

TRADE AGREEMENTS AND THE SUPPLY OF PUBLIC GOODS

Report of the Berlin meeting to consider a possible WTO Agreement on the supply of public/social goods

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Introduction

From 28 March 2015 to 29 March 2015, the Heinrich Böll Foundation (HBF) and Knowledge Ecology International Europe (KEI Europe) convened an expert meeting to consider a text for a World Trade Organization (WTO) Agreement for the Supply of Social/Public Goods (SGA). The meeting was held in Berlin, Germany at the campus of the Heinrich Böll Foundation. Participants included eighteen experts from eleven countries. The convening of this expert meeting was made possible through the support of the HBF, an independent German political foundation affiliated with the German Greens/Alliance 90 Party, with a history of supporting work on global public goods and the commons in theory and practice.

The aim of the proposed agreement is to expand the supply of social/public goods by creating a mechanism within the WTO for member governments to make binding commitments to supply (broadly defined) public/social goods having cross-border benefits. The convenors designed the Berlin workshop to serve as a space for experts with backgrounds in international trade, law, the environment, development, public health and open collaborative development models to review the draft articles of the proposed agreement on social goods and provide technical and strategic advice.

Prior to the expert meeting, a draft text was circulated on 26 March 2015, which is attached to this report as Annex A.

The participants considered the challenges and opportunities to create a mechanism increase the global supply of public goods using the architecture of the international trade rules and the dispute settlement mechanism of the WTO.

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Experts at the Berlin meeting discussed the choice of forum, the objectives and purpose of the SGA, possible definitions of qualifying public goods, the mechanisms for voluntarily registering both sui generis and standardized offers to supply public goods, procedures for withdrawing such offers, and the relationship between the schedule of commitments and the WTO dispute settlement understanding.

Background

In recent years, academics and public policy makers have focused their attention on the problem of the chronic under-supply of public goods.

Previous definitions of public goods have been diverse, and, in some cases, have been narrowed to only include goods that are strictly non-excludable and non-rival in consumption. Some broader definitions or examples more closely correspond to the wider set of goods provided or subsidized by governments, including, for example, knowledge generation, measures to address poverty, underdevelopment and the needs of marginalized populations, environmental protection, public health, and international security. In many of these areas, there are cross-border aspects, in that the public goods benefit residents of more than one country.

There is an under-supply of public goods, particularly when the benefits are global. Countries are willing to share some but not all of the costs of the supply of certain public goods. Efforts to collaborate in financing or in otherwise provisioning public goods are undermined by a lack of confidence that parties will follow through on promises.

It is possible to create binding credible commitments to supply social/public goods, but it is typically costly and time consuming to do so, particularly when this requires the creation and maintenance of a new institution, and/or mechanisms such as issuing bonds.

The WTO is an important organization with strong enforcement mechanisms, an existing institutional governance structure, and 160 members and 23 governments seeking membership.

Proposal

The proposal is to create a new agreement in the WTO on the supply of public goods. The agreement would expand the supply of public goods that have global or cross-border benefits. The proposed agreement would use the unique powers of the WTO to make voluntary offers to supply public goods enforceable and binding, in a manner analogous to other agreements in the WTO system, such as the General Agreement on Trade in Services (GATS). This would facilitate agreements between countries that are willing to share the costs of supplying public goods.

The feature that makes the WTO unique and important is the power to enforce its agreements. The WTO Dispute Settlement Understanding (DSU) allows members to impose diverse trade sanctions against other WTO members when rules or commitments are broken. The sanctions may take the form of tariffs on selective or targeted goods, and also other measures, including retaliation against intellectual property rights.

Currently, the architecture of the WTO is designed to facilitate the trade and provision of private goods, such as by promoting the private enclosure of knowledge goods through norms enforced through by the WTO TRIPS Agreement, or by lowering barriers to trade in private goods.

The WTO GATS is designed to privatize and liberalize trade in service, featuring a system of binding “offers.” The offers are not uniform, and depend upon a willingness to liberalize in a specific sector, and upon the interest of other countries to do so. Liberalization commitments are traded in an environment where “asks” and “offers” cover a wide range to topics, including changes in tariffs or agricultural subsidies, or requests for support of new intellectual property norms. What is key to the services agreement is its ability to accommodate a diverse set of offers, in a multilateral negotiation, where consensus on uniform norms is unlikely.

The GATS can serve as a model for creating binding commitments to supply a diverse set of public goods.

The benefits of a WTO agreement on public goods would be several. It could replace the need to set up a separate treaty or agreement, using the WTO’s existing governance structure and secretariat. On the other hand, a WTO schedule on the supply of public goods could complement separate treaties or agreements -- by lending the WTO’s enforcement powers to third party agreements, on public goods. By introducing public goods into the WTO environment — the culture of the WTO would be profoundly changed. “Asks” and “offers” in the WTO negotiations would no longer be exclusively about the private goods market, or about the privatization and enclosure of knowledge itself. There would be a shift to consider the competing benefits of greater openness, and a larger global commons. Knowledge that was produced to be “free” would have a new value as a trading chip in the WTO environment.

Setting out the Vision

In Berlin, KEI, KEI Europe and other proponents of the WTO SGA set out its vision - a proposal to expand the supply of social/public goods within the architecture of the WTO bound by trade rules and commitments enforceable by the WTO’s dispute settlement mechanism.

In describing the motivation for the proposal, the proponents noted that negotiations at the World Health Organization (WHO) on an R&D treaty/agreement and some other UN discussions on social investments and public goods have stalled. In the case of the WHO R&D treaty/agreement discussions, the resistance was in part because some countries were uncomfortable with committing to obligations to fund biomedical R&D that did not match their own specific priorities or preferences regarding the management of funds, but also because of a lack of confidence that other governments would follow through on funding commitments. There was also resistance among some countries to create new institutions that would require additional investments in time, money and diplomatic skills to manage and monitor.

