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What Should Not be on the Agenda?

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Trade

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What should not be on the Agenda?

The preceding is a partial list of some of the items that should have a high priority in any round of trade negotiations that pretends to call itself a *development* round. Many of the items listed have received little or no attention. Equally remarkable are several of the items (especially within the so-called Singapore Issues) that were put on the table. Some of these would almost surely impede development. The fact that the United States and Europe put such items on the agenda and continued to push them so long within the so-called Development Round is of concern: they merely bargaining chips? Was there no real comprehension about what should be meant by a Development Round?

Intellectual property rights

Recent debates about intellectual property need to be put into context. Intellectual property provides innovators with a temporary monopoly power. Monopoly power always results in an economic inefficiency. There is accordingly a high cost of granting even a temporary monopoly power, but the benefit is that by doing so, greater motivation is provided for inventive activity. The dynamic gains, it is hoped, exceed the static losses.

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Much of the most important innovative activity is outside the realm of intellectual property. Behind the inventions associated with atomic energy or lasers were basic discoveries in physics. Behind the computer were basic discoveries in mathematics. The basic research which underlies practical innovation in almost all arenas occurs in universities and government research laboratories, and few of these discoveries are protected by intellectual property.

In many cases, it is neither desirable nor practical for this to happen. Often the applications which give market value to the discovery occur years after the original discovery (beyond the normal patent life). Ideas give rise to other ideas, and there is no way to ascertain which ideas proved instrumental in the creation of follow-on ideas.

Most important, it should be recognized that material reward provides little of the motivation for much of this intellectual activity. To be sure, it could not occur without financial support. The salaries of the researchers have to be paid, and if the financial support is woefully inadequate, many would-be researchers will divert their attention to other areas. Yet there is little evidence that stronger intellectual property protection would generate a greater flow of basic ideas.

Knowledge is a public good, and this is especially true for the fruits of basic research, which is why governments have an important responsibility for its support. Intellectual property protection thus constitutes only a part—and not the most important part—of what may be called our knowledge and research system. Providing greater support to this one part of the system may actually harm other parts of the system, and impede the progress of science. Note that the system under which basic research is conducted is a very open one, in which ideas freely move around, and in which, in fact, scientists put considerable effort into disseminating their ideas and encouraging others to use them. In many ways, this is the opposite of the premises underlying intellectual property, which seeks to circumscribe the use of knowledge, limiting it only to those who are willing and able to pay.

Thus, whether within the WTO or through an alternative forum,[1] a new intellectual property regime needs to be created which

[1] For example the World Intellectual Property Organisation (WIPO) might be an appropriate forum. As we noted earlier, it is not clear that the WTO is the best forum for the establishment and arbitration of intellectual property rights.

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balances more carefully the interests of the users and the producers of knowledge[2] and goes some way toward closing the North–South 'knowledge gap'.

In some areas weaker patent laws are actually necessary to safeguard public health and promote development. The use of compulsory licensing and government use of patents could be extended for these purposes. Indeed many governments in developed countries already have strong national laws for public use of patents. Under 28 USC Sec 1498, the US government can use patents or authorize third parties to use patents for virtually any public use, without negotiation.[3] Patent owners have no rights to seek injunctions, and may not seek compensation through tort litigation. Other developed countries have similarly permissive laws. Before NAFTA Canada routinely granted compulsory licenses on pharmaceutical products for the purpose of reducing health costs through widely available generic drugs. Canada assigned royalties to the patent holders, usually of 4 per cent of the generic competitor's sales price. In sharp contrast, and despite the HIV/AIDS public health crisis, no African country has issued a compulsory license for any medicine.[4]

This situation is curious because, unlike the spirit of many areas of the WTO's intellectual property regime, the TRIPS accord provides quite liberal powers to governments to authorize third parties to use patents without the permission of the patent owners. For example, Art. 31(b) allows countries to use or authorize a third party to use a patent without negotiation or without a license if the use is for public non-commercial purposes, although the provision does require that 'adequate' compensation be made to the patent holder (Art. 31(h)).

