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Global Governance Programme

TRADE ROUNDTABLE

Organised by Petros C. Mavroidis

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

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GLOBAL GOVERNANCE PROGRAMME

Trade Roundtable

ORGANISED BY PETROS C. MAVROIDIS

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Introductory Remarks

Petros C. Mavroidis

The Doha round has been stalling for over 10 years now. It might not be 'dead and loving it' but definitely in moribund condition. Worse, there is no sign of reviving it, in the near future at least. The most optimistic scenario involves a re-engineering of the round after the US Presidential elections. There are so many uncertainties involved though that few, if any, would bet their money on it.

More worrisome is probably the fact that major trading partners are looking into deals that would eviscerate even further the non-discrimination principle, the cornerstone of the WTO. Preferential trade agreements are multiplying at alarming speed: Obama was celebrating in Hawaii the Pacific deal two weeks before the Doha round was pronounced dead yet again last December; the EU has concluded a deal with Korea, is about to do so with Canada and India, and is also contemplating (or, at least has not rejected the idea) a deal with its transatlantic partner. And then, the plurilaterals: conceived as a means to break a deadlock caused by the single undertaking-approach, they could become the means to transform the WTO into an integration process with variable geometry. The talk of a services plurilateral is picking up speed and caused friction already in some quarters.

With all this in mind, the High Level Policy Seminar "Trade Roundtable" (12 March 2012), organized within the Research Strand "International Trade" of the Global Governance Programme (GGP), aimed to address the possible ways, if any, to keep the Round alive. The memoranda presented during the seminar by the academics (featured in this publication) as well as the responses by the policy makers left us with little room for optimism. The WTO needs a reality check soon. And it will be painful, for it is not just the current round that is at stake, but its future relevance as well. Preferential trade agreements seem to run away with the trade agenda while the WTO is catching up its breath.

The participants in our seminar were:

Roderick Abbott, ECIPE
Jayant Dasgupta, Ambassador and Permanent Representative of India to the WTO
Per Cramér, Göteborg University
Claus-Dieter Ehlermann, Wilmer Hale
Bernard Hoekman, World Bank
Petros C. Mavroidis, EUI and Columbia University
Vital Moreira, MEP, European Parliament
Angelos Pangratis, Ambassador and Permanent Representative of the European Union to the WTO
Ernst-Ulrich Petersmann, EUI
Miguel Poiares Maduro, Director GGP, EUI
Michael Punke, Ambassador, Deputy U.S. Trade Representative and U.S. Permanent Representative to the WTO
Raymond Steenkamp Fonseca, IMT Institute for Advanced Studies
Harsha Vardhana Singh, Deputy Director General, WTO
Lu Xiankun, Counsellor, Head of Division for Cross-cutting Issues, Permanent Mission of China to the WTO

I would like to thank the GGP for the generous support that allowed us to put this seminar together as well as the participants who found the time and energy to prepare and present their views.

The future of trade talks after the December WTO Ministerial Conference

Roderick Abbott*

Introduction: I would wish to highlight the issues that arise from the fact that the Doha Round is stuck and that Ministers last December produced no new ideas about how to move forward. They merely said that members had to explore new approaches.

The place to start, however, is in the text that Ministers agreed in December 2011 (WT/MIN (11)/W/2). This examines a range of broad WTO issues : the importance of the multilateral system and the WTO, trade and development, and finally the Doha Development Agenda. I will quote what I believe are the key excerpts for our discussion today:

- "Ministers acknowledge that there are significantly different perspectives on the possible results that Members can achieve in certain areas of *the single undertaking*. In this context, it is *unlikely that all elements of the Doha Development Round could be concluded simultaneously in the near future*".
- "In order to achieve this end and to facilitate swifter progress, Ministers recognize that *Members need to more fully explore different negotiating approaches* while respecting the principles of transparency and inclusiveness".

This could lead to questions about how to resume negotiation on the old agenda, (mainly on Tariffs, NAMA, Services and Rules), or how to expand that agenda to include a few new issues that everyone knows will have to be tackled: investment (now an integral part of the EU's commercial policy), competition, or trade and the environment (including climate change and the impact of measures to tackle climate problems which could damage the trade system).

We need today to find out what differing approaches the members have been discussing. I will be suggesting three questions and in each case provide a short account of the discussion.

(1) A recent report has suggested that the way to kick start the multilateral system would be for the US and EU to launch a bilateral initiative - a free trade area in substance, although the authors prefer to talk of a barrier-free market. It would be preferential, but open for others to join, and if they do, this could lead to wider liberalisation among at least main players.[1]

What do Geneva people make of that idea? How would the BRICs react, for example? Do Geneva people still think that a substantial move by EU-US would kill off the WTO? Or would it concentrate minds and lead other major actors to join in?

In discussion colleagues from Geneva (USA, EU, India, China and the WTO) spent much time analyzing the continuing impasse. What we heard on the one hand was that no intermediary or facilitator (such as the WTO secretariat) could help when the sides "do not agree on what has to be done" - the gap is unbridgeable; while on the other hand there were too many areas under discussion where developing countries saw no clear advantages to them but major benefits to others. This suggests that at this early stage discussion is a long way from any consensus on the way forward.

The comments did not directly address the issue of bilateral initiatives and whether they could promote progress in the DDA. The inherent 'tension' between bilateral free trade and liberalisation *erga omnes* is well understood; but in Geneva they may have followed less closely developments from the EU-US Summit meeting last November, when a High Level Group was set up to explore closer

* ECIPE, Brussels.

1 "A New Era for Transatlantic Trade Leadership", report by a joint Task Force set up by ECIPE and the German Marshall Fund. Published in March 2012. (www.ecipe.org)

relationships. Yet there has been frequent debate through 2011 about the Trans-Pacific Partnership project, which might be said to have a similar rationale.

More generally, as regards Ministers' direction to explore new approaches, the discussion showed up the divergences of view. It was apparent that the US and EU were ready to consider alternative ways to move forward, such as agreement by consensus to pick low hanging fruit (eg. trade facilitation, efforts to assist LDCs) or by plurilateral agreements (coalitions of the willing). However it was equally apparent that India and China continued to attach importance to Single Understanding concepts: 'all parts of the deal to be agreed at the same time' and 'all elements go together, none are to be left out'.

There was a lively debate about trade facilitation, where to the surprise of the World Bank it was argued that this was not a win-win negotiation; improved customs clearance procedures and lower transaction costs would be helpful to developing countries, but the main economic benefit would be to exporters from developed countries. Associated infrastructure projects (road systems, port facilities) would be useful but they were not always the first priority for the countries involved.

Another matter mentioned was the need to tackle barriers arising from divergences in domestic regulation (eg. in areas such as TBT and SPS). The concept of mutual recognition and equivalence, as well as a negative list approach to these issues was raised.

(2) Linked to these first issues, I would ask whether the approach of discussing plurilateral agreements (either closed, with benefits only among the parties, or open for others to join in at any time) would be likely to be accepted by all WTO members as part of the WTO Agreement. (This was the route taken at the Marrakesh meeting for the GPA which was approved by consensus in 1995.) Is this a viable way forward in current circumstances for trade liberalisation? [2]

In discussion the US argued strongly for a new approach on these lines. In their view there simply was no agreement on the aims and objectives of the Round and therefore on what might be achieved. This being so, countries that nevertheless wished to move on and find new areas for trade liberalisation would have to do this among themselves. Discussion on Services was being pursued at present in a group of 16 countries (the so-called 'Really good friends') who were exploring what further opening could be achieved among themselves. This group was not closed and others were welcome to join in, provided they shared the approach.