Frustrated by this inertia, but also open to other models for stimulating collaboration on the supply of social/public goods, the proponents considered an innovative model to permit governments to make binding and enforceable commitments to supply social/public goods, among coalitions of like minded countries, around specific initiatives where there are shared interests in the projects or standards.

This new proposal was modeled after agreements in the WTO that providing for voluntary but binding offers. Mentioned specifically was the WTO General Agreement on Trade in Services (GATS), an agreement designed to progressively liberalize the services sector predicated upon a system of voluntary but binding commitments.

In discussions with a former lead USTR negotiator on services and intellectual property, Joe Papovich,, the question was posed to USTR, “why would a WTO member agree to make binding

commitments on services, where they can be subject to dispute resolution and fines, when a country can undertake the policies voluntary, without the liability of a WTO commitment?" The answer provided by USTR was, "you might think no one would make offers in the GATS, but they do. This is because, every country that agrees to meet a commitment wants something else from the WTO." The commitments one can make in the GATS become one of the asks and offers that can be traded for other things in the WTO negotiations, which involve several different agreements and negotiations.

In looking at the GATS model, a few things seemed highly relevant. First, countries could make commitments to fund or embrace standards that matched their own priorities. For example, countries interested in funding R&D for Chagas disease, or new diagnostic tools for fever, could move forward in collaboration with other coalitions of the willing and interested. Second, once a schedule was created, there was no need to create a new governance structure, to enforce the commitment. And, the WTO has the stronger enforcement mechanisms than any multilateral institution. One journalist described the proposal as a "hack" of the WTO.

In elaborating on the vision for the SGA, KEI and other proponents provided the example of the uncertainty of funding commitments to the Global Fund to Fight HIV, Tuberculosis and Malaria (Global Fund). During the course of its establishment, some donor countries have not met their commitments. The challenge for investments in public goods such as the Global Fund would be to create an enabling environment which provided a comfort level that one's peers would meet their funding commitments. Consequently, the architecture of the WTO GATS, a structure of binding heterogeneous offers to supply, provided an attractive model for establishing a system for governments to make binding offers and commitments for the supply of diverse social/public goods. In introducing the proposal experts in Berlin, KEI recounted positive conversations on this subject with several countries with diverse interests in WTO, and noted that the proposal can also be seen as filling a crucial gap in the social/public goods space, and contrasted this proposal to the expanded norms for intellectual property and investor state dispute settlement (ISDS).

Doing anything new at the WTO is a challenge, in part due to the practice of requiring consensus among all members. A diverse group of experts and stakeholders were invited to the Berlin meeting, both to provide commentary on the proposal, and to suggest revisions, but also to provide a sense of the feasibility of the project, in the WTO.

There are several reasons to be optimistic. First, all countries stand to benefit from the expanded supply of public goods. Second, the commitments will be voluntary, in the areas of interest by the member making the commitment. Because the agreement will accommodate small coalitions of parties sharing mutual interest in specific public goods projects, it will avoid the challenge of persuading very large numbers of parties to collaborate on specific projects. For governments interested in collaborating on funding or otherwise expanding public goods, the agreement would have the benefit of eliminating the need to create and maintain new institutions, which can be costly in terms of both financial resources and the capacity to monitor and manage institutions.

The proposal is, on the one hand, very narrow, building upon the capacities and strengths of an existing institution for voluntary collaborations. But by simply lowering the costs and raising the confidence in collective action, the proposal could offer a transformative change in the supply of a broad range of public goods, thereby improving social outcomes and bringing more balance to the social production of goods that benefit the general public and promote fairness and development.

Initial Impressions

The impressions expressed in the initial tour-de-table revealed deep interest in establishing an international agreement to expand the supply of global social/public goods.

A point first broached in the initial tour-de-table was the nature of the instrument within the WTO environment - framed either as a plurilateral agreement or a multilateral agreement.

A key question that arose in the initial discussions was: "is WTO the right forum?"

One expert raised the following points:

- 1) *Can this initiative be incorporated into the WTO framework/mandate? Is it feasible?*
- 2) *If the answer is yes, is there a viability for this right now? Doha round is in crisis. Developing countries don't want to add new issues (competition, investment). Developing countries may not have appetite for increasing scope of the new round.*
- 3) *WTO offers enforcement mechanism and trade retaliation. We have other mechanisms for treaty compliance*

One view expressed noted that the United Nations Educational, Scientific and Cultural Organization (UNESCO) has a narrow mandate to work on knowledge and highlighted the interaction between public goods and the right to development and ensuring developmental aspirations for the local production of public goods.

Another expert countered that UNESCO had no "enforcement teeth" and the SGA provided a momentous opportunity to "turn around the WTO" to concretely address the free rider problem in the provision of public goods in a manner analogous to the establishment of the World Intellectual Property Organization's (WIPO) Development Agenda.

One expert noted,

"What would we like to have come out of this meeting? There needs to be a bridge between conceptual discussion and concrete proposals. What incentives do governments need for the provision of public goods? Perhaps this meeting can flesh out priority global public goods?"

Many experts agreed that creating the SGA within the aegis of the WTO would create an enabling environment to address the free-rider issue and generate "peer pressure" for the provision of global public goods.

One expert noted that the SGA provided a tantalizing opportunity to bring legitimacy back to the WTO.

The convenors of the Berlin workshop reminded the expert group that the purpose of the meeting was to consider a "WTO SGA", not a "UNESCO SGA" or a "UN SGA", and to see if such a WTO agreement would have utility in the social/public goods space, as a complement and not a substitute to other initiatives.

The WTO is a powerful institution for promoting norms in the trade in private goods and services; the SGA endeavors to use this power of WTO enforcement for harnessing good. The method of

work proposed for the Berlin expert group was to review the draft articles of the SGA and provide technical and strategic advice on concrete, actionable outcomes.

Scope (Article 1.1) and Definitions (Article 1.2)

The Berlin expert group held a rich discussion on the scope (Article 1.1) and Definitions (Article 1.2) of the SGA. The treaty proponents noted that their original approach focused on global public goods and such themes as climate change, public health, knowledge generation, international security and measures to address poverty, underdevelopment and the needs of marginalized populations.