Love (2001) points out that the existing TRIPS accord permits countries to create very simple and easily administered systems for permitting production or import of generic products from the competitive sector. In this particular area the key action required to promote development is not significant reform of the current WTO rules, but rather providing developing countries with the resources

[2] Knowledge is a global public good, and thus it is particularly appropriate that the funding for such global public goods be provided by those that are most able to pay, i.e. those in the advanced industrial countries.

[3] For a discussion see Love (2001).

[4] See Love (2001).

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to develop national systems which take advantage of the current rules. In particular developing countries should be encouraged to develop compulsory licensing systems which are simple and not costly to administer. The median cost of US patent litigation in 1998 was $1.2 million for each party (Love 2001). As a result of the high cost of disputes, large patent-holding corporations can use litigation to tie up any system which enables them to do so. Fortunately, TRIPS permits countries to administer most aspects of compulsory licensing through administrative processes (see Art. 31(c), (i)–(k)) and in several cases does not require governments to grant injunctive relief to patent holders (Art. 44.2), including when related to public health.

In other areas, the TRIPS Agreement does require further revision. In particular, compulsory licensing should be extended beyond national emergencies to broader 'refusal to deal' scenarios in which developing countries are unable to access products patented by corporations which choose not to serve their market, for example, because it is too small. The revenues lost to the patent-holders as a result of such compulsory licensing are likely to be small relative to the revenues generated by the exercise of monopoly power in the more advanced industrial countries, and therefore are likely to have a negligible effect on the development of new technologies. By contrast, the cost to the developing countries of failure to provide technologies at affordable prices, particularly drugs, is enormous.[5]

In addition Art. 40 should extend the right of WTO members to provide in their national legislation for the prevention of anti-competitive licensing practices in respect of Intellectual property rights. And pursuant to Art. 66.2, new and additional measures need to be developed to ensure the transfer of technology from developed countries to least developed countries. The Doha Declaration recognized the potential for trade agreements to promote the transfer of

[5] The *right* of a government to demand compulsory licensing has been recognized even by the United States, the staunchest defender of intellectual property rights. When it was worried about anthrax, it forced the compulsory licensing of Ciprio. The only issue is under what conditions such compulsory licensing should be allowed. A *Development Round* would have provided answers that more directly address the concerns of the developing countries.

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technology (para. 37), and proposed the establishment of a working group to develop recommendations on how progress might be made in this area. Suggested measures in this area include the establishment, by developed countries, of specific incentives to encourage their firms to transfer technology to developing countries.[6] However, little progress has been made in this area and developing countries have been slow to demand effective measures.

The disparity between price and marginal cost of production can be viewed as a tax used to finance research. Basic principles of equity question the levying of this tax on some of the poorest people in the world. If the international community believes that there is a need to provide greater incentives for research for the development of medicines, then they should do so directly, through funding of research within either the public or private sector, not by levying a tax on the poor. One proposal has it that each country should make a contribution to research whose magnitude would be based on their income, and whose form would be of their own choosing. This contribution, for instance, could be in the form of direct expenditures on research, licensing fees, or implicit taxes paid to holders of patents.

There are other issues which affect developing countries' access to life-saving medicines at affordable prices. One concern is the ease with which generic drugs are able to get established, and how quickly they can enter a market at the expiration of a patent. In some of its bilateral trade agreements, the United States has been working to make it more difficult. If there is to be an intellectual property agreement within a Development Round, it should enshrine principles facilitating the rapid entry of generics.

The problems posed by bio-piracy are equally serious. While, as noted earlier, some of the claims of Western firms may not be sustained when contested in court, it is costly for developing countries to mount the legal challenge. Article 27.1 (the requirement of universal novelty as a condition for patentability) should be strengthened to protect traditional knowledge. This could be done in part by amending the TRIPS Agreement to comply with the United Nations

[6] See 'Non-Paper Submitted to the Council for Trade-Related Aspects of Intellectual Property Rights' by South Africa (WTO Ref: Job(02)/15).

