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ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES
Global Governance Programme

INTERNATIONAL TRADE OBSERVATORY (ITO)
TRADE ROUNDTABLE

Organised by Petros C. Mavroidis

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

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Introductory Remarks

Petros C. Mavroidis

On February 4, 2011, the first roundtable of the ITO took place under the auspices of the RSC at EUI in Fiesole, Florence. Participants critically discussed the current observed deadlocks in the Doha Round of multilateral trade negotiations, and advanced some preliminary thoughts on the way out. The group discussions were presided by Josep Borrell, the President of EUI, and led in the morning by Rufus Yerxa (Deputy Director General at the WTO), who provided an overall assessment of the issues that emerge as 'ground-stoppers' at this stage. In the follow up, the discussion was divided equally between four speakers: Michael Punke, the Ambassador of the United States to the WTO, gave the US perspective on the round; Lu Xiankun, Counsellor and Head of Division of the Permanent Mission of the People's Republic of China to the WTO, explained the position of its country on what needs to be done to wrap up the round; Signe Ratso, Director for WTO Affairs at the European Commission, gave the European Union (EU) perspective, and finally, Vital Moreira, Head of the International Trade Committee of the European Parliament provided the reaction of the European citizenry on what is being discussed in Geneva. The discussions during the morning session concentrated on the current agenda of the Doha Round. Miguel Maduro, Director of the Global Governance Programme, acted as overall discussant.

In the afternoon, there were presentations by five academics and the focus was equally distributed to the current- as well as a more 'normative' agenda that should eventually occupy the minds of trade negotiators: André Sapir (ULB) focused on the institutional design of the WTO and asked whether, in its current form, it can do justice to the new emerging issues; he drew a parallel between the multilateral- and the preferential agenda (as evidenced in the many preferential trade agreements that have recently seen the light of the day) and, noting the discrepancy, he asked whether it is time for the WTO to rethink its mandate if it is to continue to be policy relevant for its membership. Patrick Messerlin (Sciences Po) discussed the 'old' and the 'new' agenda as is, and as it should have been negotiated in the current round. He observed that key issues in the old agenda have largely remained outside the realm of current negotiations, whereas the progress in new issues does not even match de facto practiced liberalization: he used practice and offers in the services sector to illustrate this last point. He went on to state that one should not attach too many hopes on negotiating topics that have been hailed as innovative and meeting the aspirations of developing countries (such as the *Aid for Trade* initiative) for, in all likelihood, they will fall short of addressing actual needs. Henrik Horn (IFN), and Petros C. Mavroidis (Columbia & Neuchâtel) presented a short paper on the negotiations regarding dispute settlement. In their view, some of the issues currently on the agenda are quite important and deserve their inclusion in the talks. They remarked nonetheless, that progress has been made on peripheral issues, while discussion on key issues has so far been confined to little if any progress. They further regret that, the mounting criticism regarding the quality and internal consistency of reports (judgments) notwithstanding, negotiators did not find it opportune to include agency design in their discussions. Ernst-Ulrich Petersmann (EUI) asked the question whether the single undertaking-approach, whereby WTO Members accept to be party to (almost) all agreements concluded during a trade round should continue to be practiced in the future. He advanced both conceptual- and Realpolitik considerations to cast doubt to this perspective. He goes as far as to argue that even in the approach is followed at the end of the current round, there are reasons to believe that implementing efforts will not do justice to a similar commitment.

This is the first of our Trade Policy Briefs that we will be circulating at the end of Chatham House rules-inspired conferences at the premises of RSC at EUI. Our aim is to bring together on regular basis a group of academics and policy makers to discuss the multilateral trade agenda as it emerges and evolves.

List of Participants

Josep Borrell, President of EUI

Henrik Horn, Professor of International Economics; Research Fellow at CEPR London), and IFN (Stockholm).

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Patrick A. Messerlin, Professor of Economics, Sciences Po, and Director, Groupe d'Economie Mondiale at Sciences Po.

Vital Moreira, Head of the International Trade Committee of the European Parliament

Ernst-Ulrich Petersmann, Professor of International and European law and former Head of the Law Department of the European University Institute at Florence; former legal advisor in the German Ministry of Economic Affairs, GATT and the WTO and former German representative in numerous UN and European institutions

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Some Thoughts on the DSU Negotiations

Henrik Horn and Petros C. Mavroidis

In this short Note, we critically discuss the agenda regarding the review of the DSU (Dispute Settlement Understanding) in the ongoing Doha Round negotiations. In our view, negotiators have included some very interesting issues in their talks, but the progress so far leaves a lot to be desired. Since it is common perception, at this stage at least, that the Doha Round should be concluded within brief deadlines, and assuming that the same will be also true for the DSU Review, we believe that there is not much hope to see meaningful changes in all areas under consideration: cosmetic changes yes, but no dramatic modifications. We also believe that negotiators have omitted one key issue, namely, the necessary changes to address criticism regarding the quality of analysis in panel and Appellate Body (AB) reports.

So far, negotiators have discussed the following issues: *sequencing* (whether a request for retaliation should always follow a request for establishment of a compliance panel, in case of disagreement between the parties as to whether implementation occurred); *developing country interests, including special and differential treatment* (a rather open-ended discussion regarding what additional provisions should be introduced in the current DSU to take care of their interests); *timeframes* (the need to be stricter regarding time-frames within decisions by adjudicating bodies are being rendered); *transparency and amicus curiae briefs* (following various rulings by the AB, the question has been raised whether dissemination of information by and to the WTO adjudicating bodies should be re-organized); *flexibility and Member control* (essentially, under this heading discussions focused on the need to allow adjudicating bodies the required flexibility to address issues not explicitly foreseen in the DSU, and the ensuing need to ensure that WTO Member retain control over similar initiatives); *third party rights* (the DSU is 'incomplete' regarding several issues such as deadlines within which the interest to participate must be raised, and practice, which could be crystallized into law has provided some responses); *effective compliance* (a host of issues regarding improvements to the current picture have been advanced and to some extent discussed); *post-retaliation* (same as per the issue on third party rights); *remand* (amending the DSU to the effect that the AB is granted remand power so that it can remand cases back to Panels asking them to decide on issues they left undecided on judicial economy-grounds); *mutually agreed solutions (MAS;* there is general dissatisfaction with the current status); *strictly confidential information* (same as per the issue on third party rights); *panel composition* (whether panels should continue to be *ad hoc* bodies, or whether they should become totally or partially permanent bodies).

In Section 1, we discuss the items which, in our view, should not be negotiating items and briefly explain why. In Section 2, we discuss the items that we believe are key items and should be priority items during this review. In Section 3, we move to discuss an item that is not on the agenda but which is highly important to us, and in Section 4, we briefly recap our main conclusions.