The text of the 25 March 2015 version of the SGA provided the following insight into the possible limitations of the term “public good” and proposed a broader term of art, “social good”:

One of the more important areas of the text concern both the language and the legal definitions which set boundaries on which goods are covered in the agreement. The term global public goods is often confusing to people, in part because of an influential definition offered by the economist Paul Samuelson in the mid 1950s as an extreme case where government interventions were necessary. Samuelson created an “extreme” and “polar” definition of “pure” public goods, which had as their most important characteristics that they were both non-rival in consumption and it was impossible to exclude access to the good. In defending his definition, Samuelson said:

“Doctrinal history shows that theoretical insight often comes from considering strong or extreme cases. The grand Walrasian model of competitive general equilibrium is one such extreme polar case. We can formulate it so stringently as to leave no economic role for government. What strong polar case shall the student of public expenditure set alongside this pure private economy?

. . . A public consumption good, like an outdoor circus or national defense, which is provided for each person to enjoy or not, according to his tastes. I assume the public good can be varied in total quantity, and write X_2 for its magnitude. It differs from a private consumption good in that each man's consumption of it, X_1 and X_2 respectively, is related to the total X , by a condition of equality rather than of summation. Thus, by definition, $X_1 = X$, and $X_2 = X$.

Obviously, I am introducing a strong polar case. We could easily lighten the stringency of our assumptions. But on reflection, I think most economists will see that this is a natural antipodal case to the admittedly extreme polar case of traditional individualistic general equilibrium. The careful empiricist will recognize that many - though not all -of the realistic cases of government activity can be fruitfully analyzed as some kind of a blend of these two extreme polar cases.”

Paul A. Samuelson, "Diagrammatic Exposition of a Theory of Public Expenditure," The Review of Economics and Statistics, Vol. 37, No. 4. (Nov., 1955), pp. 350-356.

It is ironic that Samuelson's efforts to create an extreme and very limited definition of public goods has had a significant and often unhelpful influence on many policy makers seeking to consider frameworks for the supply of public goods, since in practice, only a limited subset of goods fit the narrow definition offered by Samuelson in 1955 (Article 1.2, 25 March 2015 draft of SGA).

The proposed definitions for social/public goods are found in Article 1.2 of the SGA (see below).

1. *For the purposes of this Agreement, public/social goods are defined as:*

- a. *goods and services that are directly supplied, financed, subsidized, mandated or the supply is otherwise induced for the benefit of the public, and is limited to*
- b. *goods (or services) for which consumption is not decided by the individual consumer but by the society to address a social purpose or public interest.*
- c. *The definition of public/social goods shall be interpreted broadly to be inclusive of goods and services provided on a non-commercial basis by governments and intergovernmental organizations.*
- d. *The definition of public/social goods includes but is not limited to goods and services that are non-excludable and non-rivalrous in consumption.*
- e. *The definition of public/social goods shall include goods and services relating to the production of and access to knowledge, the provision of security, humanitarian services, public health programs, the protection and enhancement of the environment, programs to promote development and alleviate poverty, and other purposes.*
- f. *The definition of a public/social good shall include goods and services for which it is rational, from the perspective of a group of nations collectively, to produce for universal consumption, or to expand production and/or consumption due to positive externalities or to achieve a social purpose.*

2. *For the purposes of this Agreement, international public/social goods are defined as public/social goods that are directly or indirectly supplied by one Member for the benefit of the public in the territory of any other Member.*

3. *For the purposes of this Agreement:*

(a) *"measures by Members" means measures taken by:*

(i) *central, regional or local governments and authorities; and*

(ii) *non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.*

Experts discussed the merits and challenges of using a broad versus narrow definition of public goods. Many experts preferred using a broader definition of public goods while acknowledge the need for some precision to prevent abuse. One expert posited that a potential downside to an overly broad definition of public goods was that voluntary commitments would employed as tools of foreign policy.

Another drafter pointed out the benefits of a broad definition of "public goods". For example, HIV treatments are rival in consumption, but under a broad definition of social goods the provision of ARVs could be part of WTO schedule on public goods. In addition, certain governments consider the containment of HIV as a matter of national security.

Some experts expressed concern that “international security” could fall under the rubric of “public goods” leading to blurring of lines between humanitarian assistance on the one hand and “international security” as a tool for the expansion of military intervention into the realm of climate change and public health, repurposed as “embedded aid.” Others expressed support for the inclusion of “international security” under the definition of public goods, providing the examples of UN peacekeeping missions and the protection of international sea lanes. The WTO, recognizing that military matters fall under the competence of its members’ sovereignty, provides security exceptions in its agreement.

On the question of subsidies referenced in Article 1.2.1(a)², it was noted that the SGA needed to be in conformity with the WTO Agreement on Subsidies and Countervailing Measures (SCM).

In the discussions of the scope and definitions of the SGA, an emerging consensus appeared on the need for a thematic approach, clustering social/public goods around such areas as public health, climate change and the production of knowledge, to name a few. Many experts called for a further refining of Article 1.2.1, in particular Article 1.2.1(f)³ which some claimed looked more at home in a preamble or objectives and principles clause. The experts called the drafting of an objectives and principles provision to further strengthen the SGA.

Relationship to other Agreements (Article 2)

Article 2.1 of the SGA states, “This agreement is without prejudice to rights and obligations under other WTO agreements”; thus the proposed Agreement is currently subordinate to all other WTO Agreements. In discussions of Article 2, the question of whether the SGA is a “covered agreement” came up since covered agreements are subject to the WTO dispute settlement understanding (DSU). For instance, in the case of the recently concluded Trade Facilitation Agreement (TFA), on 27 November 2014, members of the WTO adopted a Protocol of Amendment to insert the TFA as a “covered agreement” under Annex 1A of the WTO Agreement.⁴

With respect to covered agreements, Article 1.1⁵ of the WTO DSU states:

² For the purposes of this Agreement, public/social goods are defined as:

a. goods and services that are directly supplied, financed, subsidized, mandated or the supply is otherwise induced for the benefit of the public, and is limited to

³ For the purposes of this Agreement, public/social goods are defined as:

f. The definition of a public/social good shall include goods and services for which it is rational, from the perspective of a group of nations collectively, to produce for universal consumption, or to expand production and/or consumption due to positive externalities or to achieve a social purpose.

