

ARTICLES

Mitsuo Matsushita, *Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources*

Diane Desierto, *Development as an International Right: Investment in the new Trade-Based IIAs*

Patrick Wieland, *Why the Amicus Curia Institution is Ill-suited to address Indigenous Peoples' Rights before Investor-State Arbitration Tribunals: Glamis Gold and the Right of Intervention*

NOTES AND
COMMENTS

Petros C. Mavroidis, *Doha, Dohalf or Dohaha? The WTO Licks its Wounds*

Claus D. Zimmermann, *Toleration of Temporary Non-Compliance: The Systemic Safety Valve of WTO Dispute Settlement Revisited*

Melissa Blue Sky, *Developing Countries and Intellectual Property Enforcement Measures: Improving Access to Medicines through WTO Dispute Settlement*

TL
&D

Trade, Law *and* Development

Vol. 3, No. 2

2011

PATRON

Justice N. N. Mathur

FACULTY-IN-CHARGE

Yogesh Pai

EDITORS-IN-CHIEF

Prateek Bhattacharya

Jayant Raghu Ram

EDITORS

(MANAGING)

Shreya Munoth

(SENIOR CONTENT)

Aman Bhattacharya

Lakshmi Neelakantan

ASSOCIATE EDITORS

Meghana Chandra

Prianka Mohan

Neha Reddy

COPY EDITORS

Namrata Amarnath

Ali Amerjee

Nakul Nayak

Paarth Singh

CONSULTING EDITORS

Shashank P. Kumar

Gopalakrishnan R.

Meghana Sharafudeen

BOARD OF ADVISORS

Raj Bhala

Glenn Wiser

Jagdish Bhagwati

Daniel Magraw

B. S. Chimni

M. Sornarajah

Ricardo Ramírez Hernández

Vaughan Lowe

W. Michael Reisman

Published by

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

Petros C. Mavroidis, *Doha, Dohalf or Dohaha? The WTO Licks its Wounds*
3(2) TRADE L. & DEV. 367 (2011)

DOHA, DOHALF OR DOHAHA? THE WTO LICKS ITS WOUNDS

PETROS C. MAVROIDIS*

The most flattering statement regarding the Doha Round is that there is a lot of uncertainty surrounding its fate. The Doha Round, as originally designed and understood, is not an option anymore. Although a formula has been found to keep the ball rolling, at this stage it is impossible to predict what direction it will take. There exists a lack of leadership to conclude the round and it suffers from inherent birth defects. This absence of a conclusion might send the wrong message at a moment when the WTO is emerging as the only genuine forum of multilateral cooperation. Though this is not the first trade round in the history of the multilateral trading system and definitely not the only one that is taking longer than planned to complete, it is the first time that the round risks being ditched altogether. In all previous rounds, which were essentially 'business' deals, trading nations managed to come up with an agreement in the end. This is the first time that they have announced 'we do it for development', and they now risk delivering nothing. Something has got to give at this stage, and we are running out of time as far as options regarding 'deliverables' are concerned. The accent has correctly been placed on priority issues for the bottom billion. The WTO, even if this effort succeeds, will have to face some tough tests in the near future arising from issues which were not at all addressed during the Doha Round.

* The author is teaching WTO studies at European Union Institute (Florence), on leave from Columbia Law School where he is Edwin B. Parker Professor of Law. The author can be contacted at Petros.Mavroidis[at]unine.ch. The usual disclaimer applies.

TABLE OF CONTENTS

- I. FIRST, THE BAD NEWS
- II. THE ORIGINAL SIN: A 'DEVELOPMENT' ROUND
 - A. *History Helps (but who cares about it?)*
 - B. *GSP: Is the Candle worth the Flame?*
 - C. *DDA: Aid for Trade (next to GSP)*
 - D. *Preference Erosion*
 - E. *Developing Countries and PTAs*
 - F. *Bottom Line: No Hard Questions asked*
- III. WHY WE SHOULD KEEP THE BALL ROLLING
 - A. *Fast (but almost Empty) Track*
 - B. *Between Now and Eternity: The Middle Lane*
 - C. *Take a Rain Cheque for all remaining issues*
 - D. *The Real Trichotomy*
- IV. THE WTO AND TRADE ROUNDS
 - A. *Should the WTO be pro-active?*
 - B. *Where do we go from here?*