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Convention on Biodiversity (CBD), which was signed by 170 countries in 1993. The CBD recognizes the collective rights of village communities over those of individuals or companies and decrees that a rich country's demand for patent rights should not come at the expense of the conservation of plant diversity. One proposal is that there be a change in the *presumptions* associated with patenting, say, traditional medicines, with the applying party having to show that there has been no previous recognition of its medicinal properties, with the adjudication occurring in an international tribunal, and with the legal expenses of the developing country being divided between the applicant and the developing country in proportion to the ratio of the income per capita.

The argument of Bhagwati and others that intellectual property should not be included in a trade agreement is sufficiently compelling that in fact there should be a complete rollback of the TRIPS Agreement. The issues should be switched to another international forum (namely, WIPO). Whether within the WTO or this alternative forum, a new intellectual property regime needs to be created which balances more carefully the interests, For example, of users in both developed and less developed countries (including researchers, for whom knowledge is one of the most important inputs) and producers of knowledge. This should be reflected in all the provisions, including the tests of novelty,[7] as well as the breadth and scope of the patent. There should be a stronger presumption in the case of narrowly defined patents, and the issue of patents for business practices as well as other recent extensions of patent coverage should be examined *and agreed to* within an international process that is centered in the scientific community, not the trade ministers. There should also be sensitivity to the disadvantageous positions of developing countries in pursuing legal recourse.[8]

[7] Patents could not, for instance, be granted for traditional medicines or goods, or slight variants of those traditional medicines, when the usefulness of those commodities has already been recognized within the developing country.

[8] There is already in motion a backlash among the more technologically advanced of the less developed countries. Brazil is pushing for open source software, and China may adopt its own telecommunications standards which will enable it to avoid paying high royalties for the use of technology based on other standards. An unbalanced intellectual property regime can contribute to overall global inefficiency in the use and production of knowledge.

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Competition Issues

Competition was supposed to be one of the Singapore Issues, but the discussions on competition have devolved more to ensuring fair competitive access of developed countries to developing country markets than into ensuring that markets are really competitive, and that developing countries have fair access to developed country markets.

Ensuring competition

Today, many companies operate across boundaries. Competition policy in one country can affect others. The United States and Europe have increasingly come to recognize this. The United States instituted an action against Japan, claiming that anti-competitive practices in Japan (which the Japanese government had not stopped) had unfairly discriminated against Kodak. Europe took actions against Honeywell on anti-trust grounds, and the American government complained that its standards were too high. The EU is considering taking actions against Microsoft: even though American courts have found Microsoft guilty of violations of anti-trust laws, there is widespread concern that the remedies were insufficient.

The concerns are two-sided: there is a worry that anti-trust laws will be applied in a discriminatory way, to hurt foreign companies, and that anti-trust actions will fail to take account of anti-competitive effects in developing countries. Ideally, there should be harmonization of anti-trust laws *at the highest standard*. Advocates of strong competition worry, however, that harmonization will occur at the standard of the least common denominator, and an international agreement will legitimate such lower standards.

Given these difficulties, initial steps would include insisting on national (non-discriminatory) treatment. This would entail either eliminating dumping duties or revising anti-trust legislation, to apply the same standards to foreign and domestic firms.

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A second reform would require that national authorities look carefully at anti-competitive effects outside their own jurisdiction.[9] Not only should domestic anti-trust regulators look at competitive effects abroad, but foreign consumers should have the right to take actions in foreign courts against corporations that abuse their market power. Cross-border class-action suits should be sanctioned, allowing consumers in multiple jurisdictions to band together to impose, for instance, treble damages, with judgments enforceable in the jurisdiction of the home country.

Thirdly, consumers and governments in all countries should be able to take actions (including class-action suits) against international cartels, including those cartels in which governments are a party or which they have sanctioned. (While some developing countries may lose from such an action, the benefits received by others would almost surely outweigh the losses. For instance, oil producers may be worse off, but oil consumers would be better off.)