Others took much more nuanced positions. The EU, also a member of the group, did not yet have a common position among its members; while India and China (outside the group) felt that market opening in services should be discussed within the existing negotiating groups. They were wary of any suggestion that they should match the opening made by other group members.

There were questions from others as to the format of any final agreement – MFN with new concessions available to all, or free trade under GATS Article V, or a non-MFN agreement along the lines of the Government Procurement deal. These were crucial issues affecting how far such negotiation might in fact be the best way to promote progress in the Round. The US said that the form of the agreement would be discussed later, but it appeared clearly that a preference existed to withhold benefits to all WTO members.

(3) My third question would be about Preferential Trade Agreements: as these have been evolving there are (i) examples of deals with very broad objectives of the type discussed in the TPP and now on the Transatlantic front, with new issues integrated into the classical free trade framework, and (ii) there are others with much lighter objectives which are miles off the 'substantially all of the trade' test.

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[2] The proposals for trade in services follow another recently concluded agreement in the field of Intellectual property. ACTA or the Anti-counterfeiting Trade Agreement) was under negotiation among mainly developed countries and has the support of the US, Canada, Japan and the EU (although it has run into difficulties in the European Parliament).

Do Geneva people think that WTO can continue to welcome all guests under the same roof? or do we have to react to this evolution which carries dangers for the multilateral system - accommodating the exceptions in some cases but imposing stronger discipline in others?

Discussion of this was inherent in the various debates already reported above. There is clearly strong support at presents for all things bilateral, regional and plurilateral, which no doubt reflects the impasse in WTO negotiations. Among the many cases that could be mentioned are the EU agreements with Korea and in Central/South America, with negotiations ongoing with India and Malaysia; the ACTA deal and proposals for TPP in the Asian region and on Services; and Canada and Japan are engaged in closer partnership discussions with the EU. The overwhelming impression is that WTO members have no desire to intervene in a process which is member driven and that risks to the system can be expected to disappear in the longer term.

Blog published in March 2012

Did you think that the Doha Round had died and was gone for good? Not so : the Trade Ministers in December "deeply regretted that … negotiations are at an impasse"; but they "remain committed to work actively …. towards a successful multilateral conclusion of the DDA", and they "recognize that Members need to more fully explore different negotiating approaches while respecting the principles of transparency and inclusiveness". [3]

This has led commentators to say that "MC8 shelved the Round for an indefinite period" or that "the Doha Round was closing its doors provisionally" [4] – phrases that convey accurately enough the doubts that exist whether, after a pause for the US elections in 2012, it can be revived, with or without new approaches. In current circumstances this is not a foregone conclusion.

So, where do matters stand three months on? Here is a progress report, based on discussion at the EUI in Florence between Ambassadors[5] and trade policy experts and academics. In summary, from the point of view of moving forward and exploring new approaches, it was somewhat disappointing.

Starting with a range of comments about the current situation, what we heard on the one hand was that no intermediary or facilitator (such as the WTO secretariat) could help when the sides "do not agree on what has to be done" and the gap was unbridgeable; while on the other hand there were too many areas under discussion where developing countries saw benefits to others and no clear advantages for them. Surprisingly, this was said about trade facilitation, where the 'costs' of changes to their systems for customs clearance were seen as outweighing any benefits to their trade; and about market access where benefits would be largely to 'western' exporters despite the record growth in south-south trade in recent years.

This all seemed to show that in three months not much has yet moved. In peripheral comments [the Americans said] it was said that they had rejected the adoption of a duty-free, quota-free regime for LDCs largely because of …. opposition from other African countries who would face preference erosion (losing benefits they have under the AGOA scheme). The phantom of increased competition from Bangladesh was audible in the room. There was also a reference to China being the principal subsidiser of cotton (based apparently on calculations by ICAC) – mentioned as a reason why the Americans could not reduce their own subsidy regime – which provoked a strong reaction from the other side. 'You cannot shelter behind us'.

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[3] The Ministers also said that it was unlikely that the Single Undertaking concept (that "all elements should be concluded simultaneously") could be realised in the near term (para 2), and for good measure they encouraged Members to work towards 'early harvest' agreements and 'low hanging fruit' (para 5).

[4] Prof. Vital Moreira, MEP and Prof. Petros Mavroidis

[5] From the US and EU, and also India and China, as well as the WTO secretariat.

After all this navel gazing and facing backwards it would have been a relief to look ahead and see what new ideas might be under discussion. One Geneva representative maintained that new approaches would have to be within the Doha mandate. Almost the only truly 'new' candidate was the proposed plurilateral agreement on trade in services being elaborated by a group of 16 countries in Geneva; but this did not take us very far. [6] Questions about whether new access would be applied MFN (and indeed could be applied in discriminatory fashion in a field of domestic regulation) or whether it would be an Art. V GATS agreement, or drafted as a 'WTO agreement' along the lines of the GPA, were largely left open.

In other areas, less new, there was further support for trade facilitation (where there would be major infrastructure benefits as well as lower transactional costs), especially from the World Bank; but against the view that this was not a win-win sector, this made little impression. There was also some exchange of view about regulatory divergence in the context of TBTs with the concept of mutual recognition and of negative listing being mentioned.

It was hard to see where this could lead in Geneva. The current EU enthusiasm for all things bilateral, regional and plurilateral (agreements with Korea and in Central/South America, others under negotiation with India and Malaysia, also Canada and Japan, the TPP, ACTA and the ISA on Services) is clearly gaining speed. How such initiatives will be fitted into the multilateral system in due course remains unclear. I asked whether Geneva still considered that a bilateral US-EU initiative for closer trade relations "in a barrier free market" were still thought to be the death of the WTO. No one wanted to address the issue.

[Chatham House rules apply to this discussion. I have quoted here and there, mostly indirect quotes.]

[6] This was the subject of an ECIPE/ESF conference on March 6th. Main protagonists are the US, Australia, Canada, **with other OECD countries and a few others such as Chile, Mexico, Hong Kong, Singapore and Pakistan.** The EU is participating in the work but more circumspect.

The Doha Round and the search for a functional and legitimate co-ordination between the UNFCCC and the WTO

Per Cramér*

When signing the United Nations Framework Convention on Climate Change **(**UNFCCC), as well as the Kyoto protocol, governments were fully aware of their obligations under the WTO treaties. Moreover, it was presumed that the two systems should be mutually supportive, a stance which was explicitly spelled out already in the Agenda 21 of the Rio Earth Summit 1992.[1] In spite of an increased awareness of the climate changes resulting from the anthropogenic emission of green house gases (GHG),[2] the world community has not yet been able to create a functional co-ordination between the UNFCCC and the WTO. Instead of being two mutually supportive systems there has developed a tension between different states and interests on how the interaction between these two regulatory structures ought to be designed. Taking into account the prolonged commitments under the Kyoto protocol[3] and the agreed objective to adopt a new agreement that will bring all parties to the UNFCCC under the same legal regime by 2020,[4] I believe that creative concrete discussions over this issue are of highest urgency.

Issues relating to the interface between trade and multilateral environmental agreements are formally covered by the Doha Agenda albeit they have been outside the focus of the negotiations.[5] Nevertheless, they were initially given some attention by the WTO, at least up until the UNFCCC conference in Bali in December 2007. [6]

In the outcomes of the WTO Eighth Ministerial Conference December 2011 questions relating to climate change were however only noted *en passant* in a language revealing a basic lack of agreement between the parties:

> A number of Ministers stressed that for the WTO to remain credible and relevant it needed to address current global challenges. Some of the issues mentioned in this discussion included climate change, energy, food security, trade and exchange rates, competition and investment. Some Ministers stated that it was time to explore these issues in WTO regular bodies to enable the

* University of Gothenburg.