⁴ WT/L/940, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, Decision of 27 November 2014.

⁵ **Interpretation and Application of Article 1**

1. Article 1.1: “covered agreements”

(a) General

1. In *Brazil — Desiccated Coconut*, the Appellate Body defined the term “covered agreements” as follows:

“The ‘covered agreements’ include the *WTO Agreement*, the Agreements in Annexes 1 and 2, as well as any Plurilateral Trade Agreement in Annex 4 where its Committee of signatories has taken a decision to apply the *DSU*. In a dispute brought to the DSB, a panel may deal with all the relevant

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the “covered agreements”). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the “WTO Agreement”) and of this Understanding taken in isolation or in combination with any other covered agreement.

Commitments to Supply Public/Social Goods (Article 3)

In discussions of the SGA’s provisions on commitments to Supply Public/Social Goods (Article 3), some experts called for the need to review and consider the four modes of supply contained in the GATS. The four modes of supply⁶ include:

Cross-border supply is defined to cover services flows from the territory of one Member into the territory of another Member (e.g. banking or architectural services transmitted via telecommunications or mail);

Consumption abroad refers to situations where a service consumer (e.g. tourist or patient) moves into another Member’s territory to obtain a service;

Commercial presence implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises, in another Member’s territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains); and

Presence of natural persons consists of persons of one Member entering the territory of another Member to supply a service (e.g. accountants, doctors or teachers). The Annex on Movement of Natural Persons specifies, however, that Members remain free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis.

In discussions of a schedule for commitments to supplying public goods, one expert highlighted the dynamic nature of the WTO, as an Organization. For example, the recently concluded Trade Facilitation Agreement (TFA), was something never anticipated by the founders of the GATT. Never before has a WTO agreement linked the obligation to comply with the acquisition to do so; thus, special and differential treatment was mainstreamed into the TFA. The expert encouraged the Berlin group “to think outside the box” in designing the SGA and cautioned against being wedded too much to the architecture of the GATS. Another point posed was the need for the SGA to behave like a WTO agreement; for example, how would national treatment and most-favored nation (MFN) treatment apply?

provisions of the covered agreements cited by the parties to the dispute in one proceeding.”, https://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_01_e.htm#article1

⁶ https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm

Under Article 3.1 of the SGA, one expert proposed that “may” be replaced by “shall” so that the first sentence would read,

*“Each Member **shall** set out in a schedule the specific commitments it undertakes to supply social goods.”* [Emphasis added]

The expert reasoned that as Article 3.2 of the SGA addressed the “Modification of Schedules”, Article 3.1 should invoke a horizontal commitment as set out in the GATS asserting that most favored nation (MFN treatment should be a horizontal obligation).

One trade specialist proposed that Article 3.1 of the SGA be redrafted to contain the principle of special and differential treatment so that developed countries’ obligations would fall under “shall” and developing countries would fall under “may”.

One expert expressed the view that the SGA should have a core set of minimum obligations to supply public goods; a rich discussion followed on core obligations versus voluntary obligations. The expert group emphasized the heterogenous nature of the commitments to supply public goods. The architect of the SGA noted that it was designed to be “seductive and influential” by having the lowest entry point for making heterogenous offers to supply public goods as countries have different priorities. The need for exceptions - consistent with the General Exceptions (Article XX) in the WTO General Agreement on Tariffs and Trade (GATT) and Security Exceptions (Article XXI) was also pointed out.

On the question of creating hooks for WTO members to make voluntary but binding commitments to supply public goods, the question was posed, “what mechanism or schedule would incentivize members to make offers?” One expert turned to the GATS for inspiration noting that Article XIX of the GATS provided language to incentivize Members to commit to further rounds of liberalization. The expert proposed that language from Article XIX of GATS could serve as a model for the SGA. By including this language on progressive rounds, the SGA would encourage WTO members to make further commitments to supply public goods through a series of progressive rounds to modify their schedules. Creating these progressive rounds would in essence would engender the enabling environment (aptly described by one expert as a “beauty contest”) to induce peer pressure to increase the supply of global public goods through the further offers and modifications of schedules-analogous to pledging commitments in funding rounds for such institutions as the Global Fund or GAVI.

Article XIX of GATS states:

Part IV: Progressive Liberalization

Article XIX: Negotiation of Specific Commitments [back to top](#)

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

2. *The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.*

3. *For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV.*

4. *The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.*

In discussions of Article 3.2 of the SGA (Modification of Schedules), the relationship between special and differential treatment, on the one hand, and the modification of commitments was further explored.

Article 3.2 of the SGA states,

(a) At the request of any Member the benefits of which under this Agreement may be affected (referred to as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable than that provided for in Schedules of specific commitments prior to such negotiations.

(b) Compensatory adjustments shall be made on a most-favoured-nation basis.

The question was posed:

If there was a differential standard, how would this apply to the modification of commitments?

One expert proposed that Article 3.2(b) not apply to developing countries or least-developed countries (LDCs) in order that the Sword of Damocles (compensatory adjustments) would not inhibit developing countries from making binding commitments.

Several experts pointed out that in order to have an effective Agreement that would enhance the supply of global public goods while addressing free-riding, the SGA would need to contain a framework linked to sanctions - in this case - the compensatory adjustments framed in Article 3.2.

As noted by the chief drafter of the SGA,

If you want to build a structure of public goods without the teeth of the WTO dispute settlement understanding, you will have a weak environment for public goods. You will have a wimpy, weak system--the system you have now.