Ensuring fair access

With respect to fair access, the concern of developed countries is that restrictions imposed by developing countries (such as affirmative action or preferences for small and medium-sized enterprises) have a differential effect on multinationals. But a Development Round should recognize the legitimate role of such restrictions as social and developmental policy tools; and there should be a high burden of proof imposed on any challenge to such restrictions in order to establish that the restriction has no legitimate social or developmental objective or that those objectives could not be practicably achieved[10] in a significantly less trade-distorting way. At the same time, developed country regulations and practices which have an adverse effect on firms from developing countries (e.g. high licensing fees) should be held to a much higher standard.

[9] Fink, Matoo, and Rathindran (2001) suggest that the GATS should require domestic competition law to consider the effect of collusive agreements on foreign markets. (The relevance of this point, of course, goes well beyond the service sector.)

[10] For example, without significant adverse effects on other groups. The alternative should be 'Pareto-superior'.

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Investor agreement

There are two separate issues that need to be considered: one is the desirability of an investment agreement and the terms which a pro-development agreement should embrace; the other is whether such an agreement should be part of a trade agreement.

On the second issue, we have our doubts, for several reasons. First, the principle of *conservatism* articulated in Chapter 5 says that trade agreements should focus on trade. The Uruguay Round tried to expand the remit by including both intellectual property and investment, lightly clothed under the pretense that only trade-related measures were being considered (thus, we have the TRIPS Agreement, for trade-related intellectual property, and the TRIMS Agreement, For trade-related investment measures). But especially under the TRIPS Agreement, there is little in intellectual property law that is *not* trade-related, in the superficial sense that almost all intellectual property is in some way embodied in tradeable goods.

Secondly, taking a broader perspective, why were not labor and environmental issues also included? After all, environmental and labor regulations also affect trade. The refusal of the US to restrict carbon emissions gives American producers an advantage over European producers in energy-intensive products. Firms that employ workers on terms that do not comply with core labor standards may have a competitive advantage over those who do.

More generally, we have our doubts about the importance to developing countries of an investment agreement, at least along the lines conventionally discussed. The absence of a multilateral agreement has not prevented substantial unilateral liberalization of investment regimes. UNCTAD (2002) reports that between 1991 and 2001, a total of 1,393 changes were made to national investment regulations and more than 90 per cent of these were liberalizing. In 2001, over 200 regulatory were made in 71 countries, only 6 per cent of which were restrictive. In this environment there does not seem to be a compelling rationale to force national governments to adopt a uniform multilateral agreement. Idiosyncratic national regimes are sensitive to national development proprieties and can be tailored to existing institutional arrangements to minimize implementation costs.

Moreover if, as the advocates of these investment measures claim, they are good for developing countries because they will help attract investment, countries will have an incentive to introduce them. Indeed, individually, their incentives to do so may exceed their collective incentives, because those that do adopt these provisions (according to this theory) would be viewed as more attractive sites for investment than those that do not.

In fact, the historical experience provides little evidence that investment treaties generate significantly increased investment flows. Bilateral investment treaties (BITs) surged in the 1990s to more than 2,000 in 2001. There has been significant activity between developing countries, which accounted for 42 per cent of new BITs in 2001 (UNCTAD 2002). BITs often proscribe a range of investment protections that go further than many of the realistic proposals before the WTO. Yet there is not much evidence that the signing of bilateral investment treaties increases the flow of investment. UNCTAD (1998) found no relationship between the level of FDI and the number of BITs signed by host countries. A more comprehensive study by Hallward-Driemeier (2002) looked at the bilateral flows of OECD countries to 31 developing countries over twenty years. After accounting for trends, they found little evidence that BITs increased investment to developing countries. More research needs to be done on the effects of investment treaties on investment volume, but the existing evidence suggests that the benefits of additional treaties may be small.

If there is to be an investment agreement (either within the WTO or not) then the major subject of concern for developing countries is the *race to the bottom*—competition for investment that will erode taxes, environmental standards, or labor conditions. The kinds of investment agreements that have been pushed within the Development Round have focused on quite different issues, of benefit to the developed, not the developing, world.