1 Agenda 21 of the Rio Earth Summit, para. 2.19.

2 *Climate Change 2007 Synthesis Report, An Assessment of the International Panel on Climate Change,* IPPC 2007, available at www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

3 Draft decision -/CMP.7 *Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its sixteenth session,* available at http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/awgkp_outcome.pdf. Further negotiations are scheduled to take place in Bonn 14-25 May 2012.

4 *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action,* UNFCCC/CP/2011/l.10, available at http://unfccc.int/resource/docs/2011/cop17/eng/l10.pdf

5 In the Ministerial declaration, 14 November 2001, setting the agenda for the Doha Round, the interface between trade and multilateral environmental agreements is mentioned in para 31 (i) according to which the parties agree to negotiate on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs).

6 In a speech at the Informal Trade Ministers' Dialogue on Climate Change in Bali on 8-9 December 2007, Director-General Pascal Lamy stated: …*that within a broader context of the Doha Round's environmental chapter…and enhancing the mutual supportiveness between WTO rules and multilateral environmental agreements, the negotiations on environmental goods and services could deliver a double-win for some our members. A win for the environment and a win for trade*.
Available at www.wto.org/english/news_e/sppl_e/sppl83_e.htm.

> membership to improve understanding of their implications for trade and development while continuing efforts to seek a conclusion of the Doha Round.[7]

BTA:s as an instrument for linkage between the UNFCCC and the WTO?

The contemporary international debate concerning the UNFCCC-WTO relationship has largely focused on Border Tax Adjustments (BTA:s) related to the emission of GHG during the process of production in the exporting jurisdiction. Interest groups have advocated such measures as a means for creating incentives for non-signatories to accede the Kyoto protocol.[8] Initiatives for such measures have been put forward in industrialized states as an instrument to mitigate the risk of carbon leakage as well as protecting competitiveness for domestic industry.[9] Conversely, this type of initiatives have been intensively criticised by developing countries that have adhered to the Kyoto protocol under annex A. This group of states are particularly concerned that their exports will be targeted and that their economic development thereby will be compromised.[10]

The potential use of BTA:s certainly gives rise to a number of legal and policy issues of great magnitude which illustrates the complexities that we are facing when designing a functional and legitimate linkage between trade regulation and the developing climate regime.

Neither the UNFCCC nor the Kyoto protocol could be reasonably interpreted to require or authorize a trade measure as a strategy to make the climate regime more effective, enforce the treaty or promote membership.[11] Thus, any use of a BTA measure should be seen as an action taken at the national level and be evaluated in the light of the WTO agreements. The use of BTA:s could be challenged under the rules of GATT 1994. In general terms the reasonable conclusion is that this type of BTA:s must be seen as inconsistent with the fundamental principles of non discrimination in GATT 1994, articles I and III(2), while leaving it open for possible justification of specific measures under Article XX.[12]

Moreover it is important to underline that the Kyoto Protocol, as well as the UNFCCC itself, *is based* on the principle of the signatories' common but differentiated responsibilities and respective capabilities.[13] Under the Kyoto protocol, this asymmetrical structure is made concrete by the difference in obligations between the states listed in annexes A (developing countries) and B (developed countries) respectively. From a structural perspective, the use of BTA:s by annex B states against imports of products from annex A states can clearly be perceived as an instrument to alter or annihilate this asymmetry. If such measures are justified under GATT 1994, it would accordingly lead to a tension between WTO and the UNFCCC frameworks, this even if the rationale of the asymmetry established by the Kyoto protocol could be put in question.

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7 WTO Eigth Ministerial Conference, Chairman's Concluding Statements, 17 December 2011 WT/MIN(11)/11, Part II Summary of Key Issues Raised in the Discussion.

8 A telling example of this line of argumentation is found in a press release from environmental group Friends of the Earth Europe 2002-09-16. Available at www.foeeurope.org/press/AW_16_09_02_GMOsynergy.htm.

9 P-E. Veel, *Carbon Tarriffs and the WTO: An Evaluation of Feasible Policies*, Journal of International Economic Law, 2009, pp. 749-800, pp. 758-760.

10 See as example M. Kohr, *Threat to Bloch South's Exports on Climate Grounds*, South Bulletin, 40, Geneva 2009. Available at www.southcentre.org/index.php?option=com_content&task=view&id=1082&Itemid=279&lang=fr

11 UNFCCC article 3 (5) includes an implicit reference to GATT article XX (1): *Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.*

12 Compare: G. Goh, *The World Trade Organization, Kyoto and Energy Tax Adjustments at the Border*, Journal of World Trade 38(3): 395-423, 2004. H. Horn and P.C. Mavroidis, *To B(TA) or Not to B(TA)? On the Legality and Desirability of Border Tax Adjustments from a Trade Perspective*, The World Economy 2011, pp. 1911-1937.

13 UNFCCC, article 3 (1), Kyoto Protocol, article 3 (1).

Even if the use of BTA:s could be legally justified under WTO law it could be questioned if such measures are desirable from a policy perspective. It is clear that BTA:s relating to the emission of GHG in an exporting state raise complex issues of economic, environmental and trade policy. Countries seeking to introduce such measures will undoubtedly face significant difficulties in implementing and then administrating such a regime.[14] In the literature it has also been put forward that such measures would have limited effects for furthering climate policy objectives while they would incur a clear risk for the erosion of the regime for trade liberalisation under the WTO. [15] Without a multilaterally agreed "standard", the judgement of what should be considered as "substandard" will be based on the perceptions and preferences of the importing state.

The conclusion must be that, at the current stage of development, does the introduction of BTA:s related to the emission of GHG during the process of production in the exporting jurisdiction not constitute a viable instrument to establish a legitimate and functional link between the UNFCC and the regulatory structure for international trade.

In a longer time perspective, I believe that BTA:s could be used as an instrument to further the objectives of the UNFCCC without constituting unjustifiable discrimination or a disguised hindrance to international trade. Today it could be argued that the asymmetrical structure of the UNFCCC and the Kyoto protocol in itself rules out the legitimate use of BTA:s by annex B states against annex A states. Therefore it seems that a legitimate use of BTA:s would require that this asymmetry is modified and that the clear dichotomy between annex A and annex B states is abandoned. In concrete terms this means that annex A states have to accept GHG emission commitments for the upcoming commitment period. Moreover, this type of linkage would require that there is congruence between the signatories of the UNFCCC and the WTO. A linkage could then be established with reference to the commitments to cut GHG emissions done by each state. This linkage would make it justified under GATT law to introduce BTA:s for imports from states that do not honour their commitments. Such a development would however open up for a new set of questions that have to be carefully discussed. It would put the focus on the power to adjudicate on the question if a signatory party has infringed its commitments under the UNFCCC. To attribute this competence to the WTO dispute settlement system would mean a considerable empowerment of the panels and the AB with corresponding responsibilities. Would the WTO structure be prepared and able to take up such a responsibility with legitimacy among the signatory parties? The alternative solution would be to set up an independent specialized dispute resolution system under the UNFCCC on which the linkage to the WTO would rely. This system must go beyond the present intergovernmental paradigm[16] and could be designed along the lines of the DSU. The possibility to mobilize a common political will among the community of states in order to create such a system today could however be doubted.[17]

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[14] Z. Zhang and L. Assuncao, *Domestic Climate Policies and the WTO*, East-West Center Working Paper No 51, 2002 available at http://scholarspace.manoa.hawaii.edu/bitstream/handle/10125/6048/ENVwp051.pdf?sequence=1

[15] Compare H. Horn and P.C. Mavroidis, *To B(TA) or Not to B(TA)? On the Legality and Desirability of Border Tax Adjustments from a Trade Perspective*, The World Economy 2011, pp. 1911-1937.