Article 3.3 of the SGA deals with Standardized Commitments to provide offers to supply public goods. Article 3.3 states:

Article 3:3 Standardized Commitments

1. *Any Member may elect to propose a standardized commitment. A standardized commitment is one for which an agreement on certain terms and conditions of the commitment is reached beforehand, in consultation with other members.*
2. *A standardized commitment is otherwise treated the same as any other commitment.*
3. *The Council for Social Goods shall establish procedures for consultations and revisions of standardized commitments.*

In discussions of the need for standardized commitments, one expert provided the example of biological databases being historically funded by the US National Institutes of Health (NIH) and semi-European institutions; in a case involving a joint Swiss-US database, the Swiss source of funding dried up and the United States had to step in in order to keep the biological database in the public domain. The expert noted,

"I've seen commitments to funding (in databases), But without legal mechanisms and an overarching framework such as this, we're in a real chaotic state."

Experts noted that standardized offers could provide a level of comfort for policymakers intent on securing and maintaining the funding of open databases; without this, funding of open databases would remain unstable, with the clear and present danger of open data disappearing from the public domain.

As governments are increasingly challenged by the proliferation of multilateral institutions they fund and monitor, standardized offers, predicated upon a template for making commitments could lower transaction costs, both financial and political. Standardized commitments made under a schedule at the WTO would set norms. A few experts noted that a proposed WHO R&D treaty could be placed within a schedule of commitments to fund biomedical R&D - within Article 3.3 of the SGA. One expert noted that while the WTO TRIPS Agreement provides one paradigm for how R&D is financed - through the enclosure of knowledge- the SGA provides an open model of how governments can take collective action to sustainably finance the production of public goods.

Institutional Provisions, Council for Social Goods, Consultation, Dispute Settlement and Enforcement and Relationship with Other International Organizations (Article 4)

During discussions of the Council for Social Goods (Article 4.1), the proposed WTO body envisioned with the role of administering the SGA, one idea that received favor was that the Council for Social Goods could play a monitoring role, including the verification of schedules of

commitments to supply social goods. Another proposal considered was for the Council for Social Goods to serve as a forum for parties to notify of their intentions to modify their schedule of commitments. Thus, prior to consultation (Article 4.2) and the dispute settlement and enforcement stage (Article 4.3), disaffected Members could first air their complaints at the Council of Social Goods. WTO Members would still have recourse to the DSU if their complaints were not resolved at the Council State. One expert highlighted the importance of the council process in resolving disputes before the DSU stage; the expert cited a WTO study published by its Agriculture division which noted that one-third of disputes are avoided or resolved at the committee or council level.

Article 4.1.4 proved to be an area of divergence among the Berlin group. Article 4.1.4 states,

The Council for Social Goods shall provide accreditation to non-governmental organizations and members of the public wishing to attend and observe its meetings.

A few experts expressed reservations about this element of “innovation” to the WTO system, permitting non-governmental organizations (NGOs) and members of the public to attend and observe the proceedings of a WTO body; currently, non-governmental organizations and members of the public cannot observe WTO proceedings. Other experts voiced strong support for the participation of NGOs and members of the public in proceedings of the proposed WTO Council for Social Goods.

In discussions on dispute settlement, many trade experts cautioned against transposing the principle of non-violation and situation complaints into an agreement designed to increase the supply of social and public goods. One expert noted that while non-violation and situation complaints made sense in the context of GATT, in the context of disputes over patents, copyright, trademarks, geographical indications, industrial designs and other forms of intellectual property, non-violation and situation complaints remained anathema to the membership of the TRIPS Council, with the exception of Switzerland and the United States.

Article 4.3.3 of the SGA, modeled after Article XXIII:3 of the GATS, states:

If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part 3 of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article 3:2, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

One commentator noted,

DSU Article 22 has, as a “general principle,” the notion that concessions should be suspended in the same sector or agreement as the offending measure. In the event of a dispute over commitments under a WTO agreement on social goods, this could have the perverse consequence of giving rise to a debate over how to try to exclude a country from certain global public goods. It may be wiser to build on 22:3(c) and say that the very nature of the social goods agreement makes it neither “practicable [nor] effective to

suspend concessions” under it, and so that all retaliatory measures would have to come under other agreements, i.e., be cross-retaliation. Break the enclosures!

Furthermore, some trade commentators advised that the language contained in Article 4 of the SGA be consistent with the provisions contained in Articles 22 and 23 of the WTO Dispute Settlement Understanding (DSU). As currently drafted in the SGA, the DSU only applied to the consultation stage; it was proposed that Article 4 be redrafted so that the DSU would apply to a whole range of mechanisms including the consultation stage, the Dispute Settlement Body (DSB) and the Appellate Body. Finally, participants stressed the importance of framing the SGA as a “covered agreement”, subject to the DSU.

Transparency (Article 5)

During discussions of Article 5, a placeholder provision on transparency, it was noted that “transparency is one pillar of the GATT system”. Participants stressed the importance of ensuring the transparency of offers and commitments to supply social and goods under the SGA.

Another transparency proposal discussed was the possibility of the SGA containing a reporting mechanism or a system analogous to the WTO’s Trade Policy Review whereby members would be obliged to provide regular reports on their commitments to supply social and public goods.

In terms of the SGA’s Council for Social Goods, experts noted that WHO, WIPO and the NIH webcast proceedings of their formal meetings; many experts emphasized that it was high time the WTO get on board.

Optional Protocols and Sectoral Annexes

In discussions of optional protocols and sectoral annexes, experts pointed out that the simplicity of Article XXIX of the GATS could serve as a model for the SGA. Article XXIX of the GATS states:

The Annexes to this Agreement are an integral part of this Agreement.

One expert noted that the sectoral annexes⁷ contained in the GATS (for example on Air Transport Services, Financial Services, Maritime Transport Services or Telecommunications), were “part and parcel of the GATS” which provided tailor-made hooks to induce Members to liberalize their services. One expert cautioned that technological advancement often outpaces trade negotiations and warned of the possibility of unintended obsolescence.