Developed countries have put considerable efforts into expanding investor rights. As we noted earlier, facilitating the free mobility of capital is far less important for global economic efficiency or for the developing countries themselves than facilitating the movement of labor, particularly that of unskilled workers. Indeed, there is a strong

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case that capital market liberalization may actually lower global economic efficiency.[11]

Moreover, as we have also noted, to the extent that there is validity to the argument that improved investor protections will attract more capital, each country can do that on its own. A developing country does not have to rely on an international agreement. But is it only through international negotiations that free labor mobility can be achieved.[12] There is, accordingly, a far stronger argument for focusing on the 'rights of labor' than on the 'rights of capital'.

Equally troublesome is that arguably, some of the items that are on the agenda would actually have an adverse effect on the well-being of developing countries. The United States put the issue of capital market liberalization on the table, and has in fact insisted on such provisions in bilateral agreements (e.g. with Chile and Singapore). There is mounting evidence that full mobility of short-term speculative capital ('hot money') would actually increase economic instability, in turn increasing poverty. There is little evidence that it enhances economic growth. Indeed, the instability which it generates may well impede investment and growth. The problems of Latin America in recent years, and of East Asia at the end of the last decade, can be directly traced to capital market liberalization.

The problem with many investor protections is that other rights have been compromised in the attempt to enhance the rights of investors. Such investor rights are not costless. But those whose rights are being compromised do not have a seat at the table (see the discussion of institutional reforms in Chapter 9). For instance, Chapter 11 of NAFTA granted investor rights which compromised the rights of government to provide for the general welfare through health, safety, and environmental regulations. Recent decisions suggest that the right of a community to protect itself against toxic wastes may be compromised.

[11] See e.g. Stiglitz (2000).

[12] The distinction is perhaps not quite as strong as it has sometimes been put. Allowing immigration of labor will benefit both the recipient and donor country; but there are likely to be groups that are directly adversely affected in the recipient country and who will be vocal, and often politically effective, in their opposition. On the other hand, investors seldom oppose capital market liberalization, as they focus on the consequences of the lowering of the cost of capital. Of course, entrenched industry may resist the entry of competitors in their line of business.

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There are already mechanisms for the protection of investors against expropriation, both internationally (e.g. MIGA, the Multilateral Investment Guarantee Agency) and on the part of many of the investing countries (e.g. the Overseas Private Investment Corporation, OPIC, in the United States.) A convincing case has not been made that these are inadequate, or, if they are, that they cannot be strengthened. The new investor protections go beyond the concern for expropriation, to the granting of additional rights to investors.

Other services

In our list of priorities, we emphasized earlier the opening up of markets to unskilled labor-intensive services and the movement of unskilled labor (sometimes in support of such services.) Earlier rounds of trade liberalization focused on, for instance, financial services, the benefits of which are arguable. The standard argument is that more efficient financial service intermediation lowers the cost of doing business and thus promotes economic growth. It is pro-development. But a closer look at the record reveals a more mixed picture. In at least some developing countries there are concerns that the purchase of local banks by foreign banks has reduced the flow of credit to small and medium-sized domestic enterprises, and thus impeded economic growth. (There is a long history of such concerns, evidenced in the United States for instance by restrictions on interstate banking, intended to prevent New York and other money-center banks from buying up other banks, thereby impeding regional, and especially rural, development.) Agreements on financial services should be re-examined to ascertain whether there is sufficient protection for developing countries. In particular, the right of developing countries to impose lending requirements to force more lending to underserved populations (analogous to those in the United States in the Community Reinvestment Act) should be explicitly recognized.

Other regulatory interventions

Developing countries worry that new trade agreements will create new barriers to the entry of their goods into developed country markets (impeding their development). They worry about blue tariffs (impediments based on labor standards) and green tariffs (impediments based on environmental standards).

Standard economic theory suggests that, with a couple of exceptions noted below, weak standards do not necessarily improve a country's competitiveness, and therefore the issue of standards should not, in general, be embraced within a trade agreement. In standard theory, in a competitive market, any costly provision (such as improved working conditions) simply gets reflected in the wage paid. Such restrictions affect the *form* of compensation, but not the overall level of compensation. In general, there is no reason for the international community to intrude into the forms of compensation.