1. No Need for This

Three items on the agenda might have provoked problems in the past but were dealt quite effectively by adjudicating bodies. The proof of this is the fact that Panels have repeated the same solution over time without arousing any discomfort among the participants: *strictly confidential information* has been before Panels on numerous occasions and yet there has not been a single instance where the Panel's treatment of the issue provoked inconvenience; with respect to *third party rights* Panels managed to adopt pragmatic solutions regarding 'enhanced rights' (that is, whether parties can follow not simply the Panel but also the AB meetings), and the 10 day rule within which the interest to appear as third party must be raised is by now standing practice; *transparency and amicus curiae briefs* became an issue because of the AB ruling on *EC – Asbestos* regarding the latter item. A special

session of the WTO General Council was held to discuss this issue. But discuss what exactly? This is something akin to much ado about nothing in the old Shakespearean way: dissemination of information can take so many uncontrollable forms that it would be clearly counter-productive to go beyond the existing case law arrangement, that is, Panels can invite information from non-parties to a dispute and remain free to take it into account.

Then there is an issue that should not be an issue in the first place: our data-set (Horn and Mavroidis, 2011)[1] shows that indeed AB almost always respects the statutory *timeframes* whereas Panels do not. But what is the benchmark here when critics complain about the length of the procedure? Compared to the European Court of Justice (ECJ), the International Court of Justice (ICJ) and indeed many domestic courts, Panels seem quite fast in resolving disputes. At any rate, if the round is to finish fast, no more time should be spent on this issue.

Developing country interests, including special and differential treatment, and *flexibility and member control* should not be discussed any further unless being totally re-focused. In light of the level of aggregation of the current subject-matter (where literally everything goes) they are simply non-starters.

Sequencing is an important issue in theory, but in practice a non-issues since the dispute DS 165: WTO Members always have recourse to a compliance Panel before they request countermeasures. *Remand* could be avoided as a topic for discussion altogether, were Panels to be instructed not to exercise judicial economy (our data-set suggests that the number of claims treated per panel is no factor for delaying the procedures).

Removing these issues from the docket would not do little damage (since to our understanding, they are not close to agreements to anyone of these issues except for sequencing), and it would help Members focus on the items that we consider more important.

2. Our Wish List

Ideally, we would like a discussion on each and every item appearing in what follows. But in light of time constraints, negotiators might need to be picky as to what is in the agenda and what is left out. So, we start with what we see as most important, and gradually discuss less pressing issues, except for that the absolute priority should be given to the item discussed in Section 3 which, alas, does not feature as such in the current DSU Review agenda.

2.1 Notifications of MAS

The WTO has been often hailed as the passage from *diplomacy based adjudication* to *legalization* or *judicialization*, although the precise meaning of the latter concepts is often not made clear. In our view, a central aspect of this change is that the objective of the dispute settlement mechanism is not solely to resolve disputes, but also to do this in adequate fashion.. There is therefore increased focus on both legal procedure, and on the outcome of the resolution the disputes. The latter is potentially important, since solutions in the shadow of law could hide important negative external effects for those lacking information about the actual deal and, eventually, for the credibility of the DSU itself. In Hudec's (1993)[2] account, 56% (116/207) of all cases in the GATT were resolved at the consultation stage and we have little if any information as to the solution; this is why Arts. 3.6 and 3.7 DSU were enacted (that is, to provide transparency about bilateral deals). Yet, according to our data-set for WTO disputes, we lack information about 165/402 cases, that is 41% of all cases, a rather sizeable figure. We believe that in order to remedy this, Members should be requested to notify whether any changes

[1] Our data-set appears in www.worldbank.trade/wtodisputes

[2] Robert E. Hudec. 1993. *Strengthening International Trade Law*, Butterworths: London, UK.

in contested policies have occurred as part of a MAS. This would alert Members not participating in the negotiations of possible MFN violations.

2.2 Conflicts

There are strong reasons to believe that 'revolving doors' are harmful. But in the WTO it is accepted. For example: it is perfectly acceptable that individuals working for the WTO Secretariat can be on leave from a national delegation dealing with WTO issues and return to it having completed their stint in Geneva (similar policies were acceptable in the '60s and '70s because of lack of experts, and this is not the case anymore); a member of the AB Legal Service on leave appeared before the AB arguing a case for a private client; members of the AB continue to advertise on Internet that their law firms deal with WTO issues, their names figuring prominently in the logo; there are no detailed procedures that will allow a Member to challenge the inclusion of a judge in an AB Division or in a Panel. There is an urgent need to prevent such instances; negotiators may here seel inspiration from conflict clauses in national Bars etc.

2.3 Post-retaliation

The DSU is silent on this score. The AB in *US – Suspended Concession* pronounced on the issue, but unfortunately opted for a sweeping statement that contradicts the spirit of the DSU. (It may even have violated the letter of DSU: at the post-retaliation stage the party claiming that it has now complied and hence that countermeasures against it are illegal, should submit a new dispute and not benefit from a compliance panel as the AB argued.) It should be a rather straight-forward exercise for negotiators to agree that recourse should be taken to a new Panel when post-retaliation the defendant claims that it has complied with its obligations, as the US had suggested in the discussions before the Dispute Settlement Body, DSB, when the AB report on *US – Suspended Concession* was being discussed..

2.4 Effective Compliance

If we were not a decade into the round, this item would feature very high on our agenda. As things stand, and in light of the amount of time that needs to be devoted to this issue, we leave it in fifth place (taking account of what will be discussed in Section 3). Negotiators had the opportunity to discuss it when the Mexican proposal on *tradable remedies* was tabled. Alas, it was a brief discussion that led nowhere. It is clearly a highly complex issue. Suffice it for the purposes of this Note to re-iterate our belief that this is also a highly important issue, which is intimately linked with the effectiveness of the DSU as such, and with the credibility of the multilateral trading system.

3. Most important: the quality of adjudication

We mentioned above that *Panel composition* was one of the items discussed. Essentially the discussion focused on whether *ad hoc* panelists should be replaced by permanent panelists. The issue, as originally contemplated by its main proponent the European Union, is now 'dead': negotiators have in the meantime asked the Secretariat to draw a list of experts that could be discussed as permanent panelists. To us, the issue is not whether panelists are permanent or *ad hoc* but *whether they are equipped to do a good job.*

Panelists are being selected by the Secretariat (the DG included) and it is largely unaccountable when it comes to selecting them. In normal arbitration the parties propose one arbitrator each and the two selected chose the umpire. Here, the incentive to propose is with the Secretariat and the criteria for selection of Panelists are unknown. Expertise, what should have been the probably most important criterion, has been relegated to a secondary concern issue. Renown experts are almost never selected to act as Panelists. Occasionally, this is defended with the claim that 'innocent' judges are preferable.

