

CAN WTO TECHNICAL ASSISTANCE AND CAPACITY-BUILDING SERVE DEVELOPING COUNTRIES?

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Should capacity-building aim to widen the scope of actual economic policy choices for developing countries? Or should it be limited to helping them cope with the burden of commitments they have taken on—sometimes lightly, it has turned out—for the benefit of their more developed partners?¹

I. INTRODUCTION

Technical assistance and capacity-building are large and complex issues involving a long intellectual and social history, developing significantly since World War II, picking up in the 1960s, and passing through various paradigm shifts through today. Although countries have obtained technical expertise from foreign experts throughout history in furtherance of development goals, formalized technical assistance programs have become more central aspects of policy since World War II.² In the first decades following the war,

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¹ Henri-Bernard Solignac Lecomte, *Capacity-building and Technical Assistance for Developing Countries After Doha*, BRIDGES, Jan. 16, 2002, at 3. Solignac Lecomte is an official at the OECD writing in his own capacity.

² As Peter Morgan remarks,

[T]he approach to TA [technical assistance] that began in the late 1940s departed radically from much of what had gone before. . . . TA became, for the first time, an issue of public policy. . . . TA was now to be managed as a public sector activity . . . [as] part of projects and programmes for

thousands of experts and consultants fanned out around the world, taking up residence in ministries and project offices, partly to supervise aid projects, but also to plant their skills and expertise. . . . The underlying assumption was that developing countries lacked important skills and abilities—and that outsiders could fill these gaps with quick injections of know-how.³

Policymakers used the term “technical assistance” to refer to skill transfers to foster modernization.

After a couple of decades, development analysts switched their focus to that of “technical cooperation” to emphasize that development programs should work through a collaborative process.⁴ This term was later complemented by that of “capacity-building” to highlight the importance of local “ownership” and “absorption” of technical assistance to bolster recipients’ ability to pursue their development goals.⁵ The OECD’s development guidelines, for example, now call for “local ownership and participation in all trade-related development cooperation activities.”⁶ The lack of local ownership in previous development assistance efforts is shown by the fact that, of 113 public expenditure review

which staff in new international development organizations were accountable.

Peter Morgan, *Technical Assistance: Correcting the Precedents*, 2 DEV. POL’Y J. 1, 1-2 (2002).

³ Sakiko Fukuda-Parr et al., *Institutional Innovations for Capacity-building*, in CAPACITY FOR DEVELOPMENT: NEW SOLUTIONS TO OLD PROBLEMS 1, 2 (Sakiko Fukuda-Parr et al. eds., 2002).

⁴ See, e.g., Michel Kostecki, *Technical Assistance Services in Trade-Policy: A Contribution to the Discussion on Capacity-Building in the WTO* 6 (ICTSD Resource Paper No. 2, 2001), available at <http://www.ictsd.org/pubs/series.htm> (follow “Resource Paper No:2” hyperlink).

⁵ See, e.g., ELLIOT BERG, UNITED NATIONS DEVELOPMENT PROGRAMME, RE-THINKING TECHNICAL COOPERATION: REFORMS FOR CAPACITY-BUILDING IN AFRICA 60-63 (1993); ORG. FOR ECON. CO-OPERATION & DEV./DEV. ASSISTANCE COMM. (OECD/DAC), PRINCIPLES OF NEW ORIENTATIONS IN TECHNICAL COOPERATION (1991).

⁶ See ORG. FOR ECON. COOPERATION AND DEV., THE DAC GUIDELINES: STRENGTHENING TRADE CAPACITY FOR DEVELOPMENT 59 (2001) [hereinafter OECD], available at <http://www.oecd.org/dataoecd/46/60/2672878.pdf>.

exercises completed up to 1993, “only three included local members on the review team, not one in Africa where most were done and where the ownership problem was most acute.”⁷

Capacity-building efforts have also shifted toward the development of broader-based “social capital,” defined as “the norms and networks facilitating collective action for mutual benefit.”⁸ Initiatives that focus on the development of social capital target private and civil groups, as well as public officials. This trend, however, has raised concerns among some government officials who prefer to monopolize authority and fear undue foreign influence.

These issues are rather new to the World Trade Organization (WTO). They gained particular salience following the expiration of the transition periods for developing countries’ implementation of obligations under the 1995 Uruguay Round agreements and the launch of the Doha negotiating round in November 2001. As the transition periods concluded, many developing countries balked at implementing WTO requirements on account of the costs of doing so, and the perception that they had not benefited from market access as promised.

These countries received intellectual support from a number of international economists and development specialists who criticized the expanded scope of WTO rules. As Michael Finger and Philip Schuler of the World Bank wrote,

Our analysis indicates that WTO regulations reflect little awareness of development problems and little appreciation of the capacities of the least developed countries to carry out the functions that [sanitary and phytosanitary standards], customs valuation, intellectual property, etc. regulations address. For most of the developing and transition

⁷ See Elliot Berg, *Why Aren't Aid Organizations Better Learners?*, in *LEARNING IN DEVELOPMENT CO-OPERATION* 24, 29 (Jerker Carlsson & Lennart Wohlgemuth eds., 2000).

⁸ See Sanjaya Lall, *Social Capital and Industrial Transformation*, in *CAPACITY FOR DEVELOPMENT: NEW SOLUTIONS TO OLD PROBLEMS*, *supra* note 3, at 101; Stephen Woolcock, *The Place of Social Capital in Understanding Social and Economic Outcomes*, 2 *CAN. J. OF POL'Y RES.* 11, 13 (2000); see generally FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995); Robert Putnam, *The Prosperous Community: Social Capital and Public Life*, *AM. PROSPECT*, Mar. 1993, at 37.

economies—some 100 countries—money spent to implement the WTO rules in these areas would be money unproductively invested.⁹

Leading trade economists noted that the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter “TRIPS Agreement”) “is almost certain to redistribute welfare away from developing countries” to the developed world.¹⁰ Jagdish Bhagwati, for example, concludes that the “TRIPs should not be in the WTO at all,” and is only there because of the “harmful lobbying by corporations” of U.S. and European governments.¹¹ In these circumstances, some WTO “capacity-building” programs, if they are simply designed to assist developing countries in the implementation of WTO contractual obligations, could work against some of the interests of these countries.

When developing countries agreed to enter into new trade negotiations at Doha, Qatar, they obtained a commitment that the round, dubbed the “Doha development round,” would address issues important to their development, and that they would receive capacity-building assistance to facilitate their participation in the negotiations and the eventual integration of their

⁹ J. Michael Finger & Philip Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge*, 23 *WORLD ECON.* 511, 511 (2000); see also J. Michael Finger, *Implementing the Uruguay Round Agreements: Problems for Developing Countries*, 24 *WORLD ECON.* 1097, 1097 (2001). Finger was Lead Economist and former Chief of the World Bank’s Trade Research division. Schuler is a senior economist in the World Bank.

¹⁰ Alan V. Deardorff, *Should Patent Protection Be Extended to All Developing Countries?*, 13 *WORLD ECON.* 497, 507 (1990); see also CARLOS M. CORREA, *INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS* 35 (2000) (citing World Bank and IMF studies on the detrimental impacts of TRIPS on developing countries); *INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH passim* (Carsten Fink & Keith E. Maskus eds., 2004); KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* 12 (2000); Frederick M. Abbott, *The WTO TRIPS Agreement and Global Economic Development*, in *PUBLIC POLICY AND GLOBAL TECHNOLOGICAL INTEGRATION* 41 (Frederick M. Abbott & David J. Gerber eds., 1997); Keith E. Maskus, *Intellectual Property Issues for the New Round*, in *THE WTO AFTER SEATTLE* 137, 142 (Jeffrey J. Schott ed., 2000) (noting an estimate of “static rent transfers. . . of some \$5.8 billion per year” to the United States, and “a net outward transfer of around \$1.2 billion per year” for Brazil).

¹¹ JAGDISH BHAGWATI, *IN DEFENSE OF GLOBALIZATION* 182-84 (2004) (further noting that “the damage inflicted on the WTO system and on the poor nations [on account of this lobbying] has been substantial”).

economies into the international trading system. The Doha Ministerial Declaration dedicated more text to capacity-building than to any other issue, including four paragraphs on technical assistance, one paragraph on trade and technology transfer, two paragraphs on least-developed countries, and other references sprinkled throughout the document.¹² The 2003 World Trade Report declared, “The Doha Declaration marked a new departure in the GATT/WTO approach to technical assistance and capacity-building.”¹³ One member of the Secretariat characterized the WTO’s capacity-building program as a “sea change” for the organization, one that “we [at the WTO] are still digesting.”¹⁴

Whether these commitments to capacity-building are appropriately tailored toward serving developing country interests, however, remains under scrutiny. For example, many of the promises for technical assistance were in exchange for developing country agreements to negotiate over the four “Singapore issues” advanced by the European Union (E.U.), concerning trade and investment, competition policy, government procurement,

¹² Paragraphs 38-41 of the Doha Ministerial Declaration address overall technical assistance and capacity-building. WTO, Ministerial Declaration of 20 November 2001, para. 38-41 WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002). Paragraph 38 explicitly calls for the Secretariat “to support domestic efforts for mainstreaming trade into national plans for economic development and strategies for poverty reduction.” *Id.* para. 38. Paragraph 39 calls for coordination between the relevant international agencies, bilateral donors, and beneficiaries so as to rationalize the “IF” and “JITAP” programs. *Id.* para. 39. Paragraph 40 calls for a plan to ensure long-term funding for WTO technical assistance, which eventually led to the establishment of the Doha Development Agenda Global Trust Fund in December 2001. *Id.* para. 40. Paragraphs 42-43 focus on assistance to least-developed countries, and paragraphs 2, 20-21, 23-24, 26, 27, and 33 respectively address assistance in respect of trade and investment, trade and competition policy, transparency in government procurement, trade facilitation, and trade and environment. *Id.* paras. 2, 20-21, 23-24, 26-27, 33, 42-43. Specific technical assistance provisions were also contained in paragraphs 2.2, 3.5, 3.6, 5.1, 5.4, and 14 of the Decision on implementation-related issues and concerns. WTO, Ministerial Decision on Implementation-Related Issues and Concerns of 14 November 2001, *passim* WT/MIN(01)/17, 41 I.L.M. 757 (2002).

¹³ See WTO, WORLD TRADE REPORT 2003 xix (2003) [hereinafter WORLD TRADE REPORT 2003]. The 2003 World Trade Report also highlighted “that technology transfer had never been included explicitly on the GATT/WTO agenda before,” but now was part of the work program. *Id.* at 164 (GATT refers to the General Agreement on Tariffs and Trade).

¹⁴ Interview with WTO Secretariat member, in Geneva, Switz. (June 23, 2004).

and trade facilitation.¹⁵ Indeed, when WTO Director-General Mike Moore cautioned that the provision of technical assistance and capacity-building was a “condition of further progress on the development dimension,” he was referring expressly to the Singapore issues.¹⁶ The refusal of many developing countries to negotiate over three of these issues—trade and investment, competition policy, and government procurement¹⁷—raised the question of whether donor funding of developing country requests for trade-related capacity-building would eventually be curtailed, even though it has since expanded.¹⁸

This article is in four parts. Part II sets forth the competing (and sometimes conflicting) rationales for WTO trade-related capacity-building and technical assistance efforts. These competing rationales have led to contention over how the funding is used. Part III provides a historical overview of the WTO’s technical assistance and capacity-building initiatives as well as some of the criticisms that they have generated. Part IV addresses the political and operational constraints on the Secretariat’s implementation of a meaningful WTO capacity-building program. Part V concludes by suggesting how developing countries, donors, and the WTO Secretariat could build from current initiatives, while noting the challenges posed.

¹⁵ At the WTO ministerial meeting in Singapore in 1997, WTO members agreed to establish working groups to examine these four issues and their potential integration into the WTO system.