The proposed optional protocol on access to government funded research was designed as a broad research exemption which would provide a royalty-free license for the WHO to practice the invention. The drafters of the SGA intentionally crafted the protocol on access to government funded research as an optional protocol so as not to unduly hinder a broader buy-in to the SGA. A closing thought that emerged from discussions of sectoral annexes and optionals was the need to identify a wish list of sectors (optional and mandatory) that could form part of the annex of the SGA, modeled after Article XXIX of the GATS.

Objectives and Principles

⁷ https://www.wto.org/english/docs_e/legal_e/26-gats_02_e.htm#articleXXIX

After the Berlin group conducted a walkthrough of the text of the SGA, a rich discussion of the principles and objectives of the Agreement followed. In contrast to human rights mechanisms, tasked with safeguarding the right to health and the right to development, the SGA is designed to operate within the architecture of the WTO, enforced by the teeth of the dispute settlement understanding. In terms of drawing on multilateral agreements, declarations and other texts, the experts noted the rich corpus of materials to draw upon. One expert cited the preamble of the Marrakesh Agreement⁸ Establishing the World Trade Organization:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

One authority pointed out that it was important to demonstrate the added value of the Agreement which would “enable states to cooperate in meaningful and effect ways, to engender the production and generation of social and public goods (including knowledge) in a way that promotes human existence.”

One expert proposed the following objectives:

- *Increase the supply of public goods.*
- *Expand access to knowledge*
- *Address importance of having more equitable world.*
- *Enhance wellbeing*
- *Reduce conflict*
- *Protect marginalized populations.*
- *Protection of the environment*
- *Increase the production of innovations to meet health needs.*
- *Enhance educational opportunities*
- *Promotion of global goods for arts and culture (including the preservation of archives)*

Experts highlighted the importance of ensuring policy coherence and convergence between the principles and objectives of the WTO SGA and the UN's post-2015 Sustainable Development Goals (SDGs), recognizing that countries are at different stages of development.

During discussions on principles and objectives, the following objectives found favor with the Berlin Group:

- *To create a framework for governments to progressively increase the creation of public goods and access to knowledge.*
- *Facilitate global access to socially useful educational, cultural, scientific and technological knowledge and information with the aim of favouring objectives of social equity and environmental sustainability.*

⁸ https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm

- *Increase the supply of goods and services for the mitigation and adaptation of climate change and other environmental problems.*
- *Create new international trade instruments in the area of technology and knowledge transfer to complement Sustainable Development Goals.*

Some experts emphasized the importance of tailoring the principles and objectives of the SGA with the mandate of the WTO, specifically relating the Agreement to trade. One expert noted that just as the TRIPS Agreement changed the mission and nature of the WTO, the SGA, if adopted would transform the WTO into an Organization that increase the supply of social and public goods.

One expert posed the question,

For me it's not about privatizing public good, how do we "hack WTO" to engender the supply and provision of global public goods. Slip under the radar. Some of us believe that there is not a more robust mechanism than the WTO. That's a question we need to resolve, if there's another mechanism, what is it?

One expert cautioned that certain Members would perceive the Agreement as a "slippery slope" to introducing "non-trade issues" such as the environment or labor standards which are viewed by certain developing countries as a "tool for protectionism".

Another expert countered,

This framework is about removing barriers to the cross-border sharing of global public goods.

The need for linking the sectoral issues with the existing work and mandates of other intergovernmental organizations (such as the WHO's Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property) was noted. Experts contended that norm-setting on public goods priorities should not be made at WTO; rather, the architecture of the WTO would be employed as a recourse for dispute settlement, in addition for making offers to supply social and public goods.

Placing the SGA within the WTO: Options

In discussions of the modalities for establishing the WTO SGA as a covered agreement, subject to the WTO DSU, an authority on trade pointed out that an amendment under Article X⁹ of the Marrakesh Agreement Establishing the World Trade Organization would be required. The Annex 1A agreements cover goods, Annex 1B is the GATS and Annex 1C is the TRIPS Agreement. In the case of the recently concluded WTO Trade Facilitation Agreement (TFA), a Ministerial

⁹ https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleX

Decision (adopted in Bali, November 2013) “mandated the adoption of a Protocol of Amendment (Protocol) to insert the Trade Facilitation Agreement into Annex 1A of the WTO Agreement”¹⁰ as per Article X:3 of the Marrakesh Agreement. As the proposed WTO Social Goods Agreement (SGA) is sui generis, one option would be to insert it as an Annex 1D agreement (currently no such annex exists); however, experts noted that this would need acceptance by two-thirds of the WTO membership. An alternative route to pursue would be for the SGA to be negotiated as a plurilateral agreement subject to Article X:9 and X:10 of the Marrakesh Agreement,

9. *The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4.*

10. *Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.*

Definitions

In discussions of the definitions of social and public goods, one expert suggested that Article 1 be amended by deleting references to goods and services to read as follows:

1. *For the purposes of this Agreement, public/social goods are defined as:*
 - a. *actions that are directly supplied, financed, subsidized, mandated or the supply is otherwise induced for the benefit of the public, and is limited to*
 - b. *actions for which consumption is not decided by the individual consumer but by the society to address a social purpose or public interest.*

It was noted that the term “global public goods”, while attractive, is limited by the economics literature. As noted in Article 1 of the SGA,

Samuelson created an “extreme” and “polar” definition of “pure” public goods [such as circuses or light], which had as their most important characteristics that they were both non-rival in consumption and it was impossible to exclude access to the good...It is ironic that Samuelson’s efforts to create an extreme and very limited definition of public goods has had a significant and often unhelpful influence on many policy makers seeking to consider frameworks for the supply of public goods, since in practice, only a limited subset of goods fit the narrow definition offered by Samuelson in 1995 (Article 1, SGA).

The Berlin group agreed that the definition of social goods needed to be unencumbered by the traditional economics definition of “public goods”. One expert proposed the following definition for social goods:

Goods that are socially desirable, undersupplied by problems of international cooperation that promote the realization of human rights, well-being and the Sustainable Development Goals.