This argument should be thwarted, however: why do they seek to appoint qualified people to act as national judges in almost other instances (such as ECJ, ICJ) and not in the WTO? What is so special about the latter? But not only are panelists often or typically not experts in the issues at stake, they are neither allowed to gain experience from acting on many panels. Our data-set suggests that 87% of all Panelists so far have worked in 1-3 cases; 11% in 4-6 cases and only 2% in 7 cases and more.

The quality of reports is often criticized in the American Law Institute project that we have conducted for almost a decade for lack of methodology. The project is the only one that to discuss each and every report coming out from the WTO since 2001 (the first reports we discuss were launched in 1999). Trade experts from law and economics, political scientists, economists, classic public international lawyers, EU law lawyers, etc., have participated through the years and have very often disagreed with the 'methodology' that Panels and the AB have used in resolving disputes. The dissatisfaction is almost omnipresent when it comes to interpreting intrinsically economic concepts. Not only have Panels and the AB often failed to provide convincing interpretations and arguments. They have at least seemingly also changed their mind time and again on some key issues such as whether likeness can be shown through econometric indicators only, or whether sale at arm's length exhausts previously bestowed subsidies.

We believe that a number of things can be done to address this issue. Chief among them is the attack the lack of economic expertise: What training do lawyers or trade diplomats have to give meaning to key issues such as 'causality', 'likeness' of goods, 'so as to afford protection', etc? These concepts, and many other in the WTO Agreement, are inherently economic, and they should not be interpreted by individuals lacking a solid economic training. It should be noted that the problem is not confined to the panel stage, but also to the AB level. It is therefore necessary to get economists much more involved both at the panel and the AB level.

There are two broad ways in which economists could play a more prominent role. One is to increasingly appoint economists as experts. The other is two include economists as panelists and as AB judges. Both these should be followed. It simply does not make sense that the agreement governing world trade is shaped without the active participation of economists.

There are other improvements when it comes to selection of Panelists and AB members that one could contemplate upon. For example, the remuneration of Panelists (and to a lesser extent, AB members) is quite low. Trade delegates have a strong incentive to be Panelists (since it is quite beneficial in terms of improving their CV), but little incentive to do the work (which is time consuming and poorly paid at 600CHF/day for Panelists). It is not unreasonable under the circumstances that members of the WTO Secretariat emerge as the *de facto* Panelists, drafting many of the reports (or portions thereof) that are being published. The WTO is spending a tiny fraction of its budget on dispute settlement and a more general discussion on this issue is highly desirable since it would be odd, indeed highly counter-intuitive and against all market evidence to believe that quality can come at no expense when it comes to WTO adjudication.

4. Concluding Remarks

In brief, it is our view that the DSU Review has focused on too many items, and probably without adequate reason on some of them. Negotiators have also disregarded some important issues. We highlighted one issue that in our view deserves particular attention: the WTO regulates economic relations and, unavoidably, many key economics terms appear therein. Lawyers must stop pretending that they can play economists. It is time to change the composition of Panels and the AB, to give seat to individuals with economic expertise.

From the "Old Agenda" of the Doha Round to a long-lasting relevance of the WTO

Patrick Messerlin

The negotiations of the Doha Round have lasted ten years, with ups and downs and no final result so far. The two last years, as the Great Crisis attracted most of the attention of the policy-makers, the trade negotiations entered into hibernation after their deadlock of July 2008. The only remaining concern in international trade matters was the fear that the Great Crisis would trigger a tsunami of protection, like in the 1930s.

Late 2010, two initiatives re-launched the interest in the Doha discussions, dissipating the torpor in Geneva. First was the ability of the Korean G20 Presidency to extract from the G20 Leaders a much more convincing tone on the re-launch of the negotiations in the Summit Declaration. Second, the British, German, Indonesian and Turkish governments combined their forces to ask a group of experts led by Prof. Jagdish Baghwati and former GATT/WTO Director General Peter Sutherland to write a report on where we stand and what we should do.

These initiatives have two interesting features. First, they witness two Asian G20 Members (Indonesia and Korea) taking their full responsibilities in the emerging new world scenery and decision-making. This feature needs to be underscored because, too often, the "old" G20 Members (the EU and the US) still claim that the emerging countries do not take their full responsibilities. Second, on a more regional note, Europe was represented by two Member States, not by the European Union. To my view, this is a healthy development. The EU decision process is so complicated, slow and ultimately opaque that it tends to generate too much inertia in the domains under the Union's "exclusive competence" such as trade policy. In such a context, the joint British and German initiative offers a welcome, more subtle definition of what should be the EU exclusive competence—a more balanced and dynamic act between the Union and its Member States.

Section 1. The "Old Agenda" of the Doha Round: where we stand

If the Korean G20 Presidency has succeeded to re-energize the Doha negotiations, and if the "New Quad" initiative (Britain, Germany, Indonesia and Turkey) has amplified this momentum, time for getting a successful outcome is terribly short, as emphasized by the Seoul G20 Summit Declaration. The French G20 Summit scheduled in November 2011 will be held under high political stresses, with full speed campaigns at the highest political level in key G20 Members (China, India, France, Korea, Mexico and the United States). If such elections lead to new administrations (almost certain in China) the late 2011 year and the years 2012-2013 will not be propitious for any major decision in trade matters.

Three to four years of inertia would open the risk of a serious erosion of the world trade regime—"*a succession of small and seemingly insignificant protectionist bricks that suddenly became walls*" to quote former WTO Hong Kong Ambassador Tony Miller. The 1925-1929 years, during which countries have slowly built up protection before the 1929 eruption, show that, after enough bricks, any spark can create chaos (see Annex A). And the current changing long term shift in world powers is the perfect cauldron for creating such sparks, as illustrated by the trade tensions between Beijing and Washington.

Benefits on the horizon: the world in case of a successful Doha Round

It is often said that the Doha Round would bring limited benefits (around US$ 50 billions). This is an inaccurate statement which flows from a too narrow focus on manufacturing and agriculture—less than 30 percent of the GDP of the large countries. It ignores the potential benefits of zero-to-zero

initiatives, liberalization in services and initiatives in trade facilitation. Including these aspects even modestly would bring gains within the range of US$ 300 to 700 billions of U.S. (see Table 1, Box A)—not a minor sum for countries in desperate need to boost the incomes of their consumers which comprise firms in addition to households.

Table 1. The various values of the Doha Round (US$ billions)

A. Value based on additional market access		B. Value based on increased uncertainty	
Tariff cuts in goods	100-150	Costs of increasing applied	
Full market access in 3 sectors	100	tarrifs to bound tariffs (when	900
Modest liberalisation In services	100	possible)	
Trade facilitation	350		

References: Box A: Adler et al. (2009) Hoekman and Nicita (2010) Laborde et al. (2009a and 2009b). Box B: Australian Productivity Commission (2009).