¹⁶ See *Report to the Council by the Director General*, WTO NEWS, Feb. 13, 2002, available at http://www.wto.org/english/news_e/news2002_e.htm; see also Press Release, WTO, Governments Pledge CHF 30 Million to Doha Development Agenda Global Trust Fund (Mar. 11, 2002) [hereinafter WTO Press Release 279] (Director-General Mike Moore’s remarks concerning the “conditionality” of technical assistance and capacity-building).

¹⁷ See Gary G. Yerkey, *EU Drops Demand to Negotiate New Rules On Singapore Issues in Current WTO Talks*, INT’L TRADE REP., Apr. 22, 2004, at 676.

¹⁸ See Press Release, WTO, Aid for Trade Capacity in Poorer Countries up by 50 Per Cent since Doha (Dec. 12, 2005), available at http://www.wto.org/english/news_e/pres05_e/pr427_e.htm (referring to PASCAL LAMY, WTO & DONALD J. JOHNSTON, ORG. FOR ECON. CO-OPERATION & DEV., 2005 JOINT WTO/OECD REPORT ON TRADE-RELATED TECHNICAL ASSISTANCE AND CAPACITY-BUILDING (TRTA/CB) 1 (2005) [hereinafter 2005 TRTA/CB REPORT], available at <http://tcdb.wto.org/publish/2005%20Report-Final.pdf>).

II. COMPETING RATIONALES FOR TRADE-RELATED CAPACITY-BUILDING AND TECHNICAL ASSISTANCE IN LIGHT OF THE WTO'S MANDATE

At first glance, enhancing trade-related capacity in poor countries seems uncontroversial. All developing countries suffer from capacity constraints that impede their ability to promote their interests through the WTO, although these constraints vary widely.¹⁹ The least-developed members are in the most strained situation. A significant number of WTO members do not have a single representative in Geneva, preventing them from even considering involvement in the over seventy different WTO councils, committees, working parties and other groupings that engage in over 2,800 meetings each year.²⁰ Many other delegations have only one or two personnel available.²¹ Because of capacity constraints, many developing countries are unable to advance their interests in WTO negotiations, before WTO committees, and in dispute settlement as effectively as their developed country counterparts. Not surprisingly, they face considerable trade barriers for the product markets of greatest importance to their economies, which developed countries label as “sensitive.” A 2001

¹⁹ Of course, there are leading developing countries with extremely professional representatives who promote their interests effectively. The issue of capacity is, in practice, a relative one that varies among all countries, including those falling under the label of developing countries.

²⁰ See GARY P. SAMPSON, *TRADE, ENVIRONMENT AND THE WTO: THE POST-SEATTLE AGENDA 24* (2000). As Sampson, the former Director of the WTO's Trade and Environment Division, notes, the Egyptian delegation to the WTO has estimated that there were 2,847 meetings in the WTO in 1997, or an average of 10 meetings per working day. *Id.* at 30 (citing *Communication from Egypt*, High Level Symposium on Trade and Development, mimeo WTO (Mar. 17, 1997)).

²¹ In consequence, many countries' representatives simply do not attend or keep up with developments in most WTO committees. Developing countries may lack the capacity to attend meetings in Geneva scheduled for their express benefit. As reported by a WTO official interviewed by Braithwaite and Drahos, “We set up a Subcommittee with a Chair and a Secretary who turned up for the first meeting on trade needs of LDCs [least developed countries]. No LDCs came. No developed countries came. No one came. Not one country showed up. If it had been telecoms, the chamber would have been packed [with special interests and states pushed by telecom interests].” JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION 196* (2000). As of November 1999, twenty-eight WTO members did not even maintain permanent offices in Geneva because of a lack of resources. *WTO Organizes “Geneva Week” for Non-Resident Delegations*, WTO FOCUS, Nov. 1999, at 16.

World Bank report maintained that the prevailing pattern of protection in the world today is biased against the poor in that barriers are highest on goods produced by poor people—agriculture and unskilled labor-intensive manufacturers and services.²² Similarly, many developing countries are less able to shape their internal implementation of WTO rules in a manner that protects their interests.

In practice, however, capacity-building programs can be controversial. Who defines the purpose of technical assistance and capacity-building, and who oversees how funding is used, can shape programs toward different ends. In this sense, technical assistance is never neutral. Technical assistance programs can be relatively donor-driven to serve donor-defined interests, or they can be relatively demand-driven to serve interests defined within the recipient countries. Constituency interests in developing countries can differ, fragmenting and spurring conflict over capacity-building projects. Donors can work through allies in developing country bureaucracies to act as brokers to serve both personal and donor interests. What looks like a demand-driven request can actually be donor-driven. In the words of Thandika Mkandawire, director of the U.N. Research Institute for Social Development, developing country “nationals” may simply serve to champion “externally driven policy agendas” so that the resulting “dialogue” between donor and recipient can take on “the character of the conversation between a ventriloquist and a puppet.”²³ As one African representative to the WTO contends, “The problem [with the WTO Secretariat’s capacity-building program] is that it is ideological. They come to tell us what to think, what our positions should be.”²⁴ As he states, WTO technical

²² See WORLD BANK, *GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES: MAKING TRADE WORK FOR THE WORLD’S POOR* xii (2001); see also Bernard Hoekman, *Strengthening the Global Trade Architecture for Development*, 1 *WORLD TRADE REV.* 23, 29 (2002).

²³ Thandika Mkandawire, *Incentives, Governance and Capacity Development in Africa*, in *CAPACITY FOR NEW DEVELOPMENT: NEW SOLUTIONS TO OLD PROBLEMS*, *supra* note 3, at 147, 155.

²⁴ Interview with an African Representative to the WTO, in Geneva, Switz. (July 2004).

assistance is often about “the use of ideas to transform developing country negotiating positions.”²⁵ Even if donor-driven technical assistance does not directly conflict with a developing country’s interests, in a world of limited resources, technical assistance in one area can divert human and material resources from others that may be of greater priority.

There are at least four competing rationales for WTO trade-related technical assistance efforts:

- Facilitation of trade liberalization;
- Support for WTO-related aspects of a country’s development strategy;
- Assistance with the costs of the implementation of WTO obligations; and
- Enhancement of the capacity of developing countries to participate in the shaping of WTO rules, their interpretation and understanding, and their monitoring and enforcement.

These four rationales can overlap and conflict. Trade is widely recognized as important for development, especially for countries with small internal markets. Because of their small markets, these countries do not benefit from specialization, economies of scale, and competition. There is considerable evidence that a larger market, made possible through trade, facilitates specialization, improving productivity and decreasing costs.²⁶ The import substitution model for development is now widely criticized as having been unsuccessful.²⁷ In contrast, the great development stories since World War II are those from East Asia, which benefited from competitive export sectors.²⁸ In particular,

²⁵ *Id.*

²⁶ See WORLD TRADE REPORT 2003, *supra* note 13, at 85.

²⁷ See, e.g., DEEPAK LAL, THE POVERTY OF DEVELOPMENT ECONOMICS (1983); Albert Hirschman, *The Rise and Decline of Development Economics*, in *ESSAYS IN TRESPASSING: ECONOMICS TO POLITICS AND BEYOND* 1 (1981); JOHN WILLIAMSON, THE PROGRESS OF POLICY REFORM IN LATIN AMERICA (1990) (in which the concept of “Washington Consensus” was developed); George L. Priest, *Small Business, Economic Growth, and the Huffman Conjecture*, 7 J. SMALL & EMERGING BUS. L. 1, 16 (2003).

²⁸ Growth rates in East Asia were on average 5.5 percent per year from 1965-1990, implying a doubling of national income every thirteen years. See S. Radelet & J. Sachs, *The East Asian Financial Crisis: Diagnosis, Remedies and Prospects*, in *BROOKINGS PAPERS ON ECONOMIC ACTIVITY* 1 (1998).

developing countries can benefit from opening their markets to each other's products, as some Asian countries now demonstrate.²⁹

Development, however, is a much broader objective than trade liberalization. From a development perspective, trade is a tool. As the OECD technical assistance guidelines state, "Trade and trade liberalisation are not ends in themselves . . . [although] they can enhance a country's access to a wider range of goods, services, technologies and knowledge."³⁰ Development analysts may agree on the importance of trade, but they also disagree over the scope and timing of internal trade liberalization.³¹ Some high-growth Asian countries were more free-trade oriented, such as Hong Kong and Singapore, while others were more mercantilist, such as Japan, Korea, China, and Chinese Taipei. While all of these WTO members have moved toward freer trade, the rapid jump in their development was not because of uniformly liberal trade policies.

²⁹ See WORLD TRADE REPORT 2003, *supra* note 13, *passim*.

³⁰ OECD, *supra* note 6, at 13, 17. The guidelines call for collaboration "in formulating and implementing a trade development strategy that is embedded in a broader national development strategy." *Id.*; see also U.N. CONFERENCE ON TRADE AND DEV., THE LEAST DEVELOPED COUNTRIES REPORT 2004: LINKING INTERNATIONAL TRADE WITH POVERTY REDUCTION, U.N. Sales No. E.04.II.D.27 (2004), available at http://www.unctad.org/en/docs/ldc2004_en.pdf.

³¹ Compare Dani Rodrik, *Development Strategies for the 21st Century*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 2000, at 85-101 (Boris Pleskovic & Nicholas Stern eds., 2001), with T.N. Srinivasan & Jagdish Bhagwati, *Outward Orientation: Are the Revisionists Right?* (Econ. Growth Ctr., Discussion Paper No. 806, 1999), available at <http://www.econ.yale.edu/~egcenter/research.htm>, and L. Alan Winters et al., *Trade Liberalization and Poverty: The Empirical Evidence* 62 (Univ. of Sussex at Brighton, Discussion Papers in Econ. No. 88, 2002) (concluding "the evidence surveyed in this paper demonstrates that there can be no simple generalisable conclusion about the relationship between trade liberalisation and poverty"), available at <http://www.sussex.ac.uk/Units/economics/dp/Wintersetal88.pdf>, and David Dollar & Aart Kraay, Growth is Good for the Poor (March 2000) (unpublished paper prepared for the World Bank Dev. Research Group), available at <http://www.worldbank.org/research/growth/absdollarandkraay.htm>, and Dani Rodrik, The Global Governance of Trade as if Development Really Mattered (April 2001) (unpublished paper prepared for the U.N. Development Programme), available at <http://www.servicesforall.org/index.shtml> (follow "Policy and Governance Archives" hyperlink), and OXFAM, RIGGED RULES AND DOUBLE STANDARDS: TRADE GLOBALISATION AND THE FIGHT AGAINST POVERTY (2002).

The East Asian countries' experience demonstrates the importance of internal trade-related capacity both in government and in the private sector. Exports may have been central to the growth models of East Asian countries, but so was a strong state structure with a competent bureaucracy and a private sector subject to internal competition.³² These countries understood the importance of investing in education and skills development, and of transferring skills through the private sector; these investments provided them with broader-based internal capacity to absorb and deploy technical assistance.³³ Although all development contexts differ, countries can learn from each other's successes and failures. In a globalizing world, they can "scan globally, reinvent locally."³⁴ The East Asian experience suggests that technical assistance will be of less value without a competent state bureaucracy, engaged private sector, and civil society with a developing skill base to absorb it. That being said, the WTO can do little in this respect except improve the way in which it coordinates with other development institutions, as examined below.

Technical assistance for the implementation of WTO obligations is a conceptually different goal than those of trade liberalization and development promotion. Implementation of the core WTO obligations of nondiscrimination generally makes economic sense. Yet no longer is the WTO and GATT system just

³² See, e.g., THE DEVELOPMENTAL STATE (Meredith Woo-Cumings ed., 1999); ROBERT WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION (1990). Interestingly, a study by Schiavo-Campo has "measured the share of the number of civil servants for 100 people," and found that "the average ratio for sub-Saharan Africa (1.5) is less than that of Asia (2.6) or of Latin America (3.0)," although "Mauritius and Botswana – the best-performing countries in terms of growth, and with bureaucracies touted as efficient – have more than three times the African average: 5.5 and 5.8 respectively." Mkandawire, *supra* note 23, at 151.