[16] UNFCCC, article 14.

[17] It should be noted that the initiatives for dispute resolution system under the UNFCCC that have been presented are of a much more modest, and maybe more realistic, character. See as example the *Submission by Mediators Beyond Borders International on The Work of the AWG-LCA Contact Group, Agenda item 3.1 A Shared Vision for Long-Term Cooperative Action* in which the following text was presented for consideration:

Recognizing that disputes are an inevitable and adverse effect of climate change, the Parties are encouraged to use mediation, conciliation, arbitration, and actions before the International Court of Justice to settle their climate change disputes. Available at: http://unfccc.int/resource/docs/2011/smsn/ngo/345.pdf.

How to go forward?

The controversy surrounding the topic of BTA:s is an example of the present uncertainty concerning the relationship between the multilateral climate policy and multilateral trade policy. There are compelling reasons to overcome this uncertainty.

Concerning BTA:s, further research on the dynamic effects of such measures on the social and economic development both in countries undertaking them and in those that may be impacted by them is needed. Increased insights into these effects could contribute to the building of mutual trust that is a necessary prerequisite for the future negotiations. Moreover, the balance between climatological gains and protectionist effects must be further investigated. Some initiatives in this direction have been taken. The UNFCCC Forum on the Impact of the Implementation of Response Measures initiated in Durban, could hopefully be developed into an arena for dialogue on these issues.[18] Another initiative in this direction has been taken by Singapore which within the framework of the Committee on Trade and Environment (CTE) has requested the WTO-secretariat to compile existing studies on how BTA:s can be applied in a WTO consistent manner and addressing the usefulness of developing a set of multilaterally agreed guidelines to pre-empt the abuse of such measures.[19] It is unclear how this process has developed.

Such an exercise does not however in itself address the principal structural challenge concerning functional linkages between these two mutually dependent multilateral structures. To meet this challenge the on-going parallel negotiation processes on the development of the WTO treaties and the UNFCCC have to be closer co-ordinated and mutually reflexive.

Brief conclusions after the High-Level Policy Seminar

As a preparation for the High-Level Policy Seminar at the EUI Robert Schuman Centre,10-12 March 2012, I submitted a memo outlining the challenges described above. I did so because I believe that a seminar bringing together qualified practitioners, decision makers and academia constitute an excellent arena for discussing this type of complicated pressing issues. I would dare to say that we have a responsibility to conduct such discussions with the objective to introduce concrete initiatives into the DDA and the post-Durban debate. My proposal was to discuss the following questions:

Which initiatives and political processes are needed to develop a functional mutually supportive link between the UNFCCC and the WTO? Could these questions be reactivated on the Doha agenda?

In what way would a failure to conclude the Doha Round affect the efforts to develop such a linkage?

Could BTA:s be designed as an efficient and legitimate instrument to further the objectives of the UNFCCC without jeopardizing the objectives of the WTO? What is our present knowledge about the effects? Which further investigations are needed?

Even if the importance of the issues raised were recognized, the discussions around these questions never became concrete. It became clear that that, due to lack of mutual trust and disagreement between the signatory parties of the WTO, it will not today be possible to revive the climate related issues of the DDA.

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[18] *Outcome of the Ad Hoc Working Group on Long-term Cooperative Action Under the Convention*, para. 85, UNFCCC/AWGLCA/201/L.4. Available at http://unfccc.int/resource/docs/2011/awglca14/eng/l04.pdf. Compare: International Centre for Trade and Sustainable Development *Submission: Information and views relating to modalities for the operationalization of a work programme and possible forum on response measures*[Mandate: FCCC/SBSTA/2011/l16 & FCCC/SBI/2011/L.18]. Available at http://ictsd.org/downloads/2011/09/ictsd_submission.pdf.

[19] Promoting Mutual Supportiveness Between Trade and Climate Change Mitigating Actions: Carbon Related Border Tax Adjustments, WT/CTE/W/248, 30 March 2011.

The dominant view expressed by the participants representing the WTO as well as major parties in the Doha negotiations, was that the conclusion of a multilateral treaty on climate change must precede the bringing up the questions of linkage on the WTO agenda.

This view is an echo of the argumentation presented by Pascal Lamy at the Bali Conference in December 2007:

> My starting point in this debate is to say that the relationship between international trade – and indeed the WTO – and climate change, would be best defined by a consensual international accord on climate change that successfully embrace all major polluters. In other words, until a truly global consensus emerges on how best to tackle the issue of climate change, WTO members will continue to hold different views what the multilateral trading system can do and must do on this subject.[20]

This view could be said to be in accordance with my own argumentation concerning the preconditions for making BTA:s a legitimate instrument for linkage between the WTO and a future multilateral agreement on limitations of GHG emissions.

But this seemingly logic argumentation misses the central point. At present we are very far from attaining that "a truly global consensus emerges on how best to tackle the issue of climate change".

As we stand today, two fragile multilateral negotiation processes are conducted in parallel lines. Both of these have as their objective to address urgent issues for our common future and there seems to be a basic agreement that these issues are mutually interdependent. A future multilateral treaty-based solution must therefore include functional links between the spheres of the WTO and the UNFCCC. Still there seems to be no common political will to bring the two negotiation processes closer to each other. By making the attainment of a consensual accord on climate change that successfully embrace all major polluters a precondition for bringing up questions relating to climate change on the agenda, the WTO withdraws from the responsibility that it has been given.[21] This situation can only be described as a tragedy.

As Patrick Messerlin pointed out in his submission to the seminar, it is not only the world trade regime that is in danger today. It is the idea of "global governance" as a whole that is put at risk. He especially points out that very little progress is achieved in areas where the world community faces paramount challenges such as climatological change and the depletion of the fish stocks in the oceans.

I do not believe in a total integration between the WTO and the UNFCCC. However the WTO, as the most sophisticated and well developed multilateral organization for multilateral governance, has a responsibility beyond the "pure" trade issues. It has a responsibility to give a constructive impetus to the post-Durban negotiations, which for its success inevitably will require a functional co-ordination with the development of the regulatory framework of the WTO. As a concrete suggestion the WTO ought to take the initiative for a joint WTO-UNFCCC conference on the issues relating to the interface between the multilateral regulation for trade and cutting emissions of GHG.

When it comes to the DDA it is worth pointing out that it was deliberately formulated as a wide inclusive agenda, this in order to facilitate for trade offs and compromise solutions. As the negotiations have entered into a stalemate the agenda has been shrunk and the dominating view today is that isolated islands of common political will have to be identified in order to keep the process alive.

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[20] Speech at the Informal Trade Ministers' Dialogue on Climate Change in Bali on 8-9 December 2007. Available at www.wto.org/english/news_e/sppl_e/sppl83_e.htm.

[21] Compare the preambular text of the Agreement Establishing the World Trade Organization, para 1; The *Parties* to this Agreement, *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,** (Bold lettering added)

Deeming from the discussions at the seminar it seems that this strategy has not been crowned by success. The post-Durban negotiations are highly dependent on the development of the WTO as a well-functioning multilateral organisation and thereby dependent on the Doha negotiating process and its outcome. By reviving the climate related issues of the DDA the scope for negotiations would increase in a way that could revitalize both the Doha and the post-Durban negotiations.