Some experts asserted that the sectoral annexes should focus on such themes as knowledge, biodiversity, health, environment and security while one expert cautioned,

¹⁰ https://www.wto.org/english/tratop_e/tradfa_e/tradfa_agreement_e.htm

The existing WTO system is based on the industrial age. New innovations need to be captured in this agreement. Beyond pragmatism, we need to careful not to be outdated.

Next Steps

In assessing next steps for taking the WTO SGA forward, the convenors of the Berlin group agreed to produce a meeting report which would also provide participants the possibility of providing supplementary or dissenting comments.

In terms of producing a new draft text of the SGA, Frieder Roessler, former Executive Director of the Advisory Centre on WTO Law (ACWL) and head of the GATT's legal division, was proposed as a possible drafter.

In terms of the upcoming Nairobi WTO Ministerial in December 2015, one expert noted that various possibilities existed to move the SGA forward including the requesting of a Decision from the Ministerial Conference, the creation of a working group/committee to explore the feasibility of the SGA or the convening of a side event.

One expert noted that the SGA needed a narrative and an explanatory memorandum with the legal text included as an annex, and called for the need for fleshing out the schedule of offers and modes of delivery. The expert suggested creating a working group of Geneva-based delegates to take the idea forth, as was done in the creation of the ACWL or the preparatory work that lead to the passage of the Doha Declaration on the TRIPS Agreement and Public Health.

Given the upsurge of meetings in the international agenda devoted to such themes as development finance (Addis Ababa), the SDGs (New York) and climate change (Paris), the Berlin group agreed that these fora be used as opportunities to develop broad support for the SGA, in addition to engaging with more stakeholders from governments, civil society and foundations.

The convenors noted that in the follow-up to the Berlin meeting, they would reach out to environmental and humanitarian groups. Thanks to the leadership shown by HBF in convening the first expert group on the SGA, the Rockefeller Foundation and the Ford Foundation had expressed interest in hosting future expert consultations.

In closing, one expert noted,

Band-aids don't work. You need to provide alternatives. You need to create a positive agenda akin to the WIPO Development Agenda, the WIPO Marrakesh Treaty for the Blind, the WHO Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property, UNITAID and the Medicines Patent Pool. Are there other agencies we should go after?

Annex A

DRAFT Proposal

WTO Social Goods Agreement (Core text) (SGA)

Version March 25, 2015

Examples of possible names

Some of the choices include Public Good or Social Good,

and Global or International

Also, is this a “General Agreement,” an “Agreement” or something else.

1. International public/social goods (IPG, ISG, IP & SG)
2. International Social Goods Agreement (ISGA)
3. Trade-Related Aspects of public/social goods
4. General Agreement on public/social goods
5. Agreement on the International Supply of Social Goods
6. Agreement on the Supply of Social Goods (SoSG)
7. Social Goods Agreement (SGA)

I am lately favoring the Social Goods Agreement.

The following is a basic set of features for an agreement.

Table of Contents

Preamble

PART 1, Scope and Definition

Article 1:1 Scope

Article 1:2 Definitions

PART 2 - Relationship to other Agreements

Article 2:1 Without prejudice to other WTO Agreements

PART 3 - Commitments to Supply Public/Social Goods

Article 3:1 Commitments to Supply Social Goods

Article 3:2 Modification of Schedules

Article 3:3 Standardized Commitments

PART 4. Institutional Provisions

Article 4:1 Council for Social Goods

Article 4:2 Consultation

Article 4:3 Dispute Settlement and Enforcement

Article 4:4 Relationship with Other International Organizations

Optional Protocols

Access to government funded scientific research

Preamble

Members,

Recognizing the importance of public/social goods for the growth and development of the world economy;

Wishing to establish a multilateral framework of principles and rules for the supply of public/social goods with a view to the expansion under conditions of transparency and progressive inclusiveness as a means of promoting development and economic growth of all members;

Recognizing the challenges of financing the supply of public/social goods, and the undersupply of public/social goods that provide benefits across cross borders;

Desiring to facilitate the increasing participation of countries in the supply of public/social goods and the expansion of access to such goods,

Hereby agree as follows:

PART 1, Scope and Definition

Article 1:1 Scope

1. This Agreement applies to measures by Members affecting the supply of international public/social goods.

Article 1:2 Definitions

Note:

One of the more important areas of the text concern both the language and the legal definitions which set boundaries on which goods are covered in the agreement. The term global public goods is often confusing to people, in part because of an influential definition offered by the economist Paul Samuelson in the mid 1950s as an extreme case where government interventions were necessary. Samuelson created an “extreme” and “polar” definition of “pure”

public goods, which had as their most important characteristics that they were both non-rival in consumption and it was impossible to exclude access to the good. In defending his definition, Samuelson said:

“Doctrinal history shows that theoretical insight often comes from considering strong or extreme cases. The grand Walrasian model of competitive general equilibrium is one such extreme polar case. We can formulate it so stringently as to leave no economic role for government. What strong polar case shall the student of public expenditure set alongside this pure private economy?

. . . A public consumption good, like an outdoor circus or national defense, which is provided for each person to enjoy or not, according to his tastes. I assume the public good can be varied in total quantity, and write X_2 for its magnitude. It differs from a private consumption good in that each man's consumption of it, X_1 and X_2 respectively, is related to the total X , by a condition of equality rather than of summation. Thus, by definition, $X_1 = X$, and $X_2 = X$.

Obviously, I am introducing a strong polar case. We could easily lighten the stringency of our assumptions. But on reflection, I think most economists will see that this is a natural antipodal case to the admittedly extreme polar case of traditional individualistic general equilibrium. The careful empiricist will recognize that many - though not all -of the realistic cases of government activity can be fruitfully analyzed as some kind of a blend of these two extreme polar cases.”

Paul A. Samuelson, "Diagrammatic Exposition of a Theory of Public Expenditure," *The Review of Economics and Statistics*, Vol. 37, No. 4. (Nov., 1955), pp. 350-356.

It is ironic that Samuelson's efforts to create an extreme and very limited definition of public goods has had a significant and often unhelpful influence on many policy makers seeking to consider frameworks for the supply of public goods, since in practice, only a limited subset of goods fit the narrow definition offered by Samuelson in 1955.