³³ Korea, for example, has a large program for promoting technological development in the private sector. See Lall, *supra* note 8, at 115.

³⁴ See Sakiko Fukuda-Parr et al., *supra* note 3, at 18; see also Peter Evans, *Transferable Lessons? Re-examining the Institutional Prerequisites of East Asian Economic Policies*, in EAST ASIAN DEVELOPMENT: NEW PERSPECTIVES 66 (Yilmam Akyuz ed., 1999); Lall, *supra* note 8, at 115 (noting that there is a debate as to whether "social capital" is inherent in the Confucian ethic in Asian culture, or grew through their development strategies); Charles F. Sable & Sanjay G. Reddy, *Learning to Learn: Undoing the Gordian Knot of Development Today* (Seminar on Progressive Democratic Economies, on-line seminar paper), available at <http://www.sopde.org/Sabel&Reddy.pdf> (last visited Feb. 3, 2006).

about nondiscrimination, if it ever was. The WTO's mandate has expanded to include intellectual property and other regulatory issues. Implementing obligations under these new agreements entails significant costs, potentially distracting resource-strapped developing country officials from other priorities. Implementation often requires developing countries, unlike developed countries, to create entirely new regulatory institutions and regimes. Choices over implementation of WTO obligations can be complex. Countries need to analyze the tradeoffs of implementing WTO requirements in order to facilitate development strategies, especially as regards the substantive requirements under such newer agreements as the TRIPS Agreement.³⁵ If trade-related capacity-building programs are simply created to help developing countries implement their WTO obligations, as the technical assistance providers understand them, these programs will serve more limited (and possibly donor-driven) goals.

Finally, the primary aim of a WTO capacity-building program can be to empower developing countries to better understand WTO rules and negotiating mandates in relation to their trade objectives; to integrate these objectives in development plans; and to advance them in negotiations, monitoring, and enforcement, as well as in the shaping and sequencing of internal regulatory policies. These aims could be advanced through close coordination with other development institutions. Henri Bernard Solignac Lecomte of the OECD writes, "There can only be one ultimate objective: to empower developing countries in the multilateral trade system, and help their products to penetrate OECD and other world markets."³⁶ Although this latter empowerment objective may overlap with the others, it is much broader, adopting more of a process-based approach. Its aim is to enhance developing countries' capacities to define their own objectives and policies rather than to enhance "ownership" of substantive policies that others may have defined for them.

³⁵ See, e.g., CORREA, *supra* note 10; Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and The Privatization of Public Goods*, 7 J. INT'L ECON. L. 275 (2004).

³⁶ Henri Bernard Solignac Lecomte, *Building Capacity to Trade: A Road Map for Development Partners: Insights from Africa and the Caribbean* 7 (European Centre for Dev. Pol'y Mgmt Discussion Paper 33, 2001), available at <http://www.ecdpm.org> (choose language, search "Lecomte").

A central conundrum for effective WTO technical assistance lies in how the Secretariat views its capacity-building role in relation to its conventional sense of its mandate. WTO members and the WTO Secretariat often refer to the WTO as a “contract organization.”³⁷ By contract organization, they refer to a “member-driven” institution that facilitates the negotiation of trade agreements (the “contracts”), helps oversee implementation of the resulting contractual commitments, and, where requested, issues judicial decisions over these commitments.³⁸ WTO Secretariat officials thus traditionally have viewed their role as one of servicing negotiations (occurring in various negotiating groups), servicing member oversight of obligations (through various committees and councils), and assisting with dispute resolution (before the dispute settlement panels and the Appellate Body). Capacity-building, however, is a quite different endeavor.

One’s view of WTO substantive rules and negotiating mandates will also shape one’s appreciation of WTO capacity-building projects. Should WTO rules be viewed as contingent in time and subject to debate and modification in relation to changing development challenges, as in domestic political and contractual contexts? Or should they be viewed as fundamental, “constitutional,” “rule of law”-type commitments that domestic administrations must internalize?³⁹ As Finger, Schuler, and others maintain, many WTO rules represent political choices reflective of contractual bargaining rather than constitutive rules for a global “constitutional” order. Yet, unlike those in domestic political and contractual settings, WTO rules are extremely difficult to modify over time.

³⁷ G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 898 n.325 (1995).

³⁸ The 2004 report of the Consultative Board to the Director-General laments the “member-driven mantra” and states that the Secretariat needs to become more active. See PETER SUTHERLAND ET AL., WTO CONSULTATIVE Bd., *THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM* 73 (2004).

³⁹ For two different constitutionalist approaches by trade law academics, see, for example, JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* (1998); and E.U. Petersmann, *Theories of Justice, Human Rights and the Constitution of International Markets*, 37 LOY. L.A. L. REV. 407, 414 (2003).

WTO Secretariat officials therefore face a dilemma. If they travel to developing countries simply to “promote” existing WTO rules, they elide the political and development choices implicated by the rules. They cut off what could be valuable discussion, in meetings with those most up-to-date about WTO developments, as to how developing countries can shape the rules through implementation and renegotiation in order to advance trade-related development objectives.⁴⁰ If the Secretariat views WTO rules as fundamental commitments, then WTO technical assistance will tend to operate as a form of “soft” power to shape understandings of WTO obligations, and thereby alleviate the need for “harder” enforcement measures through formal WTO dispute settlement. If, on the other hand, the Secretariat provides a forum for raising awareness about the current rules and different positions regarding them, then it can help developing country officials critically engage with the rules in light of their perceptions of their national interests. As one Secretariat official maintains, “even if WTO capacity-building restricts itself to explaining the existing obligations to developing country officials,” it can prepare them “to take a critical view of these obligations.”⁴¹

⁴⁰ These remarks reflect a long discussion that the author had with an official who led a developing country mission to the WTO.

⁴¹ E-mail from WTO Secretariat member, to Gregory Shaffer, Professor of Law, University of Wisconsin Law School (Jan. 2005) (on file with the author). WTO Secretariat officials stress that the WTO is not a development agency mandated to provide development consulting or to finance the provision of roads, port facilities, sanitary testing equipment, information technology, and other trade-related infrastructure needs. These development tasks lie within the competence of other international organizations, such as the World Bank and the United Nations Development Programme (“UNDP”). However, now that the WTO has received significant funding for trade-related capacity-building, the WTO Secretariat also receives requests for programmatic funding from some developing country members. As a result, there is again tension between the Secretariat’s internal understanding of its “mandate” and the call for enhanced WTO trade-related “capacity-building” initiatives. The best that the WTO Secretariat can do in these situations is to refer the matter to relevant development agencies in a more coordinated manner. Interviews with Secretariat officials, in Geneva, Switz. (June 2004). *See also*, discussion of coherence of development assistance programs, *infra* Part IV.1.

III. HISTORICAL OVERVIEW OF THE WTO'S TECHNICAL ASSISTANCE PROGRAMS

The provision of technical assistance and capacity-building has changed over time within the GATT and WTO, although the type of assistance that the WTO Secretariat can deliver remains limited by the Secretariat's human resources, its perception of its mandate, and the pressures on it from members. The total size of the WTO Secretariat remains around 630 persons, a large proportion of whom are translators and support staff, compared to a World Bank staff of around 10,000 and an IMF staff of around 2,700.⁴² As for member pressures, although Secretariat officials refer to a "member-driven" mandate, some members play more predominant roles than others.⁴³ Donor governments play a central role on the WTO's budget committee, a primary means through which they oversee and constrain what the Secretariat does.

Until the creation of the WTO, GATT technical assistance largely took the form of "trade policy courses" taught in Geneva. The Secretariat organized around seventy-seven of these courses during the GATT's forty-nine year history.⁴⁴ As WTO membership grew, and as WTO rules proliferated and their scope expanded, more developing countries complained about the demands of WTO developments. The WTO launched a fund for technical assistance for least-developed countries in September 1995.⁴⁵ In 1996, the WTO published guidelines for WTO Technical Cooperation "to improve knowledge of multilateral trade rules" and "to assist in the implementation of commitments and

⁴² See WTO, ANNUAL REPORT 2005, at 105 (2005); The World Bank Staff, <http://worldbank.org> (follow "About" hyperlink; then follow "Staff" hyperlink) (last visited Feb. 3, 2006); The IMF at a Glance, <http://www.imf.org> (following "For Journalists" hyperlink, then follow "IMF at a glance" hyperlink under Facts and Issues) (last visited Feb. 3, 2006).

⁴³ See Gregory Shaffer, *The Role of the Director-General and the Secretariat: Chapter IX of the Sutherland Report*, 4 WORLD TRADE REV. 429 (2005).

⁴⁴ See Press Release, WTO, Second WTO Trade Policy Course Opens in Geneva (Aug. 28, 1995), available at <http://www.wto.org/> (follow "WTO news" hyperlink; then follow "press releases 1995" hyperlink; then follow "28.08.95" hyperlink).

⁴⁵ Press Release, WTO, Norway Provides \$2.5 Million to Launch a WTO Fund for Least-Developed Countries (Sept. 29, 1995), available at <http://www.wto.org/> (follow "WTO news" hyperlink; then follow "press releases 1995" hyperlink; then follow "29.09.95" hyperlink).

full use of its provisions.”⁴⁶ The first “modes of delivery” were, once again, “training courses” and the “development of information and training material,” complemented by “specialized technical seminars.”⁴⁷

At the Singapore ministerial meeting of December 1996, the WTO announced a broader Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries (hereinafter “IF”).⁴⁸ The IF, coordinated out of the WTO, brings together six international agencies (UNCTAD, ITC, UNDP, WTO, IMF, and the World Bank) to collaborate with bilateral donors to ensure greater coherence in the provision of trade-related technical assistance in least developed countries.⁴⁹ The

⁴⁶ See Comm. on Trade & Dev., *Guidelines for WTO Technical Cooperation*, at 2, WT/COMTD/8 (Oct. 16, 1996) [hereinafter *Guidelines for WTO Technical Cooperation*].

⁴⁷ *Id.*

⁴⁸ See IFIF, <http://www.integratedframework.org> (last visited Feb. 3, 2006); Kos-tecki, *supra* note 4, at 30.

⁴⁹ The IF has taken a “process”-oriented approach of awareness-building combined with diagnosis of trade-related challenges, with the aim of integrating trade strategies in national development plans. As part of a revised IMF/World Bank strategy, between 1999 and 2001, around fifty countries prepared “Poverty Reduction Strategy Papers” (PRSPs) in which they define priorities. Khalid Malik & Swarnim Wagle, *Civic Engagement and Development: Introducing the Issues*, in CAPACITY FOR DEVELOPMENT: NEW SOLUTIONS TO OLD PROBLEMS, *supra* note 3, at 85, 96. However, trade initially did not figure prominently in most PRSPs. See *id.* According to Prowse, one of the objectives of the IF was that trade-related capacity-building be granted greater attention “in relation to other development assistance needs.” Susan Prowse, *The Role of International and National Agencies in Trade-Related Capacity-building*, 25 WORLD ECON. 1197, 1242 (2002); see also Sub-Comm. on Least-Developed Countries, *IFIF – Proposal for a Pilot Scheme*, ¶ 1-2, WT/LDC/SWG/IF/13 (Feb. 16, 2001). In most developing countries, trade ministries play an extremely weak role compared to finance and other ministries. Interviews with members of WTO, UNCTAD, and ITC Secretariats, in Geneva, Switz. (June 2004). These interviewees also noted the problem of rapid turnover in the trade bureaucracies in developing countries, and, in particular, in the least developed countries. *Id.* The IF was endorsed at a WTO high level meeting in Oct 27, 1997. See Press Release, WTO, Inter-Agency Trade Assistance Programme Launched for Least-Developed Countries, (Oct. 30, 1997). The IF received US \$30 million in pledges through May 31, 2005, of which approximately US \$28 million had been disbursed as of that date. See Consolidated Report: IF Trust Fund – Aggregate Pledged & Transfers, http://www.integratedframework.org/files/Status_of_trust_fund.pdf (last visited Feb. 3, 2006). UNCTAD is the United Nations Conference on Trade and Development. The International Trade Centre (ITC) is a joint venture of the WTO and UNCTAD.

