_e/min99\\_e/english/about\\_e/resum03\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/resum03_e.htm).

<sup>93</sup> *Schumann*, (fn. 6), 86; *WTO*, African trade ministers urge resumption of negotiations, WTO Online, 13 November 2003, 20 November 2003, [http://www.wto.org/english/thewto\\_e/minist\\_e/min99\\_e/english/about\\_e/resum03\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/resum03_e.htm).

appropriate forum to promote their ideas in international trade relations.<sup>94</sup> They do not need to initiate individual negotiations with each and every developed state since almost all of them are members of the WTO. This saves time, money and human resources. They benefit from greater technical and financial support offered by other WTO members. They can make use of the rule of transparency with regard to negotiations in Geneva and during Ministerial Sessions. They can cooperate with each other with regard to implementing and understanding existing WTO agreements. They can make use of DSU institutions to enforce WTO rules. Finally, they are able to unite in order to promote common ideas during negotiations within the bodies of the WTO. There is no comparable international organisation dealing with worldwide trade that offers developing countries to do all this.

#### **b) New Alliances – New Power**

The second consequence appears in the strengthened role of developing and least-developed countries. They raised their voice more intensively than ever before in order to convince developed countries of their opinions. It looked like as if they were better prepared and unified than during prior Ministerial Sessions. They showed stronger self-confidence. Such alliances might be recognised as danger only wanting to cause veto effects. Sometimes this even might be true. But, on the other hand such alliances might be able to push negotiations since the allied members speak with one voice and not twenty or fifty. Their opinion is already aligned. This way, negotiation opinions are reduced. This certainly is an advantage at conferences combining more than 140 negotiating states. That means in consequence that time-consuming statements could be reduced thus allowing faster and more successful solutions. It also means that developed members as negotiating opposite face more difficulties in pushing their stances. They rather might be forced to compromise facing such strong alliances or seek for alternative solutions. After all, such new strong alliances cannot be avoided. The positive effects should be used to accelerate negotiations.

#### **c) Flexibility in Timeframes**

Cancún showed that timeframes should not be seen as exceptional. It is important that the Doha-Round will be completed even if the date of 1 January 2005 will be missed. Deadlines are made to create reliance among members and financial markets as well as to push negotiations ahead. But, the reliance is going to be damaged more if the round fails at all instead of postponing the concluding date.

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<sup>94</sup> *Schumann*, (fn. 6), 86.

#### 4. Members' Position after the Conference

The result of Cancún has been decorated with several “labels” which were already cited at the beginning of this article. In addition, very often sources spoke of losers and winners in order to evaluate the results of the conference for members.<sup>95</sup> Especially the developing countries were marked as losers since they hindered positive results with regard to the sector of agriculture by blocking the start of negotiations on Singapore issues. Lowering tariffs on agricultural products would have positive effect on their exports. On the other hand, the positive effect of lower tariffs is wiped off by high export subsidies granted in developed countries. The latter were willing to cut them to some extent but not completely. On the contrary, developing countries can as well be declared winners with regard to showing ability to ally and to hinder the start of new trade talks on the Singapore issues. Developed countries could not succeed in negotiating the commencement of trade talks with regard to the Singapore issues. This is a negative result for them. It should be underlined that all alliances and participants of the conference lost something.<sup>96</sup> The goal of progressing trade liberalisation was missed. Members even had to step back in comparison to pre-Cancún standings since energy and resources now must be spent to bring partners back to the table instead of finding solutions for the real problems of liberalisation.

## VI. Concluding Remarks

The interruption of the trade round caused by the strayed talks only temporarily should throw back negotiating efforts. Signs of willingness to forge ahead already appeared in Cancún as members tried to convince the chairman to carry on after he had announced the failure.<sup>97</sup> The conference in Cancún should be estimated as a very important experience for the WTO. It is a chance to revise some internal developments that had gone astray in order to discover, discuss and implement improvements. On 21 October 2003 the General Council of the WTO decided that the next Ministerial Conference would be held in Hong Kong.<sup>98</sup> However, the lack of determining a date for this event shows the deep impact of disagreement that manifested itself in Cancún.

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<sup>95</sup> WTO, The real losers are the poor, WTO Online, 18 September 2003, 16 October 2003, [http://www.wto.org/english/news\\_e/news03\\_e/news\\_sp\\_18sep03\\_e.htm](http://www.wto.org/english/news_e/news03_e/news_sp_18sep03_e.htm); Yerkey (fn. 7); Mrusek, (fn. 8), 1.

<sup>96</sup> FAZ, Dem Welthandel droht eine Rechtszersplitterung, (fn. 11), 21.

<sup>97</sup> Zoellick (fn. 88).

<sup>98</sup> WTO, Hong Kong China to host next Ministerial Conference, WTO Online, 21 September 2003, 23 October 2003, [http://www.wto.org/english/news\\_e/news03\\_e/hongkong\\_nextmin\\_21oct03\\_e.htm](http://www.wto.org/english/news_e/news03_e/hongkong_nextmin_21oct03_e.htm)