There are three basic exceptions to these principles. The first is when the global community is affected (a principle which has already been recognized in the appellate decision in the Shrimp–Turtle case, in the area of environment and endangered species[13]). The international community has a right to take actions to address global public goods and externalities, and among the most important of these is the global environment. Trade policy should recognize, as we have noted earlier, that not forcing firms to pay the true social costs of their environmental damage is a form of subsidy which countries should have the right to take action against. Since developing countries as a whole are more likely to be adversely affected by global warming than, say, the United States,[14] using trade policy to force compliance by the advanced industrial countries with the Kyoto Protocol could well be considered an important part of a pro-development trade agenda.

The second is related to the First—matters of human rights. Clearly, when individuals are *forced* to provide labor services

[13] As noted earlier, The United States requires domestic shrimpers to use protective technology called turtle-excluder devices, which are a kind of trap door by which turtles can escape from shrimp nets. In 1989, Congress essentially banned importation of shrimp caught by foreign shrimpers who do not use turtle-excluder devices.

[14] This is because the developing countries, on average, are already in warmer climates.

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(e.g. when they are prisoners) or *allowed* to use child labor, costs of production may be lowered. As a global community, we do not want to provide economic incentives for such behavior. On the contrary, we want to discourage it. By the same token, when governments have seized land of indigenous peoples, and provide the fruits of that land to others at discounted prices (even if those prices are above its cost of acquisition), then that should be viewed as an unfair subsidy. Countervailing duties against minerals and lumber produced in many countries would be justified by such a provision.

The third, which may also be related to the first, concerns circumstances in which countries can take actions which unfairly affect costs of production. The most notable example of this is restrictions on collective bargaining and the right to take collective action. The bargaining relationship between workers and firms is one-sided, and firms can use their economic power to drive down wages and labor costs, making their products more competitive than they otherwise would be.

In all of these cases, some argue that since these are not matters of trade (though the first clearly constitutes a trade-distorting subsidy) it is preferable to address these problems through other channels. Without prejudging the validity of this argument, the fact of the matter is that there are few other channels. Today, in the absence of alternatives, trade sanctions are one of the few ways that the international community can enforce its will, and though resort to such measures should be carefully circumscribed, the instances enumerated are among those in which sanctions may arguably be justified.[15]

On the other hand, there are a host of other regulatory interventions which may adversely affect foreign businesses, sometimes differentially so, but whose primary motivation is to enhance economic development. We referred to one earlier—restrictions on banks that require that they lend certain minimal amounts to small and medium-sized domestic enterprises and to other under-served communities. It is a legitimate role for government to undertake such actions. The United States, Japan, and many other countries did

[15] It is important that the decision about whether a trade sanction is to be imposed be taken by the international community; otherwise special interests within a country may well try to disguise protectionism behind a cloak of environmentalism or labor rights.

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so in their earlier stages of development—and continue to do so. Because foreign banks may not be in a position to screen such loan applicants as well as domestic banks can, such regulations may have a differentially adverse effect on foreign banks.

By the same token, governments may decide that affirmative action programs are desirable for social purposes, and require that all employers hire workers from certain disadvantaged groups. These restrictions might, conceivably, impose greater costs on foreign firms, who are used to hiring Western-educated individuals, but they reflect a legitimate aspiration of governments to create a more equal society.

Exchange rate manipulation

The United States has recently leveled charges of exchange rate manipulation against China. Global financial markets have exhibited enormous instability. Volatility of exchange rates presents a particular problem for developing countries. Markets are thin, and thus subject to both more volatility and manipulability. Government intervention is, accordingly, often viewed to be desirable. There are a variety of mechanisms by which the government can affect the exchange rate, and there are a variety of government policies which affect the exchange rate indirectly. Bad economic policies (for instance, large deficits) may lead to a devaluation of the currency, whether that is the intent of the policy or not. Given the sizeable adverse consequences of trade deficits, there should be a presumption that countries which have only a moderate trade surplus are not engaged in exchange rate manipulation. The complexities involved suggest that there should be a high threshold test for taking action in the event of an accusation of exchange rate manipulation, and that, at the very least, only multilateral trade surpluses, not bilateral trade deficits, should be presented as evidence of such manipulation.