WTO, UNCTAD, and ITC concurrently launched a Joint Integrated Technical Assistance Programme to selected Least-Developed and other African countries (hereinafter “JITAP”).⁵⁰ The WTO’s portion of JITAP’s work has focused on strengthening WTO “reference centres” located in these countries, which include computer terminals and Internet access, and on providing updates to officials on WTO developments.⁵¹

Analysts criticized the early WTO technical assistance programs, including the IF and JITAP efforts.⁵² Overall funding was limited.⁵³ The WTO Secretariat was unschooled in the provision of technical assistance, which lay outside its traditional competence.⁵⁴ Requests for assistance largely came from Geneva-based representatives so that capacity-building efforts were not well coordinated with national capitals, with a resulting lack of local ownership.⁵⁵ Although there were some successes,⁵⁶ the system allegedly operated in a “rigid” manner, with requests for assistance required to be fixed at least six months prior to the start of

⁵⁰ The JITAP is a “results-oriented” program involving specific activities and products. JITAP was first announced at UNCTAD IX in Midran, South Africa in 1996. Interview with a WTO Secretariat Member and ITC Officials, in Geneva, Switz. (June 23, 2004). By September 2003, the JITAP had received US \$12.6 million in its Common Trust Fund, of which US \$11 million had been pledged by donors. *Id.* In JITAP, UNCTAD’s work focuses on providing support for the beneficiaries’ development of trade policies through “inter-institutional committees.” *Id.* The ITC focuses on trade capacity issues that are more commercially oriented. *Id.*

⁵¹ Interview with Secretariat official, June 23, 2004.

⁵² See generally Brian Larson, Comment, *Meaningful Technical Assistance in the WTO*, 2003 WIS. L. REV. 1164, 1194-95; Kostecki, *supra* note 4; Prowse, *supra* note 49.

⁵³ Because it has taken so long to move beyond the diagnostic and pilot stages, some development analysts have labeled the IF “if and when.” Interview with an official at a development organization, in Geneva, Switz. (June 29, 2004).

⁵⁴ See *supra* notes 37-38 and accompanying text (concerning the WTO as a “contract organization”).

⁵⁵ Larson, *supra* note 52, at 1179.

⁵⁶ The JITAP received a positive evaluation in 2002. Interview with Secretariat official, in Geneva, Switz. (June 23, 2004). The JITAP helped establish WTO “resource centres” in its beneficiary countries, a program that was then expanded to cover developing country members generally. JITAP also allegedly facilitated the coordination of trade policy within beneficiaries through “inter-institutional committees.” Interview with a member of the WTO Secretariat, in Geneva, Switz. (June 23, 2004).

the annual plan's implementation.⁵⁷ Many of the activities were considered to be "one-off" events that would have little sustainable impact, creating an overall focus on quantity rather than quality.⁵⁸ A representative of one development organization characterized WTO technical assistance as "a joke."⁵⁹

With the launch of the Doha round in 2001 and the creation of the Doha Development Agenda Global Trust Fund, trade-related technical assistance and capacity-building programs increased. Members pledged over Swiss Francs 21.5 million (about US\$15.7 million) in 2002.⁶⁰ In 2003, funds for WTO capacity-building projects from the annual budget and the new trust fund slightly exceeded SF 30 million.⁶¹ The cost of implementing the 2006 Technical Assistance and Training Plan was also estimated to be approximately SF 30 million (around US\$23.4 million), which is broken down into a contribution of around SF 24 million from the Trust Fund (around US\$18.7 million) and SF 6 million from the general budget (around US\$4.7 million).⁶² By the end

⁵⁷ Interview with member of the WTO Secretariat, in Geneva, Switz. (June 23, 2004).

⁵⁸ Comm. on Trade & Dev., Note by Secretariat, *Technical Cooperation Audit Report for 2002*, para. 49, WT/COMTD/W/111 (Mar. 28, 2003) [hereinafter *Audit Report for 2002*].

⁵⁹ Discussion with a representative of a development organization, in Geneva, Switz. (July 2004).

⁶⁰ *Technical Assistance and Capacity-Building*, 1 DOHA ROUND BRIEFING SERIES 1, Feb. 2003, available at <http://www.ictsd.org/pubs/dohabriefings/doha12-techassist.pdf>. Governments pledged SF 30 million to the Doha Development Agenda Global Trust Fund (DDAGTF) at a pledging conference held on March 11, 2002 at the WTO. See WTO Press Release 279, *supra* note 16. As Larson notes, the DDAGTF "grew to three times the size of [the IF's funding] overnight." See Larson, *supra* note 52, at 1195. The 2004 technical assistance plan was estimated to cost around SF 36.2 million, with around SF 30 million coming from WTO sources. About SF 6 million was to come out of the WTO's general budget and about SF 24 million out of the DDAGTF. Interview with WTO Secretariat official, in Geneva, Switz. (June 23, 2004).

⁶¹ Interview with WTO Secretariat official, in Geneva, Switz. (June 23, 2004). WTO members contributed SF 24.6 million to the Doha trust fund in 2003, of which only SF 14.4 million was expended. An additional amount of around SF 6 million came out of the regular budget. *Id.*

⁶² Telephone interview with member of the WTO secretariat (Jan. 18, 2006); see also 4 DOHA ROUND BRIEFING SERIES: HONG KONG UPDATE 43-44 (Nov. 2005) (referring to the 18.7 million figure only), available at http://www.ictsd.org/pubs/dohabriefings/Doha_Hong_Kong_Update.pdf. The figures are all calculated in Swiss Francs and the US dollar equivalents vary with the exchange rate.

of 2005, over SF 71 million (about US\$55.5 million) had been provided to the trust fund, supplemented by an additional SF 24 million (about US\$18.8 million) out of the regular WTO budget, totaling around SF 95 million (about US\$74 million) over the four-year period.⁶³ These figures do not include overhead costs, including the salaries of around thirty-eight officials in the WTO Institute for Training and Technical Cooperation, nineteen “L” officials hired on fixed-term contracts to provide assistance, and other “operational staff” asked to help.⁶⁴ Moreover, these funds complement the considerably greater amounts of trade-related capacity-building that donors provide directly or through other international organizations.⁶⁵

Problems with WTO technical assistance efforts spurred the WTO to announce a “new strategy” in 2001 whose stated aims were to make technical assistance more demand-driven, to create financial stability through the Doha trust fund, and to enhance the capability of the WTO Secretariat to deliver products within its mandate in a manner that was both coherent and flexible to meet developing country needs.⁶⁶ The WTO’s “new strategy” nonetheless initially continued to focus on the more limited objectives of trade liberalization and rule implementation. The

⁶³ Email from member of the WTO Secretariat, Jan. 16, 2006. Around 6 million Swiss Francs per year were allocated from the regular WTO budget. *Id.*

⁶⁴ Interview with WTO Secretariat official, in Geneva, Switz. (June 22, 2004).

⁶⁵ The 2005 Joint WTO/OECD Report on Trade-Related Technical Assistance and Capacity-Building divided trade-related capacity-building programs into three categories which had generated the following amounts of funding: (i) trade policy and regulations, US\$ 811 million; (ii) trade development, US\$ 2.2 billion; and (iii) infrastructure, US\$ 9.3 billion. 2005 TRTA/CB REPORT, *supra* note 18. The total of these three items constituted about 4.4% of total aid. *Id.* Compare these amounts to those cited in the second joint WTO/OECD report on trade-related technical assistance and capacity-building of 2003 which reported the following amounts of funding: (i) trade policy and regulations, US\$ 719 million; (ii) trade/business development, US\$ 1.4 billion; and (iii) infrastructure, US\$ 8.1 billion, representing about 4.8% of total aid. SUPACHAI PANITCHPAKDI, WTO & DONALD J. JOHNSTON, ORG. FOR ECON. CO-OPERATION & DEV., THE SECOND JOINT WTO/OECD REPORT ON TRADE-RELATED TECHNICAL ASSISTANCE AND CAPACITY-BUILDING (TRTA/CB) 1 (2003).

⁶⁶ Comm. on Trade & Dev., Note by Secretariat, *A New Strategy For WTO Technical Cooperation: Technical Cooperation for Capacity-building, Growth and Integration*, WT/COMTD/W/90 (Sept. 21, 2001) [hereinafter *New Strategy For WTO Technical Cooperation*]. Note, however, that the 1996 guidelines for WTO Technical Cooperation also proclaimed that they should “be demand-driven.” *Guidelines for WTO Technical Cooperation*, *supra* note 46, § I.

opening paragraph of the new strategy stated: “The core mandate of the WTO is trade liberalization. . . . WTO technical assistance . . . provides enabling assistance for Members to undertake trade liberalization. . . . [The role of the Secretariat is] to assist them in understanding WTO rules and disciplines.”⁶⁷

WTO trade-related capacity-building plans were, however, modified and became somewhat more sophisticated over time. Over the last four years, each of the annual plans has been subject to, and has responded to, an audit of the previous year’s activities.⁶⁸ An audit of the Technical Assistance Plan for 2003, for example, criticized the plan’s implementation for a lack of coherence, maintaining that the Secretariat was largely servicing ad hoc requests.⁶⁹ In response, the Secretariat prepared a plan for 2004 that was to be more “quality-oriented, aiming at building long-term—i.e., sustainable, human and institutional capacity,” setting forth clearer “objectives” for each type of capacity-building “product.”⁷⁰ The 2004 Plan set forth a long list of “products” that included Geneva-based, region-based, nation-based, and distance-learning activities. This strategy has since been further developed in the 2005 and 2006 Plans, the latest of which is summarized in Table I:

⁶⁷ *New Strategy for WTO Technical Cooperation*, *supra* note 66, para. 1.

⁶⁸ See, e.g., Comm. on Trade & Dev., *Technical Cooperation Audit Report for 2004*, WT/COMTD/W/138 (Apr. 15, 2005) [hereinafter *Audit Report for 2004*] (representing the fourth annual audit of the WTO’s technical assistance programs).

⁶⁹ The 2003 Technical Assistance Plan focused on the need to build capacity to understand the rules and implement WTO agreements, on the one hand, and to develop negotiating capacity, on the other, although it called for “capacity-building based on Members’ explicitly determined priorities.” Comm. on Trade and Dev, Note by Secretariat, *Coordinated WTO Secretariat Annual Technical Assistance Plan 2003*, para. 16, WT/COMTD/W/104 (Oct. 3, 2002) [hereinafter *Technical Assistance Plan 2003*].

⁷⁰ Comm. on Trade & Dev., *Technical Assistance and Training Plan 2004*, para. 7, WT/COMTD/W/119/Rev.3 (Feb. 18, 2004) [hereinafter *Technical Assistance and Training Plan 2004*]. The 2004 plan aimed “to enhance institutional and human capacity in beneficiary countries and to address trade policy issues and concerns, ‘mainstreaming’ trade into national development and poverty reduction policies and facilitating a fuller participation of beneficiaries in the Multilateral Trading System and effective participation in the negotiations.” *Id.* para. 1.