The gains in trade in goods are provided by tariff cuts (and subsidy cuts in agriculture) which are largely known since 2008. The post-Doha average tariffs would amount to roughly 2 percent for the EU and the US and 6 to 8 percent for China (these three economies account for two-third of the world GDP and more than half of the world trade). Maximum tariffs will amount to 7 percent for the EU and US and to 15 to 18 percent for China (depending the final choice in terms of formula). In agriculture, the EU tariffs will be cut from less than 25 percent to 10-12 percent, and the average subsidy rate (the share of the EU farm subsidies in the value added of EU agriculture) from 70 to 15 percent. In other words, the post-Doha trade among these key economies would largely witness a world where more of the tariffs are irrelevant.

The situation is different for the emerging countries other than China (and Korea) and for the developing countries. For the major emerging countries other than China, their average tariff would range from 7 to 14 percent (see Table 2 for estimates) with maximum tariffs around 16-20 percent. However, it should be noted that the highest the maximum tariffs, the less numerous these tariffs tend generally to be (for instance, the maximum tariffs would involve only two HS-6 digit lines in the case of Korea). To get a sense of perspective, these tariff structures are close to those of the EU and the US in the early 1990s—a period already celebrated as marked by open markets in the case of the industrialized countries.

Table 2. Estimates of the post-Doha tariffs for selected emerging economies

	Current tariffs [a]		Post-Doha bound tariffs				Current tariffs [a]		Post-Doha bound tariffs		
	bound	applied	Swiss 20	Swiss 22	Swiss 25		bound	applied	Swiss 20	Swiss 22	Swiss 25
India						**South Africa**					
Average tariff	36.5	15.4	12.7	13.5	14.5	Average tariff	15.6	7.7	7.5	7.9	8.4
Maximum tariff	150.0	100.0	17.6	19.2	21.4	Maximum tariff	60.0	43.0	15.0	16.1	17.6
Mexico						**Indonesia**					
Average tariff	34.8	13.3	12.7	13.4	14.5	Average tariff	35.3	6.7	12.4	13.1	14.2
Maximum tariff	50.0	50.0	14.3	15.3	16.7	Maximum tariff	100.0	80.0	16.7	18.0	20.0
Brazil						**Korea**					
Average tariff	30.8	12.6	11.9	12.6	13.6	Average tariff	9.7	6.7	5.5	5.7	6.0
Maximum tariff	55.0	35.0	14.7	15.7	17.2	Maximum tariff	262.3	259.8	18.6	20.3	22.8

Source: Messerlin (2011).

The situation is quite different for the many developing countries which have used the last decade of the Doha negotiations to escape as much as possible new commitments. Table 3 lists the coalitions created by those developing countries for achieving such a "negative" result by using the implicit veto

that they get from the current regime of negotiations. As a result, the Doha negotiations are *de facto* limited to the largest 30-40 WTO Members, out of the total of 153 WTO Members.

However, this figure has to be put in perspective. The developing countries pertaining to these negative coalitions represent roughly 15 percent of the world trade (including oil). Economic analysis and the history of the Asian dragons and of the last 20 years of China's opening market policies show that the strategies of creating "negative" coalitions in order to escape substantial concessions would mostly hurt the growth and development of the countries following such a line.

Table 3. Escaping the Doha Round: the "Negative" Coalitions

	Negotiations in	
	Agriculture	NAMA
Least-Developed Countries (LDC)	32	32
Small and Vulnerable Economies (SVE) [a]	38	37
New Recently Acceded Members (N-RAM)	10	10
Other groupings with wide exceptions [b]	4	11
Total	84	90
All WTO Members [c]	127	127
Core negotiating countries [d]	43	37

Reference. Messerlin (2011). Data ssources: WTO NAMA and Agriculture Chair texts, TN/MA/W/103/Rev.3, TN/AG/W/$/Rev.4, 6 December 2008. Notes: (a) excluding N-RAM and other groupings. (b) Countries with Low Binding Coverage in NAMA and Net Food Importing Countries in agriculture. (c) Counting the EC as one WTO Member. (d) The WTO Members not pertaining to a negative coalition.

Costs on the horizon: "defensive preferential trade agreements" if the Doha Round fails

There is another—more accurate to my view—way to look at the value of the Doha Round. Rather than to focus on the economic gains from additional market access, it is to see a successful conclusion of the Doha Round as the best way to limit the risk of a major slide to protection. Calculating the possible cost of such a large scale slide provides astronomical figures—a minimum of roughly 900 billions of U.S. dollars, roughly the equivalent of a second Great Crisis (see Table 1, Box B).

This is the "true" value of the completion of the Doha Round that everybody should have in mind. It corresponds to the value that insurance provides, a point neglected or discounted by trade negotiators who (for obvious reasons) tend to focus entirely on maximizing the concessions extracted from trading partners hence who lose the much larger view of the "systemic" benefits for every country. Bound tariffs are valuable because they deliver certainty, and because business needs certainty. Ignoring the value of bound tariffs, or discarding it, is equivalent to ignore the value of the insurance industry—obviously a major economic misjudgment.

That said, one may argue—and hope—that such a collapse would be an extreme situation, hence an unlikely one. Hence, one would like to have a sense of what could occur more likely in the case of a failure of the Doha Round. What follows suggests a possibility which is certainly not the only one, but which has the advantage to be very consistent with the reactions that are currently surfacing in the Doha negotiations.

During the recent months of negotiations, the emerging countries have more visibly than ever been split in two groups of countries: China and the rest of the emerging countries (Brazil and India being maybe their best representatives although things are very complex). Most (not all) of this rest of the emerging economies are reluctant to concede additional tariff cuts for two very different motives:

- a motive that they always mention in Geneva is the need for the EU and the US to open more largely some markets, typically their agricultural markets, to the exports of these emerging countries;
- a motive that they mention much less vocally in their respective capital cities is the fear that additional cuts in their industrial tariffs would expose their domestic producers to the more efficient Chinese firms (not so much to the EU or US firms which are not most frontal competitors).

These motives are not new, but they are exacerbated by the additional demands for concessions that the countries are currently tabling in Geneva.

In case of a failure of the Doha Round, the second motive will become dominant. It will lead to "defensive preferential trade agreements (PTAs)", that is PTAs that will seek to get a kind of Doha Round result, but without China (for fear of its efficiency) and/or (less surely) the EU and the US (for dissatisfaction with the concessions offered by these countries). In other words, there will be a complex game among three groups of actors: the EU-US, China and most of the other emerging countries.