The WTO and the Doha Round: Three Options Looking Forward

Bernard Hoekman*

The Doha Development Agenda (DDA) negotiations, underway for more than 10 years, have been in a state of stasis since 2008 as a result of disagreements between major players on the extent of new liberalization commitments, especially for nonagricultural products. Efforts to use the eighth WTO Ministerial Conference in December 2011 to partially "harvest" results in areas of particular relevance to the least-developed countries (LDCs) and other low-income countries—such as duty-free, quota-free access for LDCs and an agreement on trade facilitation—failed. The prospects for successfully winding up the talks in the near future are dim.

The deadlock is costly. Assessments of the market access dimension of what has been negotiated to date suggest that the DDA could generate a global welfare (real income) boost of some US$160 billion (Laborde, Martin, and van der Mensbrugghe 2011). This significantly underestimates the value of an agreement, because continued paralysis also means that the WTO is not delivering on its "legislative" function—the development of new global rules of the game for national trade policies that generate negative spillovers.

Many have called on policy makers to acknowledge failure, terminate the talks, and start a process of defining a new negotiating agenda that includes issues of greater salience to businesses. Others call for a shift in negotiating techniques and practices so as to prevent a small group of countries (or a group of small countries) from blocking agreement among the largest trading nations. The utility of such recommendations is limited at best. The subjects that are on the table in the DDA—agricultural trade policies, manufactured goods, and services—will need to figure into any multilateral trade negotiation. The problem that is holding up agreement is not 'blocking behavior' by small (developing) countries. The source of the deadlock that has prevailed since 2008 is disagreement among the large players on the depth of market access commitments. This is not something smaller countries can do much about.

This note argues that a three-pronged approach offers a way forward from where we are today. First, a move by a subset ("critical mass") of the larger players to improve their offers on market access—defined both as reductions in applied barriers to trade and locking-in policies through binding WTO commitments—and 'harvest' some of what is on the table that is of relevance to all WTO members. This will require a willingness to give up on the 'single undertaking', but as long as agreements apply on a MFN basis such a shift in negotiating modalities need not be detrimental to smaller countries. Second, leverage the transparency functions of the WTO and use existing bodies to assess and discuss trade-related policies that have spillovers on trading partners, including regulatory policies that are not yet covered by WTO disciplines. Third, move away from defining the value and relevance of the WTO in narrow mercantilist market access – i.e., focusing primarily on the applied level of trade barriers—and recognize the importance of rule-making in reducing uncertainty for firms.

Shifting Towards Critical Mass Approaches

Major stakeholders in the negotiations have stressed that more market access concessions are needed for any Doha deal to be acceptable. Arguably the contours of any deal to do more to lower applied barriers to trade and agricultural support need to be defined by the large players on a so-called critical

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mass basis. A key feature of critical mass agreements is that they need not involve all of the WTO membership. Instead, they imply agreement among the large players, with the associated benefits extended to all WTO members (that is, those who are not part of a deal are allowed to "free ride"). Such an approach is nothing new for the WTO; in practice, negotiations under the General Agreement on Tariffs and Trade (GATT) were always limited to those countries with the greatest interest in a particular area or set of products, with whatever was eventually agreed upon being extended to all members as a result of the most favored nation (MFN) rule. The threshold for agreement has tended to be around 90 percent, that is, some 90 percent of the trade involved in an area or set of products needed to be between the participating countries. A recent example of a critical mass agreement is the Information Technology Agreement, but tariff negotiations in earlier GATT rounds also conform to this rule of thumb.

To date, efforts to extend what is on the table on market access have centered on sectoral approaches and proposals for trade in goods. Developed countries with already low average tariffs have argued that they have little left with which to negotiate and induce emerging market countries to significantly lower their applied tariffs. This argument neglects the fact that concessions need not be limited to merchandise tariffs—they can involve agricultural policies, the procedural rules affecting antidumping, and others. Other elements of the DDA offer significant scope for countries to expand the level of their commitments; services are one such area. Services negotiations have been sidelined for much of the post-2001 period, in part because of a decision that services talks would commence in full force only *after* a deal on agricultural and nonagricultural market access modalities was concluded.

Trade and investment in services is inhibited by myriad policy barriers that are more restrictive than those applying to trade in goods. Moreover, the extent to which applied policies are locked in through binding WTO commitments is limited. This matters for a number of reasons, but most important is that the productivity, and thus competitiveness, of both goods and services firms depends on access to low-cost and high-quality producer services such as telecommunications, transport, finance, and distribution.

The market access outcome of the DDA would be greatly enhanced if a critical mass of the 15–20 or so largest WTO members were to agree to bind current levels of openness. The associated reduction in uncertainty would be valuable to firms, reduce risk premia, and encourage greater investment. In addition, if these countries could negotiate a package of liberalization commitments organized around clusters of services that are critical to business users and the smooth functioning of the global economy—such as logistics and supply chain management—they could significantly enhance the relevance of the DDA to global business.

The DDA area that may be of greatest potential importance from a market access and welfare ('gains from reform') perspective is trade facilitation. The costs created by inefficient trade facilitation—both monetary and, more importantly, those resulting from delays and uncertainty associated with clearance and regulatory compliance—can be greater than the cost of paying tariffs on the affected imports. Recent trade literature has documented the importance of trade costs as a determinant of whether firms export; that exporters tend to be among the most productive firms; and that the productivity effect of greater trade—deriving from both imports and exports—is an important driver of overall economic growth. Most firms do not export, and those that do often sell into only a few markets. Major factors explaining this include lack of information, difficulties in obtaining credit, and the various costs associated with entering each new export market. Trade clearance and associated regulatory compliance requirements are elements of such market entry costs that impede smaller firms from participating in export activities.

A trade facilitation agreement that reduces such costs will expand trade along what trade economists call the "intensive" and "extensive" margin. The first of these refers to greater exports of products that are already being shipped to a given market; the second describes new exports—either

new markets or new products. An expansion along the extensive margin is particularly important from a welfare and growth perspective, because new varieties of goods and services account for a large part of the potential gains from liberalization. This is a feature of the DDA that is rarely sufficiently emphasized in discussions of what is on the table. It is not only the effect of a given reduction in trade costs on existing trade flows that generate benefits. More important is that agreements that lower trade costs will generate new trade.

Leveraging the regular WTO bodies

The political cycle in several major countries (e.g., China and the United States) make it unlikely that much of what is being negotiated in the DDA can be concluded before the end of 2013. The most that is likely to be feasible are to agree on subjects like trade facilitation that have clear benefits for all Members. This situation creates an opportunity for WTO members to start to identify a forward-looking process and launch a work program to discuss policy matters that are not part of the DDA.

Much has changed since 2001 when the Doha Round was launched. The sustained high economic growth rates in large emerging markets—most notably China—over the last decade have made these countries more important as import markets and more powerful sources of competition for export markets. The world has moved from a situation characterized by low food prices to one where prices are expected to remain substantially higher on average than they have been during recent decades, as well as more volatile. Greater demand for food and natural resources could potentially bring on a more activist use of trade-related policies that have negative pecuniary spillovers on trading partners. All of these developments call for multilateral cooperation to determine rules of the game for food, natural resource, and climate-related trade policies and to strengthen the monitoring and transparency-related activities of the WTO.