TABLE I
2006 TECHNICAL ASSISTANCE & TRAINING PLAN
PRODUCTS⁷¹ SUMMARY

- Four three-month trade policy courses at the WTO in Geneva, for which participants first undergo a selection process. Over a cycle of six courses, four are offered in English, and one each in French and Spanish;
- Five three-month regional trade policy courses respectively for English-speaking Africa; French-speaking Africa; Asia and the Pacific; the Caribbean; and Latin America. In the past, courses have been held in Nairobi, Kenya for Anglophone Africa; in Rabat, Morocco for Francophone Africa; in Hong Kong for Asia/Pacific members; in Santiago, Chile for Latin America; and at the University of West Indies, Jamaica for the Caribbean. The Secretariat hopes to hold regional courses in the future for “Arab and Middle East Countries, Central and Eastern Europe, Central Asia and the Caucasus.”⁷² Through these regional courses, the Secretariat hopes to build regional institutional partnerships and academic networks;
- A series of regional and subregional short trade policy courses, from one to three weeks, often conducted with regional partner institutions, such as the Asian Development Bank, the Institute for the Integration of Latin America and the Caribbean, and the UN Economic Commission for Africa;
- Around seventy shorter regional seminars on specific WTO issues, from agriculture to textiles, dispute settlement to the TRIPS Agreement, with priority given to topics under negotiation. These seminars, which aim to provide more advanced levels of training that may build on previous programs, may be conducted in partnership with other international and regional agencies;

⁷¹ See Comm. on Trade & Dev., *Technical Assistance and Training Plan 2006*, WT/COMTD/W/142 (Dec. 16, 2005) [hereinafter *Technical Assistance and Training Plan 2006*].

⁷² *Id.* para. 32.

- National seminars which are provided flexibly in response to developing country requests, with up to two seminars allocated for each developing country, and three for least-developed countries (in addition to the assistance that the latter may receive under the JITAP and IF programs);
- One-week Doha Development Agenda courses for senior government officials that focus on the state and process of the Doha negotiations, which are “held in each region;”
- An intensive course on Trade Negotiation Skills for officials who will serve as government negotiators;⁷³
- Four specialized courses held in Geneva on dispute settlement and trade negotiation theory and practice, and on the WTO Sanitary and Phytosanitary Agreement;
- Three introductory courses in Geneva for least developed countries, including one for Geneva-based delegates that is open to other developing country delegates;
- Other Geneva-based support, including an induction day for new diplomats, two “Geneva weeks” for those WTO members without permanent representation in Geneva, video conferencing, advisory assistance on dispute settlement issues, and ad hoc assistance;
- Distance learning courses through computer-based training modules, interactive guides, and on-line forum;⁷⁴
- Establishment and upgrading of “WTO Reference Centres,” of which around 130 operated in ninety countries by June 2004.⁷⁵ For poorer countries, the WTO has provided information technology equipment and helped with internet access outside of the local power grid. (One of the aims is to facilitate trainees’ ability to maintain contact with members of the WTO Secretariat and with each other.);

⁷³ The WTO held its first course on “negotiating trade agreements: from theory to practice” from Dec. 2-13, 2002, and its second from June 16-27, 2003.

⁷⁴ The first WTO eTraining program was scheduled for June 21 to July 30, 2004. See *First WTO eTraining Course for Government Officials*, WTO NEWS, May 14, 2004, available at <http://www.wto.org/> (follow “WTO news” hyperlink; then follow “News Archives 2004”; then follow “17.05.04: WTO launches training courses over the Internet” hyperlink).

⁷⁵ E-mail from a member of the WTO Secretariat, to Gregory Shaffer, Professor at Law, University of Wisconsin Law School (June 2004) (on file with the author). See also *Technical Assistance and Training Plan 2006*, *supra* note 71, para. 114.

- WTO internship and trainee programs to build hands-on practical learning;
- Outreach activities for parliamentarians and civil society, involving around five regional activities and some national ones in response to requests;
- Through collaboration with the OECD, creation of a data base of trade-related technical assistance activities to facilitate greater coordination.⁷⁶

The Secretariat intends to work increasingly with partner institutions and to extend its training beyond government officials, including by “training [local and regional] trainers.”⁷⁷ The Secretariat hopes that the regional courses held in developing countries can foster the creation of “academic networks with institutions of higher learning.”⁷⁸ Over time, the Secretariat would like the regional partners to assume “a growing share of the responsibility of the courses,” with the Secretariat overseeing quality control.⁷⁹ The Secretariat has also begun a Ph.D. mentor program in Geneva, where Ph.D. candidates from developing countries are provided with space in the WTO library and assigned a mentor from within the Secretariat.⁸⁰

⁷⁶ See Doha Development Agenda Trade-Related Technical Assistance and Capacity-Building Database, available at <http://tcbdb.wto.org>.

⁷⁷ Interview with Secretariat official, in Geneva, Switz. (June 22, 2004).

⁷⁸ See *Technical Assistance and Training Plan 2006*, supra note 71, paras. 83-95; *Technical Assistance and Training Plan 2004*, supra note 70, para. 24. One of the plan’s objectives is to “enhance the capacity of [local] academic institutions to backstop policy-making.” Comm. on Trade & Dev., *Note on the Meeting of 16 and 23 October 2003*, para. 40, WT/COMTD/M/46 (Nov. 24, 2003) [hereinafter *Note on the Meeting of Oct. 2003*] (remarks of Secretariat). Confirmed in interviews with Secretariat members, in Geneva, Switz. (June 22, 2004).

⁷⁹ *Technical Assistance and Training Plan 2004*, supra note 70, para. 26.

⁸⁰ Twelve students are to be funded in 2006. See *Technical Assistance and Training Plan 2006*, supra note 71, para. 91; *Note on the Meeting of Oct. 2003*, supra note 78, para. 87.

The IF and JITAP programs were revamped in 2003 and 2004 in order to better “aim at mainstreaming trade within national development strategies by promoting trade policies supportive of the poverty reduction objectives of those countries.”⁸¹ The JITAP program was expanded in 2003 to include sixteen countries (with the original eight then exiting from the program at the end of 2005), and its modules were reduced from fifteen to five core programs.⁸² The IF’s coverage was expanded from three countries to fourteen in 2003, and to thirty-two by October 2004.⁸³ The IF opened a second “window” to include “bridging” funding of up to US\$1 million per country for priority needs, in addition to diagnostic studies (its “first window”).⁸⁴ In 2005, the Development Committee of the World Bank and IMF endorsed further expansion of the IF, which was supported in the WTO Ministerial Declaration at Hong Kong.⁸⁵

Skeptics outside of the WTO nonetheless question whether WTO trade-related capacity-building will be reoriented in practice. They suspect that WTO capacity-building programs will continue to focus on PowerPoint presentations of “rules” and on

⁸¹ Integrated Framework Steering Comm., *Financial Report on the Integrated Framework Trust Fund (IFTF)*, para. 1, WT/IFSC/W/7/Add.1 (May 1, 2002) (Report by the United Nations Development Programme [UNDP]: Mar. 2001-Feb. 2002, Addendum).

⁸² See *Technical Assistance and Training Plan 2006*, *supra* note 71, para. 118; interview with WTO Secretariat member, Geneva, Switz. (June 23, 2004).

⁸³ See *Technical Assistance and Training Plan 2006*, *supra* note 71, para. 125; e-mail from WTO Secretariat member, to Gregory Shaffer, Professor of Law, University of Wisconsin Law School (Oct. 12, 2004) (on file with the author). One interviewee in the WTO Secretariat characterized this as a “mini-crisis of success” for the IF. Interview with WTO Secretariat member, in Geneva, Switz. (June 2004).

⁸⁴ The “first window” consisted of diagnostic studies prepared on a pilot basis for three least-developed countries (LDCs). *Technical Assistance and Training Plan 2004*, *supra* note 70, para. 94. It was then extended to fourteen LDCs in 2003. *Id.* (confirmed in interview with WTO Secretariat member, in Geneva, Switz. (June 22, 2004)). Following the diagnostic studies, IF beneficiaries were to obtain funding from donor organizations, but it allegedly turned out that there was little follow-up. A World Bank official blamed the donors for not coming through with funding. Discussion with World Bank official, in Geneva, in Switz. (July 2004). A donor representative, in contrast, blamed the World Bank for, among other matters, hiring consultants from Washington D.C. to prepare “huge fat” diagnostic studies instead of using the Bank’s local people. Discussion with a donor representative, in Geneva, Switz. (July 2004).

⁸⁵ See Doha Work Programme, Ministerial Declaration, ¶ 49, WT/MIN(05)DEC, (Dec. 22, 2005).

developing countries' implementation obligations because of a restrictive "interpretation" of the WTO's rule-oriented mandate, which is pressed by donor countries monitoring the WTO's budget.⁸⁶ As one developing country representative remarked, "the donors were careful that the Doha trust fund went into the WTO where they could control it, and not into another organization."⁸⁷ He concluded that

the delivery modes [of the Secretariat's new plan] may be better, but the orientation is likely to be the same. Ultimately, the donors will control how the money is used. For example, when technical assistance is provided on WTO agricultural issues, the US Department of Agriculture will send an expert who will tell you what your position should be in the Doha round agricultural negotiations. They and the WTO guys go to countries to tell them what to do, not how to analyze and review options and their implications. WTO capacity-building and technical assistance are important, but we need to fight all the time over how they are applied.⁸⁸

IV. POLITICAL AND OPERATIONAL CHALLENGES TO IMPLEMENTING A WTO CAPACITY-BUILDING PROGRAM

WTO technical assistance and capacity-building programs face at least four major interrelated challenges. They are: (i) the difficulty of ensuring that WTO technical assistance is coherently integrated into larger development strategies, and consists of more than a fragmented hodgepodge of "one-off" events; (ii) the

⁸⁶ Many developing countries would like to have the WTO mandate explicitly include "development" issues, but developed countries prefer to keep it narrow, focusing on the "rules" of a "contract" organization. Interviews with officials in other Geneva-based international organizations and developing country non-governmental organizations, Geneva, (Switz. June 2004) (noting who is "interpreting" and "defining" the "mandate"). One interviewee from another international organization characterized changes in the WTO regarding development issues as ones of "rhetoric," since the WTO will remain a "rule-based system." June 29, 2004, Geneva. One response, however, is that there are different roles to be played by different organizations, and the aim should be to build greater coherence between the work of these organizations.

⁸⁷ Discussion with developing country representative, in Geneva, Switz. (July 2004).

⁸⁸ *Id.*

incentives of donors to frame capacity-building projects to advance donor constituency interests; (iii) the risk of dependency, which can undermine local capacity, unless technical assistance is absorbed institutionally and socially; and (iv) the threat of discontinuation of significant WTO and other trade-related technical assistance after the completion (or termination) of the Doha round, so that trade-related capacity-building does not remain a significant WTO function.

TABLE II
PRIMARY CHALLENGES FOR AN EFFECTIVE WTO
CAPACITY-BUILDING PROGRAM

1. Coherence vs. Fragmentation
2. Short-term donor interests and donor constituency demands
3. Dependency risks if technical assistance not absorbed institutionally and socially
4. Lack of institutionalization on account of short-term WTO bargaining dynamics

A. THE CHALLENGE OF COHERENCE WITH BROADER
 DEVELOPMENT STRATEGIES

Technical assistance projects can be random and uncoordinated. Because donors like to take credit for assistance projects, they prefer not to provide substantial funding through an international organization or a common fund.⁸⁹ As Susan Prowse of the U.K.'s Department for International Development writes, different agencies thus often support "a vertical multiplicity of trade-related assistance initiatives with little to no horizontal coordination."⁹⁰ The resulting challenge is to ensure greater coherence of trade-related technical assistance programs in relation to a recipient's overall development strategy.

⁸⁹ Interview with a developed country representative to the WTO, in Geneva, Switz. (June 2004).

⁹⁰ Prowse, *supra* note 49, at 1239 (citing Tom Pengelly & Mark George, Building Trade Policy Capacity in Developing Countries and Transition Economies: A Practical Guide to Planning Technical Co-operation Programmes (Mar. 2001) (unpublished paper for the Dept. for Int'l Dev.), available at <http://www.dfid.gov.uk/pubs/files/buildingtradecapacity.pdf>).