If this proposition is correct, then the EU/US and China have a joint interest to a successful outcome of the Doha Round—and China even more than the EU and the US. The logic behind this conclusion is as follows. In the aftermath of a failed Doha Round, the "Big Three" (China, the EU and the US) will witness the emergence of PTAs which will tend to open markets as envisaged under the Doha Round, but also to exclude them. This could be done in absolute terms: new PTAs will be expressly designed by excluding the Big Three. However, such a straightforward exclusion is not likely: saying no to the Big Three would be politically difficult and economically costly. The favorite game of this uneasy tripolar world during the coming decade would then be to design PTAs involving the "Big Three" on less favorable terms than those not involving the Big Three.

Section 2. Sketching a successful package of the Doha Round

In agriculture and industry, there should be the recognition that the Doha Round will mostly consolidate and moderately expand the unilateral liberalizations undertaken during the two last decades. Paradoxically, the Great Crisis makes this recognition easier from a negotiating point of view for two reasons:

- key emerging economies have revealed their willingness and capacity not to increase their applied tariffs in difficult times—that is, not to use their WTO rights to increase applied tariffs up to their much higher bound tariffs. Such a revealed preference erodes the emerging economies' claim that they make a huge concession when cutting their bound tariffs (they are currently showing that they do that for their own good) hence to accept to limit their requests for exceptions to such cuts.
- key industrial countries have a strong interest in a progressive transition in order to minimize economic turbulences in these two sectors. Deeper market access in emerging economies will make them more—not less—effective hence attractive, as amply shown by Korea or China. Such a view should induce the developed countries to abandon their claim for getting additional "*effective market access*" (additional tariff cuts) from the emerging economies.

In both manufacturing and agriculture, tariff cuts based on the agreed formulas will do a good job—better in manufacturing than in agriculture because tariff peaks (above 15 percent) will be cut more severely in the former than in the later. However, the exceptions raise concerns in both sectors. It may be too late to make these exceptions much less generous, but time and energy should be devoted to improve them as much as possible. It is beyond the scope of such a short note to examine possible improvements in detail. Economically sound improvements could be as follows:

- in manufacturing, the emerging G20 WTO Members would agree to choose the Swiss formula with no exception (a Swiss coefficient of 25 with no exceptions is from an economic point of view much better than a Swiss coefficient of 20 with the current exceptions).
- in agriculture, the developed G20 WTO Members would agree to reduce the exceptions in the processed food products (for instance, by limiting cuts to 33 percent and by not allowing post-Doha tariffs above 50 percent) on the basis that processed food products are closer to manufacturing than to the farm business strictly speaking.

Finally, note that these improvements balance the efforts made by the emerging and developed countries.

That said, it is crucial to underscore that the main unchartered source of gains to tap for wrapping up the Doha Round is services. This is where most of the action in the negotiations should be in the months to come.

The July 2008 "Signaling Conference" has shown a large pool of services for which countries have shown interest in opening markets, including mode 4 for some of them (see Table 4). These services are business services, communication services and distribution services. Note that:

- the two first services have been largely resilient to the crisis
- altogether, the value added of these services amounts to 10 trillions of U.S. dollars, roughly the same than the value added of the agricultural and industrial sectors together.

Even if moderate, improved market access in subsectors of these three huge sectors would easily deliver the boost needed to conclude the Doha Round.

Table 4: The 2008 Signaling Conference: Revealing the Willingness to Negotiate in Services

Services	Signalling Conference 2008		2005 offers: market opening moves		Size of sectors	Crisis resilience
	Nbr WTO Members	GATS mode underlined	EC	US	(US$ bn)	
	1	2	3	4	5	6
Business Services	Virtually all	4	yes	no	4918	High
Communication Services	Substantial	3	yes	yes	737	High
Distribution Services	Substantial	3	yes	no	3809	--
Environmental Services	Substantial	3	some	no	--	--
Construction & Related Engineering	Substantial	3 & 4	some	no	1715	High
Transport Services	Substantial	3	some	some	1282	Low
Financial Services	Notable	3	yes	small	1770	Low to High
Educational Services	Notable	3 & 4	no	yes	1444	--
Tourism and Travel Related Services	A few		yes	no	774	Low
Health and Social Services	A few	3 & 4	no	no	1483	--
Recreational, Cultural & Sporting	--	--	small	no	1217	--
Energy	Substantial	3	--	some	--	--

Reference: Messerlin, P and E. Van der Marel (2009). Sources of data: Columns 1 and 2: TNC Chairman's Report of 30 July 2008; Column 3: WTO (2005a); Column 4: WTO (2005b); Column 5: OECD (2006); Column 6: Mattoo and Borchert (2009). Notes: Column 1 reports the number of WTO Members having expressed interests in negotiating the service mentioned. The TNC Chairman's Report includes a separate paragraph for audiovisuals, with two WTO Members expressing interest. Column 2 reports the explicit mention of modes 3 and 4 for the service at stake. Columns 3 and 4: see text. Column 5 gives the total size in billions of US$ (PPP) in the U.S., EC and Top 8 group markets by service. Note that Recreational services includes the Personal, Community and other Social sector, while Educational services include R&D services. Column 6 reports the resilience of services to the current economic global crisis as reported by Mattoo and Borchert (2009). Crisis resilience is low in financial services, and high in insurance.

As services are difficult to negotiate, the most promising track capable to achieve tangible results is the plurilateral approach. In fact, the "negative coalitions" which have flourished under the Doha Round during the last ten years can be seen as the negative way to define the "coalition of the willing" that are reflected by plurilaterals in a "positive" way.

That said, it is well known that negotiating in services is hard to do. In particular, how the negotiators of a country could consider that concessions granted by opening the distribution sector of their country to foreign providers would match the concessions received in air transport or business services? During the last ten years, WTO negotiators have been so obsessed by minute details in agricultural or industrial tariffs that they did not start to think on this much bigger issue. A solution in the specific case of the Doha Round would be to assume that the basis of the concessions (that is, the value added of the distribution sector and the value added of the air transport sector) should be broadly similar. This proposition makes sense to the extent that the Doha Round would essentially bind the existing unbound liberalizations.

Section 3. Looking after the Doha Round: Opening new chapters

Completing the Doha Round will clearly absorb the attention of the trade negotiators. But the Great Crisis and a successful Doha outcome impose convergent pressures on the WTO:

- the role of the WTO as the key negotiating forum on tariff cuts in goods will be much smaller after a successful Doha Round (as explained above)—it is "death by success".
- the WTO is unlikely to be a negotiating forum in opening services markets because of the complexity of services negotiations (as underscored above). Plurilaterals seem the most promising way of liberalizing services.
- the WTO will remain the ultimate world forum for binding market access in goods and in services if it is made more flexible (the "Single Undertaking" should be an option to be used only every three or four Rounds).
- the WTO will keep its role as "rule-guardian" with its dispute settlement mechanism.

This broad evolution gives the impression of a fading WTO role—the so-called increasing "irrelevance" of the WTO.