The WTO is not just a marketplace in which countries exchange liberalization commitments and agree on rules of the game for policies. It is also the institution that monitors the trade policies of Members and through which negotiated policy disciplines and market access commitments are enforced. Most public attention regarding the WTO centers on the DDA and the dispute settlement mechanism, but the standing and ad hoc committees, working groups and other bodies, formal or informal, are all fora that can be used by Members to address trade policy issues. This latter dimension of the WTO is particularly relevant for firms because the associated mechanisms help to reduce uncertainty regarding the competition conditions firms will confront when exporting or investing. Uncertainty can be a major source of market entry and operating costs, and reduce investment and job creation.

There are many systemically important issues that the DDA does not address. One reason for concluding the DDA as rapidly as possible is to be able to move on to address these other significant issues. Indeed, a precondition for successful conclusion of the talks is likely to be agreement to engage in efforts to cooperate in areas that are currently off the table. Some of these issues are well known and have given rise to tensions and disputes, for example: biofuel subsidies and other types of “green” industrial policies; the possible use of carbon border adjustment as part of domestic climate change mitigation programs; export taxes on inputs to support domestic downstream industries; and export restrictions on food staples as part of an effort to insulate domestic markets. Other important and currently off-the-table issues include discrimination in government procurement; restrictions on foreign ownership of assets (natural resources, real estate, enterprises in sensitive sectors); and allegations of anticompetitive behavior by multinationals or state-owned enterprises.

Space constraints prevent a substantive discussion of the issues that WTO members arguably need to come to grips with. The main point is that there are various issues that concern all WTO members and that call for multilateral cooperation to maintain an open trading system. Agreeing on a process to address these matters, or, at the very least, to discuss them, will provide assurances that issues of

interest to all WTO members are not being ignored, and that Members are willing to engage in a dialogue that may lead to agreement down the road to launch negotiations on rules in the areas concerned. A major element of any future WTO agenda is to further reduce barriers to trade and investment in services and more generally address the effect of differences in regulatory policies in segmenting markets, including so-called nontariff measures.

Moving forward to discuss new issues of common interest need not wait for the conclusion of the Doha Round. Launching a discussion of non-DDA issues in working groups under the auspices of existing WTO committees would ensure that time is not lost while market access negotiations in the Doha Round continue. The results of the deliberations could feed into an eventual Doha Round conclusion, but more realistically would aim to define an agreed upon set of follow-on activities that would be pursued under WTO auspices. The opportunity cost of waiting for the DDA to be concluded is increased substantially if it means delaying discussions on systemically important matters that are not currently on the DDA agenda and require cooperative solutions.

Enhancing transparency and knowledge

Arguably much more could also be done to use existing WTO bodies and mechanisms to enhance trade policy transparency, the impacts of trade policies and knowledge of good practices.

There is an important agenda revolving around increasing the transparency of WTO member policies, including nontariff measures and what members do in the context of preferential trade agreements (PTAs). The financial crisis revealed major gaps in the available information on trade and investment policies. WTO notification requirements are often not satisfied on a timely basis, if at all. In some areas—trade finance, for example—there are no global databases on flows and prices. Very little is known about applied government procurement practices. There are no comprehensive depositories of information on nontariff measures applied by WTO members. Some steps have been taken to improve the ability of the secretariat to compile and make available information of trade policies and trade flows. But we are still quite far away from a situation in which there is complete and up-to-date information on a country-by-country basis on applied trade policies affecting trade in goods and services. There is good information on tariffs – although less so for applied bilateral preferential tariffs and associated rules of origin – but the situation is much worse for data on non-tariff instruments, subsidies, policies affecting trade in services, and information on what Members are doing in terms of implementation of PTAs.

Concrete actions to enhance both monitoring and analysis of trade and investment policies and their effects—including the extent to which countries use policies to discriminate in favor of national firms and specific trading partners through PTAs—will help the WTO fulfill its role of sustaining an open and non-discriminatory multilateral trading system and enhance the perceived relevance of the institution in ensuring transparency and providing useful data to traders and citizens.

Barriers to trade increasingly overlap with regulatory policies that do not lend themselves to standard tariff reduction techniques and commitments. The WTO could do much more to offer effective mechanisms through which members can learn from each other on how to design and implement regulatory systems that support greater trade while attaining underlying regulatory objectives—by discussing the substance of applied regulatory policies; assessing their impacts on trade; bringing in regulators to engage them in the trade policy reform process, etc. Such mechanisms have been implemented in some PTAs. Doing so at the WTO level could help ensure that a better basis is laid for multilateral cooperation to integrate markets and support greater trade.

Instituting a parallel process that does *not* involve negotiations but that instead focuses on the substance of regulation (or the effects of a lack of appropriate regulation) could help countries improve regulatory outcomes and facilitate an expansion in trade. Such processes should extend to regular, systematic discussion and multilateral scrutiny of the implementation of PTAs, with the goal

of identifying good practices that could be widely adopted by WTO members. Creating such mechanisms for exchange and learning can help avoid a recurrence of the DDA experience with the Singapore issues and help prepare the ground for future negotiations on services.[1]

Moving Away from "Market Access Metrics"

Negotiators have been working for almost 10 years to define a negotiating set. The contours of this set were narrowed down over time, especially following the 2003 Cancun ministerial, when potential new investment, competition, and procurement disciplines were taken off the table. Since 2004, the negotiations have centered primarily on a traditional market access and rules agenda (including disciplines on agricultural support policies). This agenda offers potential gains for all WTO members, both in terms of lower barriers on goods and services exports and from a reduction in uncertainty regarding possible increases in levels of import protection—through greater tariff bindings, reductions in the average level of bound tariffs (the so-called ceiling tariffs that governments commit not to exceed), and specific commitments for services.

Average tariff levels today are much lower than just a decade ago, and far below the averages that prevailed in the 1980s. Quantitative import restrictions have largely disappeared. The last (2008) proposals under active discussion in the DDA would reduce the world average *bound* tariff for agricultural products from 40 to 30 percent and from 8 to 5 percent for nonagricultural goods. Average *applied* farm tariffs faced by developing country exporters would fall from 14.2 to 11.5 percent, and those on their exports of manufactures from 2.9 to 2.1 percent. The reductions in applied tariffs are beneficial to exporters and consumers, but do not appear to add up to a lot—after all, if DDA only generates less than a 1 percentage point cut in the average tariff on manufactures, this clearly will not do much to lower prices of the goods concerned or enhance the ability of exporters to compete in foreign markets.

Much criticism has been based on the results of global simulation models that suggest the net real income gains from any politically feasible DDA outcome are likely to be small in the aggregate: as mentioned above, what was on the table in 2008 would generate "only" US$160 billion in additional income as a result of lower trade barriers. This is not insignificant and compares well to what was achieved in previous rounds. Whether one regards this number as significant or not, this numerical lens misconstrues a critical function of WTO negotiations. These negotiations are not primarily about reducing applied levels of protection, but center on establishing trade policy rules and reducing uncertainty through a "lock-in" of policies and binding of tariff rates, either at, or much closer to, applied levels. The benefits of this dimension of WTO negotiations are ignored in models simply because economists cannot quantitatively assess these features.[2]

The quantitative analyses also tend to underemphasize the fact that although tariffs are generally already low on average, therefore limiting the aggregate effect of further reductions, the formula-based negotiation modalities that have been developed will effectively eliminate all tariff peaks in high-income countries. The focus should therefore be on what happens to products and sectors where tariffs are much higher than average—agricultural products, textiles, and footwear. The same is true of agricultural support policies in OECD countries, which generate costs that are not large enough to concern consumers greatly. But for the affected groups—whether farmers in Brazil or coastal fishermen in West Africa—what is on the table matters much more than what is inferred from looking at the reduction in average tariffs.