The WTO has struggled with its attempts to provide a coherent capacity-building program. As Chiedhu Osakwe, the former director of the Trade and Development Division, stated in 2002,

We have to realize that we have a monumental problem with coordination. . . . There are coordination challenges at every level, there are coordination challenges within the Secretariat, . . . among the beneficiary countries, . . . and amongst the donors. Frequently we are in the middle of friendly fire with regard to the same Missions and their capitals.⁹¹

The WTO's Technical Cooperation Audit Report for 2002 confirmed,

The activities of the TA [technical assistance] Plan in 2002 were not planned, designed or implemented as part of a systematically and coherently developed multi-year technical cooperation project or programme for a technical sector, a country or a region or sub-region. The plan lives and dies from one year to the next. Therefore, the cumulative benefits of the current TAs for the beneficiaries are more the result of coincidence than systematically thought out efforts.⁹²

Most activities were of short duration and involved the “dissemination of information. . . rather than real skill development and capacity-building.”⁹³ Early WTO technical assistance reports merely described activities in such terms as: “present detailed information,” “inform the government,” or “explain the structure of GATS.”⁹⁴ The WTO's 2003 technical assistance plan admitted “coordination challenges remain acute. . . at the national level, amongst agencies, and amongst bilateral donors.” The report

⁹¹ Comm. on Trade & Dev., Report by Secretariat, *High Level Briefing/Meeting on Technical Cooperation and Capacity-building for Capital-Based Senior Officials*, para. 17, WT/COMTD/43 (July 16, 2002) [hereinafter *High Level Briefing/Meeting*].

⁹² *Audit Report for 2002*, *supra* note 58, para. 21.

⁹³ *Id.*

⁹⁴ *Id.* “Only six per cent of the back-to-office reports” included reference to “pre-set indicators” of capacity objectives. *Id.* para. 34.

found too many “ad hoc demands and fitful Secretariat responses.”⁹⁵ The Secretariat nonetheless maintains that, having learned from these experiences, it has built a more effective plan for the future with a coherent set of products, each with a clear capacity-building objective, as summarized in the previous section.⁹⁶

Conceptualizing capacity-building goals is much easier than implementing them. Part of the conundrum is that a country needs capacity to coordinate, rationalize, and absorb the technical assistance provided. As development analyst Devendra Panday writes, “Integrating and transforming [donor assistance] into a coherent national strategy and then implementing the strategy is a very difficult proposition for a poor country whose coordinating capacity is swamped from all directions.”⁹⁷ Thus, some countries have told the Secretariat that “they need technical assistance to identify their domestic technical assistance needs.”⁹⁸ They also need resources just to manage the assistance provided. They admit that “seminars and workshops . . . will be of little value . . . if the objective is to develop capacity in the broad sense.”⁹⁹ However, ad hoc demands are much easier to formulate, especially when a country lacks internal capacity.

Implementation of a trade-related technical assistance strategy, moreover, must be able to respond to the dynamic of WTO negotiations and dispute settlement.¹⁰⁰ The WTO Director-General has consistently emphasized “the urgency underpinning the on-going Doha trade negotiations and work programme. . . .

⁹⁵ *Technical Assistance Plan 2003*, *supra* note 69, para. 4.

⁹⁶ Interview with WTO Secretariat member in Geneva, Switz. (June, 2004).

⁹⁷ See Devendra Raj Panday, *Technical Cooperation and Institutional Capacity-building for Development: Back to the Basics*, in CAPACITY FOR DEVELOPMENT: NEW SOLUTIONS TO OLD PROBLEMS, *supra* note 3, at 61, 79.

⁹⁸ *Technical Assistance Plan 2003*, *supra* note 69, para. 16.

⁹⁹ *High Level Briefing/Meeting*, *supra* note 91, para. 72.

¹⁰⁰ *Id.* para. 94. The representative of Chile remarked “it is very difficult to anticipate what specific needs a developing country will have next year, because we don’t know exactly what it is that is going to be required, and the challenges that will have to be faced in the course of the negotiations.” *Id.* at 25. The negotiating dynamic reflects the “bicycle theory” of trade policy which claims that, “unless there is forward movement, the bicycle will fall over.” See JACKSON, *supra* note 39, at 24 (1998).

Time frames and deadlines need to be adhered to.”¹⁰¹ Developing countries must also respond to regional and bilateral trade negotiations. They thus need flexibility in the formulation of technical assistance requests in order to participate effectively in multiple and complex negotiations.¹⁰² They do not wish to finalize technical assistance requests six months or a year in advance when the dynamics of negotiations and disputes can raise new needs. This understandable desire for flexibility can conflict with the aim of integrating WTO technical assistance into long-term strategies.

B. THE POLITICAL CONTEXT

A major challenge for the creation of a meaningful WTO capacity-building program is that development objectives can conflict with the interests of powerful constituents within donor countries. Government officials in every country are pressed to respond to their constituents, whether these constituents are protectionist or export-oriented. Not surprisingly, donors respond to the demands of constituents that wish to impede access to “sensitive sectors” and to press for immediate implementation of intellectual property and other requirements, regardless of another country’s development priorities. Donors may tie aid to profit national companies and consultants.¹⁰³ Technical assistance is not necessarily “free.”

Although overall technical assistance is critically needed, one may thus question if developing countries are truly beneficiaries of some WTO so-called “technical assistance” initiatives.

¹⁰¹ Integrated Framework Steering Comm., *Report on Mainstreaming Seminar II*, para. 4, WT/IFSC/2 (Jan. 2003).

¹⁰² For example, Colombia asked for technical cooperation for home officials to be conducted back-to-back with meetings of negotiating groups. *High Level Briefing/Meeting*, *supra* note 91, para. 129. Similarly, Kenya spoke of the need to “focus on upgrading technical skills and capacity . . . to negotiate on various subjects under discussion in the WTO.” *Id.* para. 55. Mauritania expressed a similar need. See WTO Comm. on Trade & Dev., *Note on the Meeting of 27 and 28 November 2003*, para. 42 WT/COMTD/M/47 (Jan. 14, 2004) [hereinafter *Note on the Meeting of Nov. 2003*].

¹⁰³ See, for example, efforts within the OECD to eliminate “tied aid,” where development assistance is subject to conditions, such as a requirement that the recipient use companies from the granting state. See ORG. FOR ECON. CO-OPERATION AND DEV., 2002 REPORT ON EXPORT CREDITS IN THE OECD (Mar. 2002), available at <http://www.oecd.org> (search “2002 Export Report”).

As stated earlier, most development analysts believe that implementation of intellectual property protection, especially in the manner desired by some richer countries, is not a priority for the poor.¹⁰⁴ Yet the first organization with which the WTO signed a “Cooperation Agreement” for the provision of technical assistance was the World Intellectual Property Organization (WIPO).¹⁰⁵ In July 1998, the WTO and WIPO announced a new joint initiative “to help developing countries which are members of the WTO meet the 1 January 2000 deadline—less than a year and a half away—for conforming with the [TRIPS Agreement].”¹⁰⁶ Similarly, other early WTO capacity-building plans consistently referred to “technical missions. . . aimed at helping individual countries to adapt their existing legislation and regulations to the WTO Agreements in areas such as customs valuation, trade remedies and TRIPS, and transposition of tariff schedules.”¹⁰⁷ A special initiative for African countries likewise proclaimed that it is “assisting beneficiary countries implement their obligations under the WTO.”¹⁰⁸ In the build-up to the Cancun ministerial meeting in 2003, “of the 1048 TA/CB priorities communicated by Members to the WTO Secretariat, the largest number were to be ‘Singapore issues’ (investment, competition policy, transparency in government procurement and trade facilitation),” which were

¹⁰⁴ See Finger & Schuler, *supra* note 9 (estimating that the implementation of the TRIPS, Customs Valuation, and SPS Agreements would cost developing countries around US\$150 million dollars, which equals a year’s development budget for most LDCs). See also sources cited in *supra* note 10.

¹⁰⁵ See *New Strategy for WTO Technical Cooperation*, *supra* note 66, para. 6 n.5.

¹⁰⁶ Press Release, WTO, WTO and WIPO Join Forces to Help Developing Countries Meet Year-2000 Commitments on Intellectual Property (July 21, 1998).

¹⁰⁷ WTO Comm. on Trade & Dev., Note by the Secretariat, *Report on Technical Assistance 2000*, at 31, WT/COMTD/W/83 (May 2, 2001) [hereinafter *Report on Technical Assistance 2000*]. The report maintained, for example, that a “systematic” purpose in the “cooperation” was to assist developing countries with their notification obligations. In the words of the WTO report, “In order to raise Members’ awareness of their notification obligations, the Secretariat almost systematically includes a module on notification requirements in national as well as in regional seminars.” *Id.* at 13. Interestingly, Santa Lucia (a non-resident member of the WTO) expressed the need for flexibility to respond to developing country needs, but the example that it cited was its need “to do notifications” to the subsidies committee concerning “subsidy programs.” *High Level Briefing/Meeting*, *supra* note 91, para. 124.

¹⁰⁸ *Report on Technical Assistance 2000*, *supra* note 107, at 20 (referring to the JITAP, *infra*).

the primary demands of the E.U.¹⁰⁹ Of course, one may validly counter that without such technical assistance, developing countries would have been less effective in engaging with the Singapore issues. Moreover, many developing countries did not oppose their inclusion. The point remains, however, that the party most vociferously demanding incorporation of these negotiating issues was the E.U. When it appeared that implementation issues were being given less attention in the 2004 capacity-building plan, the E.U. complained that “no [technical assistance] was foreseen for the actual implementation and application of existing WTO Agreements.”¹¹⁰ Even if one takes a favorable view of a significant amount of WTO-spurred regulatory change, in a world of limited resources, there are opportunity costs when development assistance is provided in one area—say for intellectual property protection—and not in another.

Many developing countries view the WTO Secretariat’s provision of technical assistance with circumspection because the Secretariat could be advancing the interests of those who oversee the WTO budget: the major donors.¹¹¹ An official at an international development agency complains that when WTO Secretariat members travel to a developing country to provide technical assistance, they “do not engage in exchange with stakeholders where it is an open question as to whether a WTO rule is good or bad for development, and what are the implementation options and their tradeoffs for a country.”¹¹² The official maintains that WTO Secretariat members are discouraged from offering counsel as to how a WTO obligation could be interpreted by a country to facilitate a development objective. In at least one case, a WTO Secretariat member complained that officials from other development agencies that might be critical of a WTO rule were

¹⁰⁹ *Technical Assistance and Capacity-Building*, *supra* note 60, at 3.

¹¹⁰ *Note on the Meeting of Oct. 2003*, *supra* note 78.

¹¹¹ *See, e.g.*, BRAITHWAITE & DRAHOS, *supra* note 21, at 196 (maintaining that the WTO’s upper management faces an incentive structure “which is symbiotically linked to the power of the US and EC”).

¹¹² Discussion with individual at an international development agency, in Geneva, Switz. (June 2004).

“not being helpful for the WTO agenda.”¹¹³ As one representative from Africa remarked, “you have to be wary of them [members of the WTO Secretariat],” and “need to fight constantly” for developing countries’ interests to be respected.¹¹⁴ The experiences of developing countries will vary as a function of the country, the country official, and the Secretariat member providing the assistance. Developing countries generally appear grateful for the assistance that they receive. The point remains that capacity-building is likely to be more effective if the Secretariat member conducts the mission not to “promote” a rule, but rather to clarify it and engage about it in an open-ended manner.