This impression does not take into account the role that the WTO could play in the new challenges generated by globalization. Three key challenges are discussed in what follows. Getting started in these areas would not need a lot of time—a key point since WTO negotiators should above all finish the Doha business.

Monitoring the level of protection in the world

After a successful Doha Round, trade liberalization in goods would largely be done among the main world economies. The main task is to keep it in good shape. In other words, the WTO should expand a new role that it has started to play: to be an effective monitor of the world level of protection. The world trade and the world trade regime have been largely resilient to the 2008-2009 Great Crisis. If this resilience needs to be underscored, it should not be taken as granted. As a result, the information on the level of protection in the world should be strengthened—available faster and in more detail. One issue that needs serious improvement is subsidies. Subsidies are a relatively direct instrument of protection (compared for instance than public procurement) hence not too difficult to monitor. And cutting subsidies will benefit from the support of the G20 Finance Ministers who will be more than happy to reduce the pressures on their public budgets.

Contributing to improving Aid for trade

Increasing international aid would not be easy if growth remains sluggish in the large developed countries which happen to be the main providers of aid under international conditionality rules. Moreover, aid granted by developed countries is increasingly confronted to aid provided by some emerging economies under quite different conditionalities. As a result, frictions on "unfair" aid competition are likely to emerge in the future. In this context, the best way to increase international aid from donors, to prevent frictions on unfair aid competition and—last but not least—to make aid more beneficial for recipients is to evaluate aid programs. As of today, such evaluations are simply not available or are of so poor quality that they are useless. National aid agencies and international institutions have not been able to structure a robust and consistent evaluation framework. Before granting more aid, there is thus an urgent need to have better guidelines for assessing the impact of the aid granted on the recipient economies.

Contributing to the climate and water world regimes

There is now a notable literature (in climate) and an emerging literature (in water) which strongly suggest that:

- the WTO principles of non-discrimination are critical for a good world regime in climate and water;
- the WTO rules should be amended to accommodate many (not all) specific needs of the climate and water community. For instance, WTO rules on subsidies should be revisited for better fit a world economy where concerns such as climate change and water supply may require subsidies. Unsuitable disciplines can only lead to trade conflicts, as already observed on biofuels, photovoltaic cells and fossil fuels. Guidelines defining "codes of good conduct" when granting green or water subsidies would help to prevent such conflicts.

In all these three areas, the WTO would be only one of the international institutions to be involved. That should not prevent it to launch initiatives in these areas which pertains to the world global governance regime.

Annex A: Average tariffs of selected European countries, 1914-1945

The figure shows the average tariffs of Britain, France and Germany from 1914 to the mid-1940s. Interestingly, Britain appears to lead the race to higher tariffs. However, this partly reflects the fact that non-tariff barriers played a substantial role in the early 1920s (tariff surcharges, most notably in France) and in the 1930s (quotas, most notably in Germany).

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Can WTO Members implement future Doha Round Agreements as a 'Single Undertaking'?[1]

Ernst-Ulrich Petersmann

The Uruguay Round Negotiations in GATT from 1986 to 1994 were concluded as a 'single undertaking', just as the provisions on membership (Article XI) and accession (Article XII) in the Agreement establishing the World Trade Organization (WTO) treat 'this Agreement and the Multilateral Agreements annexed thereto' as a single undertaking, subject to the exception that 'accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement'. The 2001 Ministerial Declaration launching the 'Doha Round' of multilateral trade negotiations likewise provides that 'the conduct, conclusion and entry into force of the outcome of negotiations shall be treated as parts of a single undertaking'; but the Declaration postponed the decision on the adoption and implementation of future Doha Round Agreements until after the results of the negotiations in all areas have been established.[2] Even if WTO members should reach consensus on *concluding* the Doha Round negotiations as a 'single undertaking', it remains uncertain whether they will also be able to *implement* future Doha Round Agreements as a 'single undertaking' notwithstanding the consensus-, 'acceptance by all Members'- or 'two-thirds majority'-requirements in Article X for amending the WTO Agreements and for the entry into force of such amendments only 'for the Members that have accepted them'. Will a 'single undertaking' on the implementation of the Doha Round agreements inevitably alter the 'single undertaking' underlying the WTO Agreement? As these legal issues have never been discussed so far in the Doha Round negotiating groups, and in view of the recent proposals for setting a final deadline for the conclusion of the Doha Round negotiations by December 2011[3], it is time for promoting a public discussion on whether future Doha Round agreements can be implemented as a 'single undertaking'.

1. Lessons from past GATT and WTO negotiations?

The 1948 Havana Charter for an International Trade Organization never became effective since, following its rejection by the US Congress, other countries lost interest in joining the Agreement without the USA. The tariff liberalization resulting from the eight GATT Rounds of multilateral trade negotiations was implemented through Tariff Protocols providing for the entry into force of GATT 'schedules of concessions' on mutually agreed terms different from GATT amendment procedures, requiring a two-thirds majority decision only in case of Accession Protocols (Article XXXIII GATT). The 1964 and 1979 agreements on non-tariff barriers resulting from the Kennedy and Tokyo Rounds were concluded as self-standing agreements and entered into force only for the limited number of GATT contracting parties that ratified these agreements. The 1994 Uruguay Round Agreements were concluded as a 'single undertaking' and, following a decision taken by all GATT Contracting Parties in December 1994, entered into force for 'original members' either on 1 January 1995 or on the 30th day following their acceptance during 1995-1996 (cf. Articles XI, XIV WTO Agreement); for subsequently acceding countries and customs territories, the date of entry into force of the WTO Agreement was specified in their respective Accession Protocols (Article XII WTO Agreement). The decision to terminate GATT 1947 by the end of 1995 contributed to the quasi-universal WTO membership of currently 153 WTO members covering about 95% of world trade and conducting

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1 Readers are advised to consult the more detailed legal analyses by M. Kennedy, and H.Nottage/T.Sebastian referred to *infra*.