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1 For an elaboration of these arguments, see Hoekman and Mattoo (2010). The Singapore issues refer to transparency in government procurement, investment policy, competition policy and trade facilitation. In 1997 the WTO established working groups for each of these subjects with a view to determining whether to launch negotiations on them. No agreement could be reached to do so in the case of procurement, investment and competition policies.

2 For a more extensive treatment of these arguments, see Hoekman, Martin, and Mattoo (2010).

Tariff bindings—and more generally negotiated disciplines and restrictions on the ability of governments to use certain policies—reduce the uncertainty that is inherently associated with engaging in international trade. Exporters confront more uncertainty than do firms that operate only on their domestic market. National transactions and contracts can be enforced in national courts; there are no borders where goods may be held up in customs; there is no exchange rate risk to worry about; and so forth. Anything that can lower the costs associated with exporting will both benefit existing exporters, and, more importantly, encourage new exporters, as more firms will be able to start exporting to new markets. The associated expansion of exports along this so-called extensive margin of trade will boost economic welfare and growth.

Advocacy for the Doha Round (and the WTO more generally) needs to center more on the effects of the negotiated rules and policy disciplines. Selling or criticizing the Round on the basis of simulated estimates of real income gains or export growth resulting from the application of market access formulae misses much of the story. The complete ban on agricultural export subsidies would be a major step forward, for example, and cannot be quantified by estimating the impact of removing extant subsidies—especially in a period where high prices have greatly reduced the prevalence of their use. The ban is significant because if world prices fall in the future, the decline cannot trigger an increase in export subsidies. Maximum allowed levels of domestic agricultural support (subsidy ceilings) would fall by 70 percent in the European Union and 60 percent in the United States, based on 2008 modalities. Again, instead of stressing how much a deal will reduce the actual amount of subsidization, more emphasis is needed on explaining why such ceiling bindings are valuable. Agricultural protection and subsidies in OECD countries have reduced the amount of food that is traded internationally and led to greater instability of world prices, with large negative spillover effects on developing countries, whether exporters or importers. Disciplines on the ability of governments to use import or export barriers to insulate domestic markets, and hence make world markets thicker, would be a major source of welfare gain for developing countries (Martin and Anderson 2011).

Conclusion

Concluding the Doha Round is important in itself and for sustaining the cooperation that has resulted in the current open rules-based multilateral trade regime. Continued paralysis is costly for the system because it prevents progress on the legislative side—the negotiation and agreement on rules of the game in new as well as old areas that are important for global markets' operation. The WTO offers a multilateral umbrella under which the major trading powers can agree on how to manage and support the needed process of "global rebalancing." Using the WTO to map out rules of game and deal with policy externalities is likely to be much more productive than the pursuit of unilateral policies—both in terms of supporting the needed structural transformation and in maintaining an open trading system.

Abstracting from the need to put in place mechanisms to support a process of building trust and understanding on how to address the market-segmenting effects of domestic regulation, moving forward arguably does not require fundamental changes to the WTO negotiating process. There has been much discussion in this regard about the Single Undertaking: the notion that nothing is agreed until everything is agreed. This is clearly a factor that can slow down the process of getting to yes. One solution that is often proposed is a greater reliance on plurilateral agreements that bind only those countries willing to sign on, who then may decide not to accord the benefits of what has been agreed to nonsignatories. The main reason to consider plurilaterals is to avoid free riding—an issue that arises if some large countries do not want to join. However, this is not the source of the current deadlock—the problem is that some large countries want more than other large countries are willing to offer.[3]

[3] Plurilateral agreements differ from critical mass agreements in that the latter apply on a MFN basis—that is, they permit free riding by those that are not part of the critical mass.

The Single Undertaking does imply an opportunity cost if agreements in specific areas must wait for an overall deal agreement. If such areas also generate little in the way of reciprocity value—that is, the issue is not something that trading partners care much about—carving them out of the Single Undertaking will not come at the cost of taking negotiating chips off the table that could have been used to link to other issues. Alternatively, if the gains and costs of agreement in a specific area are balanced, a carve-out also comes at little cost from a linkage perspective. The best example of such an issue of the first type is duty-free, quota-free access for LDCs, because this is an action that does not entail any reciprocity by the LDCs. An example of the second possibility is trade facilitation—this will benefit all WTO members, both as exporters and as importers. Since inefficient trade facilitation generates mostly socially wasteful costs—as opposed to rents or government revenues—moving forward on trade facilitation is important from a trade promotion and economic welfare perspective, and would come at low cost from a "linkage foregone" perspective, because most of the benefits accrue to the countries that take actions to improve facilitation. Indeed, in an area such as trade facilitation, given that most of the benefits accrue to the countries that pursue reforms, governments should simply do so rather than incur the opportunity costs of waiting for a deal to be struck at the WTO.

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Beyond Doha: the WTO Must Rethink its Mandate and Performance

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1. Introduction

Concluding the Doha round at least as originally planned becomes a remote possibility with every day passing. On the other hand, the WTO has a very important mandate anyway which is independent of the success/failure of rounds: discussions in the various committees manage to produce better communication across trading nations, and resolve many disputes as well: a look into the TBT (Technical Barriers to Trade) Committee for example, suffices to persuade the observer that dozens of specific trade concerns are being resolved at this level with no need to go to dispute settlement and the ensuing administrative cost for the WTO; through its publications it disseminates information about all issues coming under its purview; dispute settlement emerges still as the only compulsory third party adjudication regime. This is a tall order already and taking care of it requires significant investment by all involved. Failure to conclude the Doha round will not in and of itself eviscerate the importance of the WTO. Failure to address some pressing issues, like the three issues mentioned here might do more harm.

2. Three Issues to Tackle

There is always a risk inherent in prioritizing one issue to tackle over another. The reason why dispute settlement has been privileged here is because this is the only genuine WTO voice; moreover, WTO dispute settlement is the only genuine compulsory third party adjudication-regime currently available in international relations: there is a lot at stake here, and failures could be costly especially because of the possible negative spillovers in other areas. Preferential trade agreements (PTAs), the second chosen item, proliferate and become more and more relevant in regulating international trade casting thus doubt on the continuing relevance of the WTO. One argument that one frequently hears in policy circles explaining the attraction of PTAs is their flexibility. One possible way for the WTO to react to the attractiveness of PTAs is by adopting itself flexible modes of integration, such as those offered by plurilateral agreements, already an institutional possibility in the WTO regime.

2.1 Dispute Settlement

There is a lot of talk during the DSU (Dispute Settlement Understanding) review currently still ongoing, on either genuine issues but where nonetheless no change can realistically be expected (remedies, where root and branch reformers must have had ample evidence that their proposals do not fly with the membership), or on issues that have been resolved in practice (sequencing), or on issues of secondary importance (remand authority for the Appellate Body, AB). There is no discussion at all (or not anymore) about the agency design: the American Law Institute (ALI) has emerged as the only forum that critically scrutinizes the output by Panels and the AB since 2000, and the consensus there is that there are severe methodological failures in WTO case law. Even commonplace terms such as 'like' products have proved difficult to define.[1] The case law on other, more convoluted issues such as the causality-requirement in contingent protection instruments, is incoherent if not impenetrable altogether.

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1 See for example, the recent Panel reports on US-Clove Cigarettes, US-COOL, and US-Tuna II (Mexico), where Panels working almost simultaneously ended irreconcilable outcomes. The absence of clear guidance by the AB is definitely a contributing factor to this mess.