In the 2004 capacity-building plan, the Secretariat spoke of the need for Secretariat “management of the demand” for technical assistance because of the Secretariat’s limited resources and the potentially unlimited requests.¹¹⁵ The E.U. supported the idea that “the WTO Secretariat assumes a more proactive and strategic role in assisting those members that have difficulties in identifying their technical assistance needs.”¹¹⁶ Although there is a strong rationale for bureaucratic coordination to ensure greater coherence, many developing countries distrust Secretariat discretion. They demand that the Secretariat serve their requests in a “transparent” manner. India, for example, stressed that technical assistance must remain “demand-driven rather than having any aspects that might suggest a prescriptive approach from the part of the Secretariat.”¹¹⁷ Morocco expressed concern that the Secretariat’s approach for 2004 will give the Secretariat too much “discretionary power.”¹¹⁸ Costa Rica and Kenya likewise supported the need to “provide more flexibility to individual members in deciding national activities.”¹¹⁹ At the following meeting of the Committee on Trade and Development, Mauritania expressed

¹¹³ *Id.*

¹¹⁴ Discussion with African representative to the WTO, in Geneva, Switz. (June 2004).

¹¹⁵ *High Level Briefing/Meeting, supra* note 91, para. 9. The Secretariat notes the need “to move away from demand-driven TA” to one in which members set priorities for managed TA. *Id.* para. 28.

¹¹⁶ *Id.* para. 89.

¹¹⁷ *Note on the Meeting of Oct. 2003, supra* note 78, para. 58.

¹¹⁸ *Id.* para 45.

¹¹⁹ *Id.* para. 71 (Costa Rica), para. 79 (Kenya).

similar views on behalf of the Africa Group, a perspective that Thailand, Colombia, and Morocco also supported.¹²⁰

3. *The Need to Avoid Dependency*

For most development specialists, the measurement of a development project's success lies not in the quantity of assistance but in the extent to which the project empowers a country to devise and implement effective strategies on its own over time. As David Ellerman writes, the "fundamental conundrum" will remain the paradox of "supplying help to self-help."¹²¹ The OECD guidelines similarly speak of the need for approaches that "strengthen the ability of partner countries to continue helping themselves after the donors have left."¹²² The challenge is to avoid what Ellerman dubs "Say's Law of Development Aid"—when "the supply of aid seems to create and perpetuate the demand for it."¹²³ The temptation to become dependent on aid is high. Developing countries that are strapped for funds may conform to donor demands simply to get the funds. "In 1989, for example, for the countries of sub-Saharan Africa, excluding Nigeria, technical cooperation was equivalent to 14 percent of government revenues. For ten countries, it was equivalent to at least 30 percent."¹²⁴ Not surprisingly, the initial beneficiaries of the JITAP program for Africa did not wish to "graduate" from it, although the program had been designed to shift from an initial group of countries to others on the continent after a set number of years.¹²⁵ When developing countries become dependent on external funding, whether for WTO matters or otherwise, technical assistance programs could actually undermine the development

¹²⁰ *Note on the Meeting of Nov. 2003*, *supra* note 102, para. 42.

¹²¹ David Ellerman, *Autonomy-respecting Assistance: Towards New Strategies for Capacity-Building and Development Assistance*, in *CAPACITY FOR DEVELOPMENT: NEW SOLUTIONS TO OLD PROBLEMS*, *supra* note 3, at 43.

¹²² OECD, *supra* note 6, at 17.

¹²³ Ellerman, *supra* note 121, at 50; *see also* Morgan, *supra* note 2, at 5 ("TA in many instances led to the erosion of ownership, commitment and independent action of national actors. Put in place to help generate independence, TA led in too many cases to a sense of dependence.").

¹²⁴ Fukuda-Parr et al., *supra* note 3, at 12.

¹²⁵ Interview with WTO Secretariat official, in Geneva, Switz. (June 23, 2004). On the JITAP, *see supra* notes 50-51 and accompanying text.

of local capacity. WTO resources may be too limited and missions too sporadic to create such dependency, at least in the short term. Yet the conundrum of “supplying help to self-help” to countries that lack underlying capacity remains. Unless technical assistance is absorbed by developing countries institutionally and socially in a broad-based manner, it will have little long-term impact.

D. THE CHALLENGE OF ENSURING SUSTAINABILITY IN LIGHT OF SHORT-TERM NEGOTIATING GOALS

As the Consultative Board to the Director General on “The Future of the WTO” recently noted, “little technical assistance is funded directly through the WTO budget,” calling into question the “security and predictability for these efforts into the future.”¹²⁶ Rather, most funding is provided through ad hoc donations to WTO technical assistance efforts provided by individual WTO members.

These donors wish to see payoffs from the funds that they provide. If trade-related technical assistance does not generate desirable results, it may be discontinued. Donor governments have thus demanded improvements in the evaluation and reporting of how WTO capacity-building efforts work.¹²⁷ The WTO Secretariat has organized meetings about every six weeks between it, donors, and beneficiaries regarding the use of WTO capacity-building products.¹²⁸

The problem, however, arises in the definition of success and its timeline. Is success to be measured by whether the Doha round is concluded? Is it to be measured by whether the Doha round leads to market access in sectors desired by particular developing countries? Or are capacity-building programs now institutionalized within the WTO so that their objectives are longer term? Certainly the Doha round will not in itself resolve developing countries’ trade-related capacity needs.

¹²⁶ SUTHERLAND ET AL., *supra* note 38, at 78.

¹²⁷ See Comm. on Trade & Dev., *Note on the Meeting of 22 May and 12 June 2003*, para. 46 WT/COMTD/M/45, (Oct. 7, 2003) (U.S. remarks).

¹²⁸ Interview with Secretariat Member, WTO, in Geneva, Switz. (June 23, 2004).

The technical assistance now provided was granted “explicitly and implicitly” in response to developing countries’ agreement to launch the round, which included the Singapore issues.¹²⁹ When three of the Singapore issues dropped out of the negotiations in July 2004, the future scope of WTO technical assistance was put in question. As the E.U. representative warned following the Cancun ministerial when many developing countries rebelled against inclusion of these issues in the work program, “The Cancun outcome required a re-assessment of TA priorities. . . . Members needed to reconsider the scope of future TA since it was not clear what the scope of the DDA would be in the future.”¹³⁰ Canada suggested that the Secretariat reduce trade-related technical assistance over time and become the coordinator, rather than a deliverer, of such assistance.¹³¹

Developing countries, in contrast, generally insist “technical cooperation and capacity-building should be considered as a fundamental aspect of the activities of the WTO.”¹³² Some Secretariat observers maintain that it may be politically difficult for donors to significantly curtail technical assistance now that it has been somewhat more institutionalized within the WTO. At a high-level WTO meeting, a U.S. representative agreed that capacity-building should be “an enduring component of the work of the WTO.”¹³³ Nonetheless, donors’ perceptions of WTO capacity-building projects’ effectiveness in achieving certain goals, however those goals might be defined, will shape future funding decisions.

¹²⁹ Interview with a developed country representative to the WTO, in Geneva, Switz. (June 2004).

¹³⁰ *Note on the Meeting of Oct. 2003*, *supra* note 78, para. 50 (the DDA refers to the Doha development agenda).

¹³¹ *See High Level Briefing/Meeting*, *supra* note 91, para. 81.

¹³² *See id.* para. 128 (remarks of Colombian official in reference to paragraph 38 of the Doha Declaration). Confirmed in numerous interviews in Geneva, Switz. (June 2004).

¹³³ *Id.* para. 104.

V. CONCLUSION: SOME POTENTIAL ADAPTATIONS WITHIN DEVELOPING COUNTRIES, THE WTO, AND DONORS

The role of capacity-building programs should be to empower developing countries to take advantage of trade-related opportunities, whether through shaping WTO law and tariff concessions to facilitate development goals, deploying WTO rights in dispute settlement, implementing WTO law more effectively, or otherwise. It is, of course, always easier to examine challenges and failures than to implement strategies to capitalize on new opportunities. This concluding section aims to highlight positive developments in WTO capacity-building efforts and some adaptations to be considered by beneficiaries, donors, and the WTO Secretariat.

First, we should recognize that since the Doha round was launched in November 2001, donors have provided a greater amount of funding for trade-related technical assistance and that the WTO Secretariat improved in delivering its part. The Secretariat now provides a broader spectrum of products that include regional courses hosted by local universities, specialized regional courses, workshops on negotiation techniques, partnerships with academic and other institutions, and WTO reference centers set up around the world. The provision of this assistance has been somewhat more demand-driven, resulting in a better understanding of WTO rules and negotiating dynamics among a broader array of developing country government officials. WTO observers note that developing countries have been much more engaged in the Doha round of trade negotiations than they were in the past, suggesting greater “ownership” of the technical assistance provided.¹³⁴

¹³⁴ As Faizel Ismail, the head of the South African delegation to the WTO, said following the Cancun meeting,

The only silver lining to the disappointment felt by G-20 members at the abrupt end of the WTO Cancun Ministerial Conference was that developing country negotiators had come of age. They had galvanized a formidable group of developing countries and skillfully built a common negotiation position that provided a sound platform to continue negotiations for a fair and freer global market for developing countries' agricultural products.

Faizel Ismail, *Agricultural Trade Liberalisation and the Poor: A Development Perspective on Cancun*, BRIDGES, Jan. 2004, at 4. Such engagement could, however,

TABLE III
PROPOSED ADAPTATIONS TO MAKE WTO CAPACITY-BUILDING PROGRAMS MORE EFFECTIVE

Beneficiaries:	<ul style="list-style-type: none"> (a) Broader-based absorption of technical assistance institutionally and socially (b) Regional pooling of resources through policy networks
Donors:	<ul style="list-style-type: none"> (a) Linking long-term interests to the development of stable, prosperous states (b) Greater coordination and pooling of development funding (c) Raising internal profile of development agencies (d) Raising public awareness of development issues and needs
Secretariat:	<ul style="list-style-type: none"> (a) Greater analytic independence from member pressures (b) Enhanced coordination with development organizations (c) Institutionalized WTO technical assistance as a semi-autonomous program

How can developing countries, donors, and the WTO Secretariat build on past developments? First, developing countries would benefit if they *ensured that the absorption of trade-related technical assistance became broader-based* by increasing institutional coordination to include multiple government departments, the private sector, and civil society representatives.¹³⁵ Technical assistance and capacity-building endeavors will be most sustainable if they permeate broadly throughout institutions and societies. Donor capture is less likely if a broad array of stakeholders is included. If the focus of technical assistance remains on individual capacity rather than larger societal and institutional capacity, the WTO could simply be training individuals whose

result from assistance from organizations and networks that are independent of the WTO, rather than through the WTO itself.

¹³⁵ Similarly, the OECD guidelines refer to “effective mechanisms for consultation among three key sets of stakeholders: government, the enterprise sector, and civil society.” OECD, *supra* note 6, at 14.

objectives and career paths are unpredictable.¹³⁶ Trade-related capacity-building will be more effective if it also takes into account, directly or indirectly, local constituent requests, including those of the private sector, academics, and other civil groups, as part of a bottom-up process. The WTO's 2002 audit, however, showed that the "representation of other economic sectors remains insignificant [with representatives limited to officials from certain ministries] . . . despite general recognition that the involvement of the private sector and civil society representatives is desirable."¹³⁷

If developing countries are to shape the international trading system to facilitate their economic development, and if they are to take advantage of WTO rules, they will need to work with the private sector to enhance the resources at their disposal. They will also need strong civil society networks to provide government representatives with greater negotiating leverage. The United States and Europe have learned how to harness private resources—informational and material—to advance their agendas.¹³⁸ Developing countries will need to develop strategies of their own that involve broader-based constituencies. To give a few examples, civil society organizations have been instrumental in reframing debates over the TRIPS Agreement and agricultural subsidies, and Brazil's private sector has helped finance WTO legal challenges against U.S. cotton and E.U. sugar subsidies.

There are some signs that WTO capacity-building efforts are becoming broader-based. The Secretariat's recent plans have explored ways to increase the absorptive capacity of technical assistance projects through coordination with broader networks of actors. Developing country representatives have welcomed the Secretariat's initiative to work with developing country academic

¹³⁶ Some WTO trainees will leave government service or be assigned to agencies that do not work on trade matters. One interviewee noted that the trade policy course was extremely valuable for him and others, but that some students appeared to treat the course as an opportunity for "tourism." Interview with developing country representative, in Geneva, Switz. (June 30, 2004). Similarly, a WTO official questioned the extent to which some beneficiaries are "serious" about capacity-building in light of the minimal efforts of some students in the courses. Interview with a WTO official, in Geneva, Switz. (June 23, 2004).