2 Doha Declarations (WTO 2003), at p. 20 (para. 47).

3 Cf. J.Bhagwati/P.Sutherland (eds), *The Doha Round: Setting a Deadline, Defining a Final Deal* (Interim Report January 2011.

accession negotiations with more than 25 third countries. In the Doha Round negotiations, WTO members neither agree on replacing the WTO Agreement by new Doha Round Agreements (following the 'single undertaking approach' applied at the end of the Uruguay Round Agreements) nor on how to prevent that implementation of future Doha Agreements through WTO amendment procedures entails many years of delays, two classes of WTO membership and 'free-riding' by those WTO members which, following entry into force of the WTO amendments upon ratification by two-thirds of the 153 WTO members, may prefer benefiting from the WTO non-discrimination commitments without ratifying the Doha Round Agreements.[4]

2. Do WTO rules enable implementing Doha Round Agreements as a 'single undertaking'?

The GATT and WTO amendment procedures are cumbersome and time-consuming. Amendments of certain GATT and WTO provisions require unanimous acceptance by all members. Hence, a previous Protocol amending Part I of GATT 1947 was abandoned after 10 years because one GATT contracting party was unable to obtain parliamentary approval.[5] The last GATT amendment of 1965 adding Part IV on 'Trade and Development' to GATT 1947 achieved unanimous acceptance only in 1979. By the end of 2010, the 2005 WTO Protocol amending Article 31 of the TRIPS Agreement had been ratified by only 31 out of 153 WTO members. As many future Doha Round Agreements are aimed at amending and supplementing numerous WTO agreements, the two-thirds requirements for amendments pursuant to Article X WTO Agreement appear to be inevitable to the extent that Doha Round results cannot be given legal effect through the more flexible procedures for modification of GATT and GATS schedules, through a new 'WTO II' Agreement replacing the existing WTO, or by decisions of the WTO Ministerial Conference. For instance, if the 'negotiation phase' of the Doha Round could be successfully concluded by the end of 2011 with a consensus decision to proceed to the 'implementation phase' by elaborating and signing a single *Protocol implementing the Doha Round Agreements* in 2012, WTO members could aim at concluding the ratification process in 2013 with a view of making the new agreements effective as of 1 January 2014. Entry into force of the Doha Round Agreements following their ratification by a two-thirds majority of WTO members could be further conditioned by additional 'critical mass provisions', target dates and other 'decisions' (e.g. by the WTO Ministerial Conference pursuant to Article IV:1 WTO Agreement) so as to ensure overall reciprocity of their final bargain.[6] A two-thirds majority of WTO members having ratified the Doha Agreements could also insist in 2014 on obtaining a temporary 'WTO waiver' from their WTO most-favored-nation commitments vis-à-vis those WTO members that have not yet ratified the 'single Doha Round undertaking' and risk undermining also the 'single WTO undertaking'. Obtaining the consensus necessary for such a request and the three-fourths majority for granting such a temporary waiver (cf. Article IX WTO) could be facilitated by granting longer transition periods to the least-developed WTO members who have already been exempted from tariff reduction commitments in the Doha Round. The scope of the 'waiver' could thus be limited and targeted to the presumably small number of WTO members which did not ratify the 'single undertaking' by 2014 in spite of this previously agreed deadline and without adequate justification of their delay. The alternative option of transforming parts of the Protocol implementing the Doha Round Agreements into a temporary 'Plurilateral Agreement' (Annex 4 WTO Agreement) - pending ratification of the Doha Round agreements by all other WTO members – would likewise require a consensus decision (Article VIII) that could be more difficult to achieve.

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4 Cf. M.Kennedy. 2011. Two Single Undertakings – Can the WTO Successfully Implement the Results of a Round? *Journal of International Economic Law*, 14: ….

5 GATT BISD 15S/65.

6 Cf. H.Nottage/T.Sebastian. 2006. Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law, in: *Journal of International Economic Law*, 9: 989-1016.

Amendments of WTO rules usually apply only to those WTO members that have ratified the amendment. Yet, the 'Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference' (Article X:3 WTO). Following entry into force of the Doha Round agreements upon their ratification by a two-thirds majority of WTO members and a possible extension of the deadline for the least-developed WTO members, such a decision based on Article X:3 could exert considerable pressure and discourage 'free-riding' by third WTO members.

Integrating future Doha Round Agreements into WTO law – even if done by a single 'protocol amendment' – is likely to transform the WTO legal and institutional system by creating – at least during a transitional period until ratification of the Doha Round Protocol by all WTO members - additional categories of WTO members with diverse legal rights and corresponding obligations. Implementing the Doha Agreements may also require institutional amendments, for instance regarding agreed amendments of WTO dispute settlement procedures and their application to new Doha Round Agreements like the Trade Facilitation Agreement that will not be applicable to any WTO member until it accepted it. Even more so than the 1994 WTO Agreement, a future Doha Round Implementation Protocol risks remaining an 'incomplete agreement' delegating the future clarification of numerous legal controversies to the WTO dispute settlement bodies whenever the political WTO bodies fail to adopt 'authoritative interpretations' (cf. Article IX:2 WTO Agreement) or other agreed clarifications of WTO rules. The likely increase in recourse to WTO dispute settlement proceedings could further challenge the 'legal-political equilibrium' among the political and judicial dimensions of the WTO legal and dispute settlement system. Just as European economic courts, similar to national courts in constitutional democracies, operate as parts of a 'four-stage process' (J.Rawls) of constitutional, legislative, administrative and judicial rule-clarification reflecting and protecting different perspectives of 'public reason', so will WTO members and WTO dispute settlement bodies have to further clarify the 'basic principles and objectives underlying this multilateral trading system' (WTO Preamble) in order to justify vis-à-vis domestic citizens their often divergent interpretations and progressive clarification and development of WTO rules. As in many national and regional jurisdictions, views about the appropriate 'institutional balance' between the legislative, executive and judicial organs remain contested also in the WTO and have been discussed also in a number of WTO dispute settlement reports like *India-Quantitative Restrictions*[7], *Turkey-Textiles*[8] and *US-Poultry (China)*.[9]

3. Provisional Implementation of Doha Round Agreements prior to amendments of WTO law?

Appropriate leadership and collective political pressure should enable ratification of a 2012 WTO amendment implementing the Doha Round Agreements by a two-thirds majority of WTO members in the course of 2013 and an additional WTO Ministerial Decision in December 2013 on the date of entry into force of the Doha Round agreements (e.g. on 1 January 2014 for WTO members having ratified the agreements and, for other WTO members, on the 30th day following their acceptance during 2014-2015). Yet, if the amendments of the WTO Agreement should not enter into force due to less than the necessary 102 ratifications: could WTO members agree on provisional application of some Doha Round agreements prior to amendments of WTO law?

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7 Cf. WT/DS90/AB/R adopted in September 1999.

8 Cf. WT/DS34/AB/R adopted in November 1999.

9 Cf. WT/DS392/R adopted in October 2010.

If a 2012 WTO Protocol on the implementation of the Doha Round agreements would not obtain – by the end of 2013 - the necessary number of ratifications for amending the WTO Agreement as of 1 January 2014, some WTO members may request a WTO 'waiver' from the WTO most-favored nation commitments authorizing provisional application of some Doha Round results among those WTO members that have ratified the Doha Round agreements. A pragmatic 2014 Protocol on the provisional application of some Doha Round agreements could also be transformed into a Plurilateral Trade Agreement covered by Annex 4 of the WTO Agreement so as to enable its provisional, transparent administration inside the WTO legal framework as an incentive for third WTO members to ratify the Doha Round Protocol and related WTO amendments. As none of the leading trading nations has currently enacted 'fast-track legislation' facilitating parliamentary approval and ratification of future Doha Round agreements, implementing a 'single Doha Round undertaking' in conformity with the 'single undertaking' underlying the WTO Agreement may raise a host of complex legal questions testing the ingenuity and pragmatic traditions of WTO lawyers. Even if it should turn out once again – as in the case of the 1947 'Protocol on Provisional Application of GATT' – that it may be '*le provisoire qui dure*', the existing WTO Agreement could continue providing a stable legal and institutional framework for world trade and trade policies of all WTO members also during a transitional phase of progressive ratification of the Doha Round agreements and their provisional application by a limited number of WTO members.