We have collected a number of definitions that have been proposed by many contributors to the international debate on global public goods here: <http://keionline.org/node/1790>, and provide some additional links to academic work here: <http://keionline.org/socialgoods>, which include more inclusive definitions, for example by Musgrave and Steiner.

The proposed definitions consider not only a broader legal boundary for public goods, and also suggest the possible use of the term social goods, a term used and defined a workable way by Steiner.

1. For the purposes of this Agreement, public/social goods are defined as:

- a. goods and services that are directly supplied, financed, subsidized, mandated or the supply is otherwise induced for the benefit of the public, and is limited to
- b. goods (or services) for which consumption is not decided by the individual consumer but by the society to address a social purpose or public interest.
- c. The definition of public/social goods shall be interpreted broadly to be inclusive of goods and services provided on a non-commercial basis by governments and intergovernmental organizations.
- d. The definition public/social goods includes but is not limited to goods and services that are non-excludable and non-rivalrous in consumption.
- e. The definition of public/social goods shall include goods and services relating to the production of and access to knowledge, the provision of security, humanitarian services, public health programs, the protection and enhancement of the environment, programs to promote development and alleviate poverty, and other purposes.
- f. The definition of a public/social good shall include goods and services for which it is rational, from the perspective of a group of nations collectively, to produce for universal consumption, or to expand production and/or consumption due to positive externalities or to achieve a social purpose.

2. For the purposes of this Agreement, international public/social goods are defined as public/social goods that are directly or indirectly supplied by one Member for the benefit of the public in the territory of any other Member.

3. For the purposes of this Agreement:

(a) "measures by Members" means measures taken by:

(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

PART 2 - Relationship to other Agreements

Article 2:1 Without prejudice to other WTO Agreements

This agreement is without prejudice to rights and obligations under other WTO agreements.

PART 3 - Commitments to Supply Public/Social Goods

Article 3:1 Commitments to Supply Social Goods

Each Member may set out in a schedule the specific commitments it undertakes to supply social goods. Each Schedule shall specify:

- (a) The nature of the social good and the role of the Member in advancing its supply, including the specific mechanisms for financing, subsidizing, mandating, or otherwise inducing the supply of the social good.
- (b) The rationale for making a commitment for the supply conditions and qualifications on national treatment;
- (c) where appropriate the time-frame for implementation of such commitments; and
- (d) the date of entry into force of such commitments.

Article 3:2 Modification of Schedules

1. (a) A Member (referred to as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.

(b) A modifying Member shall notify its intent to modify or withdraw a commitment to the Council for Social Goods no later than three months before the intended date of implementation of the modification or withdrawal.

2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable than that provided for in Schedules of specific commitments prior to such negotiations.

(b) Compensatory adjustments shall be made on a most-favoured-nation basis.

3. (a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.

(b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.

4. (a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.

(b) If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may

5. The Council for Social Goods shall establish procedures for rectification or modification of Schedules. Any Member which has modified or withdrawn scheduled commitments under this Article shall modify its Schedule according to such procedures.

Article 3:3 Standardized Commitments

1. Any Member may elect to propose a standardized commitment. A standardized commitment is one for which an agreement on certain terms and conditions of the commitment is reached beforehand, in consultation with other members.

2. A standardized commitment is otherwise treated the same as any other commitment.

3. The Council for Social Goods shall establish procedures for consultations and revisions of standardized commitments.

PART 4. Institutional Provisions

Article 4:1 Council for Social Goods

1. The Council for Social Goods shall carry out such functions as may be assigned to it to facilitate the operation of this Agreement and further its objectives. The Council may

establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.

2. The Council and, unless the Council decides otherwise, its subsidiary bodies shall be open to participation by representatives of all Members.

3. The Chairman of the Council shall be elected by the Members.

4. The Council for Social Goods shall provide accreditation to non-government organizations and members of the public wishing to attend and observe its meetings.

Article 4:2 Consultation

1. Each Member shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by any other Member with respect to any matter affecting the operation of this Agreement. The Dispute Settlement Understanding (DSU) shall apply to such consultations.

2. The Council for Social Goods or the Dispute Settlement Body (DSB) may, at the request of a Member, consult with any Member or Members in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Article 4:3 Dispute Settlement and Enforcement

1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the Dispute Settlement Body (DSB).

2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend concessions or other obligations under another covered agreement, in accordance with Article 22 of the DSU. [Note, in particular, Article 22(3).

3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part 3 of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article 3:2, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

Comments from one reviewer: DSU Article 22 has, as a “general principle,” the notion that concessions should be suspended in the same sector or agreement as the offending measure. In the event of a dispute over commitments under a WTO agreement on social goods, this could have the perverse consequence of giving rise to a debate over how to try to exclude a country from certain global public goods. It may be wiser to build on 22:3(c) and say that the very nature of the social goods agreement makes it neither “practicable [nor] effective to suspend concessions” under it, and so that all retaliatory measures would have to come under other agreements, i.e., be cross-retaliation. (Break the enclosures!)

Article 4:4 Relationship with Other International Organizations

The General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with the supply of social goods.

PART 5, Misc

Article 5:1 Transparency

Etc.

Optional protocols

Such as, possibly:

Access to government funded scientific research

Members electing to endorse the protocol on access to government funded scientific research agree to the following:

1. Grants and research contracts should normally include a provision that gives the government body providing the funding a worldwide royalty free right to use grant or contract related inventions, including but not limited to:

- a. the right of the government to elect to provide the World Health Organization or its designee the right to practice the invention, and
 - b. the right of the government to elect to permit third parties to undertake research on the patented invention on a non-discriminatory and royalty free basis.
2. Grants and research contracts shall include a provision that gives the funding body the right to require that all investigators funded by the agency submit or have submitted for them to a publicly available archive an electronic version of their final peer-reviewed manuscripts upon acceptance for publication, to be made publicly available no later than 12 months after the official date of publication, recognizing the agency implements the public access policy in a manner consistent with copyright law.