¹³⁷ *Audit Report for 2002*, *supra* note 58, para. 18.

¹³⁸ See GREGORY SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* *passim* (2003).

institutions and think tanks, to provide WTO internships, and to organize a program for their doctoral students to use the WTO library. Developing country hosts of WTO regional courses, in particular, hope that the courses stimulate greater awareness of WTO trade issues in government ministries and universities, as well as in the general public as a result of media coverage.¹³⁹ Nonetheless, some developing country representatives have been reticent about civil society- and parliamentarian-oriented capacity-building projects, at least where the funding comes out of the WTO's technical assistance budget. India and Egypt have stated, for example, that they do not view outreach programs for parliaments and civil society as technical assistance activities but rather as national activities.¹⁴⁰ Thailand agreed with this perspective.¹⁴¹ The Secretariat's 2006 plan nonetheless includes "outreach activities for parliamentarians and civil society," although they are to be "organized in response to requests from WTO members."¹⁴²

Second, developing countries could benefit from mechanisms to pool their resources at the regional and international levels, including through policy networks.¹⁴³ Most developing countries are small. These countries will never have the capacity to follow and advance their interests effectively in the WTO system by acting alone. Like European countries, they could benefit from networking and pooling resources through regional and other institutions. The WTO's "regional" technical assistance programs could, at least in theory, facilitate this coordination. Although strategies for pooling resources have their limits, they need to be compared with the alternative of each developing country working on its own, in which case the trading powers can more easily play developing countries off of each other.¹⁴⁴

¹³⁹ Interview with a representative from an African country, in Geneva, Switz.

¹⁴⁰ See *Note on the Meeting of Oct. 2003*, *supra* note 78, paras. 68-69. Curiously, Pakistan's representative supported the inclusion of outreach programs for parliamentarians and civil society. *Id.* para. 70. So did the representative from Venezuela. *Note on the Meeting Nov. 2003*, *supra* note 102, para. 63.

¹⁴¹ *Note on the Meeting of Nov. 2003*, *supra* note 102, para. 57.

¹⁴² See *Technical Assistance and Training Plan 2006*, *supra* note 71, paras. 78-82.

¹⁴³ John Braithwaite, *Methods of Power for Development: Weapons of the Weak, Weapons of the Strong*, 26 MICH. J. INT'L L. 297, 299 (2004) (noting the importance of working through policy networks and nodes).

¹⁴⁴ See, e.g., Peter Drahos, *When the Weak Bargain with the Strong: Negotiations in the World Trade Organization*, 8 INT'L NEGOTIATION 79 (2003); Gregory Shaffer,

As for the WTO Secretariat, the WTO is mainly, but not entirely, a member-driven organization. Secretariat members are able to exercise authority in numerous contexts, including in the provision of technical assistance. Some of the Secretariat's assistance raises fewer tensions than others. For example, capacity-building programs regarding trade negotiating skills and the use of the WTO's dispute settlement system address how developing countries can better defend and advance their objectives. Technical assistance for implementation, in contrast, can represent a form of "soft" persuasion by the Secretariat of what developing countries must do in respect of other members' demands. To put this in context, sparks would fly if Secretariat representatives were to travel to Washington D.C. or to European capitals to teach administrative officials (in a potentially doctrinaire manner) what WTO rules require them to do and why these rules are "good" for their countries.

Although the WTO's organizational culture is not that of a development institution, and although the initiatives described below may be difficult to achieve in light of that organizational culture, members could continue to attempt to integrate development orientations within the Secretariat itself. *Institutionalizing a component for capacity-building in the WTO* could, over time, induce the Secretariat to become more conscious of the varying development contexts of trade. Just as the Secretariat admirably has been self-critical regarding its past provision of technical assistance, it could be self-critical in its understanding of the role of trade rules in development. It could view trade rules not as unambiguous "rule of law" ends in themselves, but rather as tools

The Challenges of WTO Law: Strategies for Developing Country Adaptation, WORLD TRADE REV. (forthcoming 2006). The proliferation of bilateral trade negotiations and agreements, and the manner of implementation of the general system of preferences, often divide developing countries, making it more difficult for them to coordinate across issues in a sustained manner. See Gregory Shaffer & Yvonne Apea, *Institutional Choice in the GSP Case: Who Decides the Conditions for Trade Preferences: The Law and Politics of Rights*, 39 J. WORLD TRADE 977 (2005). Developing countries nonetheless would have to monitor and develop trust that the secretariats of regional associations and the lead representatives in regional networks work effectively on their behalf, a challenge that in many cases could be substantial.

that can be applied (and, in some cases, adapted) to varying development contexts. The WTO could, in particular, open permanent regional offices where WTO staff can become more attuned to region and country-specific needs.¹⁴⁵

To the extent that the WTO Secretariat lacks the *independence and mandate* to engage with developing country representatives and stakeholders in an open way about WTO rules in development contexts and about how WTO disciplines might be interpreted or adapted, developing countries should *ensure, where appropriate, that representatives from development agencies and other consultants who have greater independence are included in relevant WTO trade-related “capacity-building” projects*. The Consultative Board to the Director General on “The Future of the WTO” recently recommended that a “semi-independent agency” under “WTO management” should be created for the provision of technical assistance.¹⁴⁶ That proposal should be seriously considered, though internal WTO experts would likely need to be included in many missions because of their up-to-date knowledge and experience, whether in respect of WTO dispute settlement decisions, committee notifications and monitoring, or negotiations.

As the scope of WTO rules continues to expand, a single set of disciplines becomes less appropriate for all WTO members. One can, and should, distinguish between core GATT rules of nondiscrimination, which apply to all members, and other substantive rules.¹⁴⁷ Article XXXVI of Part IV of GATT 1994 expressly provides that “developed countries do not expect reciprocity for commitments made to them in trade negotiations [from] . . . less-developed contracting parties.” It further specifies “the less-developed countries should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade

¹⁴⁵ This idea was considered in *Audit Report for 2002*, *supra* note 58, para. 48.

¹⁴⁶ See SUTHERLAND ET AL., *supra* note 38, at 78.

¹⁴⁷ See Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, in REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY AND DEMOCRATIC GOVERNANCE 227-28 (Ernst-Ulrich Petersmann ed., 2005).

needs, taking into consideration past trade developments.”¹⁴⁸ In practice, however, developing countries often have only received longer transition periods to implement WTO obligations, such as under the TRIPS Agreement, periods that by now have largely elapsed. There is a role for greater differentiation of members based on less-developed countries’ capacities and levels of development, especially as regards newer WTO regulatory requirements. That variation can be implemented through conditioning implementation on defined development thresholds and through enhanced special and differential treatment provisions.¹⁴⁹

The Trade Policy Review Mechanism (hereinafter “TPRM”), in particular, could be given a greater development orientation when applied to developing countries.¹⁵⁰ If trade strategies are to be integrated into development plans, as called for by the IF, the JITAP, and the WTO’s technical assistance programs, then it makes sense to adapt the Trade Policy Review Mechanism accordingly. TPRM implementation reviews could examine the ways in which a developing country has mainstreamed trade policy as part of a development strategy. Implementation of WTO requirements could be viewed through the lens of sequencing based on development thresholds. Representatives of member organizations of the IF and JITAP, such as the World Bank and UNCTAD, could participate. This adaptation could be applied on a trial basis with least-developed and other low-income countries. As Prowse points out, a development approach, at least in theory, is not alien to GATT-WTO traditions that already include such issues as infant industry promotion and balance of payment concerns.¹⁵¹

¹⁴⁸ General Agreement on Tariffs and Trade [GATT], art. XXXVI, Dec. 15, 1993, 1867 UNTS 3.

¹⁴⁹ The national treatment obligations under the General Agreement on Trade in Services (“GATS”), for example, only apply to sectors listed in a country’s GATS schedule. *See* General Agreement on Trade in Services [GATS], art. VII, Apr. 15, 1994, 1869 U.N.T.S. 183. Although developing countries may benefit from collectively opening their markets to greater competition, WTO rules now cover much more than non-discriminatory market access, as we have stressed.

¹⁵⁰ *See* OECD, *supra* note 6, at 9 (suggesting that the TPRM be used “to raise awareness of constraints to trade and investment in developing countries” so as “to ensure coherence between trade policies and regulatory regimes on the one hand, and overall development goals on the other.”).

¹⁵¹ *See* Prowse, *supra* note 49, at 1247 (referring to GATT article XVIII).

Donors will continue to be under pressure from domestic constituents to shape technical assistance to advance those constituents' interests. Constituents that lose income due to reduced donor government subsidies or increased foreign competition in their home markets will oppose technical assistance provided to developing countries that facilitates these objectives. Capacity-building initiatives, however, are more likely to be effective if donors view them as longer-term foundational issues to enhance developing country trading options in the global economy, and not as shorter-term concessions as part of a trade negotiation package.

Developed countries' *definitions of their national interest* can change, including in response to changing world contexts and internal political developments. Today, the unstable security situation that the world confronts offers opportunities and sets constraints for trade-related development strategies. On the one hand, the threat of terrorism can impede and disrupt trade, which could particularly harm countries with small internal markets. On the other, global concern with terrorism could focus developed countries' attention toward the development of stable developing states that can serve as critical allies. *Trade-related development thus has become a global security issue.* In this respect, there are analogies between the current situation and past ones, in which East Asian countries benefited from the United States' desire for strong and economically successful allies during the Cold War. As one high-level member of the WTO Secretariat quipped, "the Doha round was a gift of Osama bin Ladin."¹⁵² Similarly, the 2002 U.S. National Security Strategy states,

A world where some live in comfort and plenty, while half of the human race lives on less than \$2 a day, is neither just nor stable. Including all of the world's poor in an expanding circle of development and opportunity is a moral imperative and one of the top priorities of U.S. international policy.¹⁵³

¹⁵² Interview with WTO Secretariat member, in Geneva, Switz. (June 2002).

¹⁵³ The policy is set forth in GEORGE BUSH, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES* (Sept. 17, 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>. The strategy is best known for its justification of the need for preemptive strikes, so that its development dimension is often overlooked.

Developed and developing countries' security interests are both linked with global development that gives rise to more stable and prosperous states.

Capacity-building initiatives will be more effective if donor *development agencies coordinate* among the group of other agencies, including through common development vehicles. The OECD Development Assistance Committee has been attempting to facilitate this process. Moreover, donors could *increase the profile of development agencies and integrate them into their trade policy networks*. In the United States, an independent development agency could be raised to a cabinet-level position and be included as part of all U.S. inter-agency trade policy committees.¹⁵⁴ Perhaps most importantly, donor governments, agencies, and non-governmental organizations need to raise awareness in their own publics of the role of development programs in order to generate broader-based political support. As Jeffrey Sachs points out, Americans believe that their government gives vastly more development aid than it does. For example, a 2001 survey showed that Americans believed that their government provided foreign aid that was "30 times the actual figure."¹⁵⁵

WTO capacity-building programs can play a small, but beneficial, part for development. This article has assessed past practice and ongoing challenges. Like any empirically grounded work, this one is bound to reflect a subjective element as to where it casts its lens. Its aim, however, has been to provide a critical but ultimately constructive assessment of WTO capacity-building initiatives, highlighting the adaptations that donors, beneficiaries, and the WTO Secretariat have made, and those that they could make, for WTO capacity-building programs to become more effective over time.

¹⁵⁴ See Jeffrey Sachs, *The Development Challenge*, FOREIGN AFF., Mar./Apr. 2005, at 78, 90 (making a similar proposal).

¹⁵⁵ *Id.* at 80 (citing a figure of from a 2001 survey).