The Future of the WTO: Learning from the Past

André Sapir

In a speech on the history of the multilateral trading system pronounced in September 2010, WTO Deputy Director-General Alejandro Jara rightly recalled that when 23 nations sat for trade negotiations in Geneva in April 1947, the event, the first step towards the creation of the multilateral trading system, had little international resonance.[1] The real focus was instead on the preparations for a major new global institution, the International Trade Organization (ITO), which together with the two Bretton Woods institutions would make up the three pillars of the post-World War II international economic order.

The Geneva talks ended on 30 October 1947, with the signature of the General Agreement on Tariffs and Trade (GATT). One month later, the UN Conference on Trade and Employment began in Havana with the view to establish the ITO. The Havana Charter signed in March 1948 not only envisioned the creation of the International Trade Organization, but also contained international rules in five different areas. Besides commercial policy, with Chapter IV of the Havana Charter essentially reproducing the GATT rules, there were supposed to be rules on employment and economic activity (Chapter II), economic development and reconstruction (Chapter III), restrictive business practices (Chapter V) and inter-governmental commodity agreements (Chapter VI).

In 1950, when, given the opposition in the US Congress, the US Government announced that it would not seek ratification of the Havana Charter, only the GATT rules survived, without the institutional underpinnings of the ITO and without the other rules foreseen by the ITO Charter.

The addition of Part IV to the GATT in 1965, which outlines principles and objectives for the treatment of developing countries by the multilateral trading system (partly akin to those contained in Chapter III of the ITO Charter), was a first step towards filling the gap between the GATT and the Havana Charter. The second step was the creation of the WTO on 1 January 1995, at the end of the Uruguay Round, which brought to reality the failed attempt in 1948 to create an International Trade Organization.

Does the transformation of the GATT into the World Trade Organization prefigure the bringing to reality of the other plank of the Havana Charter that was abandoned in 1950, namely the introduction of international rules in areas outside commercial policy instruments covered by the GATT? The answer is probably yes, but how far the extension will go is precisely what part of the discussion on the future of the WTO is all about.

The creation of the WTO seems to have produced a paradoxical situation. On the one hand, it clearly marks the biggest reform of the world trading system since the creation of the GATT. On the other hand, the system has witnessed an unprecedented proliferation of preferential trading arrangements, which, although permitted by WTO rules, are in clear violation of one of its founding clauses, the most favoured nation principle.

Is the simultaneity between the creation of the WTO and the proliferation of PTAs a pure coincide or are the two related to one another? My contention is that it is rather the latter, at least as far as PTAs concluded by the European Union and the United States, the world's two largest trading entities, are concerned. The replacement of the GATT by the WTO was not just a matter of setting up a trade organization. It was also an extension, mainly at the insistence of the EU and the US, of multilateral rules from trade in goods only (the GATT) to trade in services (through the General Agreement on Trade in Services, the GATS) and trade-related intellectual property rights (through the Agreement on

[1] See Alejandro Jara, "A Brief History of the Multilateral Trading System," Remarks by the Deputy Director-General of the WTO at the European Trade Study Group (ETSG) annual conference, Lausanne, 9 September 2010.

Trade-Related Aspects of Intellectual Property Rights, the TRIPs Agreement). The fact of the matter, however, is that neither the GATS nor the TRIPs have proved able to deliver the kind of the discipline that the EU and the US had hoped for, hence their pursuit of PTAs that include discipline on trade in services and intellectual property rights that goes far beyond WTO-agreed rules.

In truth, however, the GATS and the TRIPs agreements have little in common with the kind of discipline envisaged by the Havana Charter in areas outside trade in goods. Rules on intellectual property rights were not envisaged at all. On the other hand, the Havana Charter did include an article on "Special Procedures with respect to Services" (Article 53) as part of its chapter on restrictive business practices.

Two subjects covered by the Havana Charter have recently come under consideration for possible inclusion in future WTO negotiations. One is exchange rates. Chapter IV of the Charter includes an article entitled "Relationship with the international Monetary Fund and Exchange Arrangements" (Article 24), which is essentially the same as Article XV GATT on "Exchange Arrangements".

Article XV says that, in case of disputes regarding balance of payments, foreign exchange reserves or exchange arrangements, GATT members shall "consult fully with the International Monetary Fund" and shall accept its determination as to whether a country's exchange arrangements are consistent with its obligations under the IMF Articles of Agreement. Article XV also says that countries "shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund."

Recently there has been much discussion, especially in the United States, as to whether China's exchange rate policy amounts to an "exchange action" that may have the effect of frustrating "the intent of the provisions" of the GATT. There has never been, however, a definitive ruling by the GATT or the WTO on the meaning of Article XV, including how GATT provisions might be frustrated by exchange action, which is why there are now demands that the WTO legislates to clarify the significance of Article XV. At the same time, it should remembered that the GATT and Havana Charter were originally written at a time when the world lived under fixed exchange rates, which imparted a specific meaning to the expression "exchange action" and to the role of the IMF that may not be relevant today.

The other subject that has recently come under consideration for possible inclusion in future WTO negotiations is primary commodities. From the viewpoint of international trade rules, much of the current discussion on primary commodities focuses on export taxes, which are clearly not prohibited by GATT rules, and export prohibitions or restrictions, which are explicitly permitted under GATT Article XI:2, when they are "temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to" WTO exporting countries. The question arises, however, as to whether the issue of primary commodities will lead sooner or later to a discussion on inter-governmental commodity agreements, as originally envisaged under Chapter VI of the Havana Charter.

The conclusion I draw from this short note is that developments in the global economy - be they the issue of China's exchange rate regime, the rising prices of primary commodities or the question of climate change not discussed hitherto - seem to be forcing WTO members to rediscover the virtue of the ITO, which was to seek to embed rules on commercial policy within a wider system of international rules. At the time of the creation of the WTO, in 1994, its members added to the WTO Agreement a Ministerial Declaration on Achieving Greater Coherence in Global Economic Policy Making, calling on the WTO to cooperate with other organizations, mainly but not exclusively the IMF and the World Bank. Although some progress in the direction of greater coherence has been achieved, especially during the crisis thanks to the newly-created G20 summits, much remains to be done. My sense is that the future agenda of the WTO will contribute to attain such coherence.