The WTO judge should prepare its own demise by making the outcome in the marginal transaction predictable and this is where WTO adjudication has failed and a change is required. Some recommendations advanced call for 'professionalization' of dispute adjudication and systematic economics input (since the objectives sought through WTO are of quintessential economic nature) that could help not only in quantifying countermeasures, but crucially in providing a stable methodological vehicle to adjudicate disputes. The current state of affairs is unsatisfactory by any reasonable account and there is need to rethink the current structure where AB judges are part-timers, Panelists operate ad hoc and are rarely repeat players,[2] and economics input has no permanent seat in the deliberations.

2.2 Preferential Trade Agreements (PTAs)

There is substantial discrepancy between the WTO and the preferential agenda as a recent study by Horn et al. (2010) amply shows. It is not maybe a totally irrelevant fact that president Obama was celebrating the Pacific regional integration a few days before the Doha round was closing its doors provisionally at the very least. Should the WTO should emulate the PTA agenda and if yes, why has not it happened so far? Or is it the case that some deals can only occur between a sub-set of the WTO Membership, the like-minded groups?

The risk is of course that trading nations continue to do bilateral deals and commit policies at the bilateral level that they refuse to commit multilaterally. Danger, because ion a world where customs duties have become irrelevant in large part, it is commitments on the 'regulatory' agenda that have impact on trade relations: if their impact is addressed outside the confines of the WTO what impact will WTO have on trade relations in the first place?

There are some recent papers (Andras and Staiger, 2012) that call for positive integration (at least in respect of competition rules) as some sort of necessity in response to the ongoing increase in offshoring and outsourcing. PTAs allow for similar possibilities and indeed, as Horn et al. (2010) show some of this is already happening. What could the WTO response be to all of this?

2.3 Integration Modes

The WTO knows of the so-called plurilateral agreements, that is agreements between a sub-set of its Membership. The advantage of plurilaterals over PTAs is that the door is open to all WTO Membership in the former, but not necessarily when it comes to the latter.

The recent services-initiative is probably an indication of more to come in this context. There are many advantages in pursuing this mode of integration and some obvious disadvantages. A lot has been written on this score but there are two areas that I think have been overlooked: the link with PTAs, in the sense that plurilaterals should be viewed by multilateralists more favourably than PTAs since the road to 'multilateralizing' a plurilateral agreement is open to all WTO Members. Second, the issue of the future decision making at the WTO: some plurilaterals might not be interesting to some WTO Members that will be in position to decide on their operation within a narrower memberships-setting facilitating thus deals among them.

3. Concluding Remarks

The WTO has to take care of itself first and foremost in order to continue to be relevant. It is the only genuine institution of globalization and is demise could be an avatar of even less multilateralism over the years to come in an era where global issues proliferate and it is only through cooperation that many of them could be solved in sustainable manner.

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[2] Horn et al. (2011).

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Four months into the post-Doha era

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A. The WTO's negotiating and rule-making arms are in trouble

At MC8, WTO members explicitly recognized that the conditions for a successful conclusion of the DDA are currently non-existent. This is not exclusive to the WTO: the multilateral system, as it was conceived in the post-war world, is under a great deal of pressure. Which does not mean it has become irrelevant or obsolete: the most significant outcome of the MC8, i.e. the finalization of Russia's acceding process, is a testimony to the WTO's relevance as a global organization in today's increasingly inter-dependent world. Still, one must acknowledge that the WTO's impossibility to deliver a new round of trade liberalization raises doubts about its own and its members' ability to adapt to changing trade realities, namely the emergence of new global actors.

B. How did we get here?

a) Growing membership:

From the 23 founding members of GATT, the WTO membership has grown to 153. This is a tribute to the resounding success of its negotiation, discussion and enforcement capacities. But while the EU and the US have been the locomotives of trade liberalization in the past 60 years, their necessary leadership is no longer sufficient to pull the rest of the WTO members into an agreement (will an eventual EU-US FTA re-start the engine? Or will it break it?). With more heavyweights around the table, it becomes extremely difficult to reach an agreement, especially when the main actors have very different perceptions about each other's and their own roles.

b) A new global trading landscape:

The emergence of new trading powers, like China, India, Brazil etc, has made the picture even more challenging. The traditional paradigm - a clear division between developed and developing economies - no longer applies. Now there are four categories of countries: LDCs, middle development economies, emerging economies and developed economies. It has proven impossible to get developed and emerging economies to reach a compromise on the DDA, particularly between the US and China.

c) Cumbersome negotiating processes:

The difficulties concluding the DDA are exaggerated by cumbersome negotiating processes, i.e. the single undertaking (which means that even low-hanging fruit cannot be picked until the toughest issues are agreed) and consensus rules (anyone can block a deal = veto power). During the Uruguay Round, countries that refused to take part in deals risked being excluded from the multilateral system and therefore exposed themselves to losing market access in other countries. Now, countries are discouraged from making difficult concessions in specific areas since they no longer face the threat of losing MFN access to the markets of their peers. This means that the cost of rejecting a whole deal package is much lower.

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d) Limited mandate:

The DDA agenda was very ambitious regarding the liberalization objectives but its scope was rather narrow, focusing on tariffs and a few NTBs, with key areas such as investment, competition and government procurement out of the agenda. Even so, members became more reluctant to make significant cuts in barriers to trade in goods and services and to proceed to a significant agricultural trade reform process. The end-result is much less consequential, which in turn decreases the interest of key players that rather turn to other avenues to create more trade opportunities, namely regional and bilateral agreements, where much more ambitious objectives can be achieved, both in market access (particularly in services, government procurement, investment) and other areas (IPR, regulatory harmonization, labour and environmental standards).

C. Alternatives (or substitutes?) to trade multilateralism

The past decade has seen a proliferation of preferential trade agreements (bilateral, regional or other limited-members FTAs) in all parts of the world. Paragraphs 4 to 10 of Article XXIV of GATT, the Enabling Clause and Article V of GATS, do allow for a departure from the guiding principle of non-discrimination. WTO members have seized this possibility to create new trade opportunities that the multilateral trading system has failed to deliver. Although they are considered as sub-optimal solutions, preferential trade agreements present a lot of benefits: market access is WTO+; inclusion of the so-called 'Singapore issues'[1] and of "trade-and…" matters, such as sustainable development.

In addition to PTAs, there could be an increase in sectorals/plurilaterals negotiated under the WTO umbrella, following the example of the Information Technology Agreement (ITA). The controversy generated by ACTA and the fact it was NOT negotiated in the WTO indicates that, even with the system in crisis, multilateral 'oversight' is still what legitimates initiatives driven by coalitions of the like-minded.

D. After Doha

The MC8 "shelved" the Doha Round for an indefinite period of time. There are now three possible routes left to the WTO members: i) to pick a few items from the Doha mandate that could be ripe for conclusion as stand-alone multilateral deals - for example on trade facilitation; this approach would likely have the EU's support; ii) to engage in plurilateral agreements covering new areas of trade liberalization - for example services, as favoured by the US; iii) to conclude bilateral deals with key partners, which seems will be the choice for many countries. The very suggestion that the US and the EU could be heading for the negotiation of an ambitious bilateral FTA is a telling sign of what may be on the horizon.

E. New items on the global trade agenda?

In my view, the agenda of the WTO needs to be broadened in order to address a number of relevant issues (like trade and climate change, competition, energy security, food security, currency manipulation, etc). The problem is that many WTO members are not willing to burden the WTO agenda in order to try and keep alive the Doha agenda.

[1] Transparency in government procurement, trade facilitation (customs issues), trade and investment, and trade and competition.


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