I. FIRST, THE BAD NEWS

On May 31, 2011 the Director General (DG) of the World Trade Organization (WTO) Pascal Lamy announced before the Trade Negotiating Committee (TNC) of the WTO that the Doha round as we knew it, is dead.¹ It remains to be seen if something can still be saved by the definite deadline of December 2011. Lamy repeated that no one wants to drop the Doha mandate (nor the single undertaking-approach²).³ However this statement looks more and more like an empty shell and reflects that the Doha mandate continues to live on as an objective but not as tangible reality.

¹ Chairman's opening remarks, Trade Negotiations Committee: Informal Meeting, WTO: 2011 News Items (May 31, 2011) *available at*: http://www.wto.org/english/news_e/news11_e/tnc_infstat_31may11_e.htm (last visited Sept. 30, 2011) (hereinafter Lamy). The May 31, 2011 TNC meeting was supposed to take a snap shot on what could be done to salvage the Doha Round since, in the absence of an agreement so far, it is becoming increasingly obvious that its conclusion should not be taken for granted. It did not produce any meaningful results other than an informal commitment to re-discuss the issue at the Ministerial Conference to be held in December 2011, *see* WTO Doc. JOB/TN/11 of May 31, 2011. No luck at the follow up meetings so far, the last being held on July 26, 2011, WTO Doc. JOB/TN/14.

² "Virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately", Principles, How the negotiations are organized, *available at*: http://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm (last visited Sept. 30, 2011).

³ Lamy, *supra* note 1.

In order to address the delay in the determination of the substantive issues under the Doha mandate, Lamy divided the issues on the table into three lists – ‘fast track’, ‘medium track’ and ‘slow track’ based on the possibility of the negotiations materializing by December 2011. This provides the hope that something can still transcend the veil of intangibility and become part and parcel of the future multilateral arsenal, as of December 2011 (the ‘fast lane’). This will be the subject matter of the LDC (least developed countries) list in Lamy’s announcement, which has a (more or less) definite content and comprises Duty-Free Quota-Free (DFQF) market access for goods originating in LDCs (including rules of origin), the LDC Services Waiver (a waiver for allowing preferential market access in the service sectors in which LDCs may be given some preferential treatment when offers on this will be made at some later date), and a step forward (to be determined) on cotton.⁴

The rest of the trichotomy is as follows: an LDC+ list with issues (to be defined) with a significant development component by December 2011 (the ‘middle lane’);⁵ market access in NAMA (non-agricultural market access), agriculture and services, trade remedies, and TRIPs (trade related intellectual property rights) should be left for later (as they could not be seen as candidates resulting in outcomes this year) in what Lamy himself called the ‘slow lane’.⁶ How much later? That’s anybody’s guess.

This note discusses how we ended up here in relation to the Doha mandate. In Section 2, I explain why, in my view, the round was ill-conceived from day one. In Section 3, I discuss the options available to the trading nations following the TNC meeting of May 2011. Section 4, instead of conclusions, offers some thoughts on the role of the WTO in the negotiating game.

II. THE ORIGINAL SIN: A ‘DEVELOPMENT’ ROUND

A number of voices have argued that calling the Doha round a development round was not suitable.⁷ Srinivasan should be credited with providing the most comprehensive and persuasive critique of the agreed agenda in Doha, back in November 2001.⁸ He argues that trade is just one of the tools in the development

⁴ Lamy, *supra* note 1.

⁵ Lamy, *supra* note 1.

⁶ Lamy, *supra* note 1.

⁷ T.N. Srinivasan, *The Future of the Global Trading System: Doha Round and Beyond*, in THE FUTURE OF GLOBALIZATION 105-44 (Ernesto Zedillo ed., 2008) (hereinafter Srinivasan); See also, Kyle Bagwell & Robert W. Staiger, *Can the Doha Round Be a Development Round? Setting a Place at the Table*, NBER Working Paper No. 17650 (Dec. 2011).

⁸ Srinivasan, *supra* note 7.

process; that there are many other tools that influence development and are probably more important than trade, and hence, the WTO has no mandate to negotiate on the matter. Thus, one would risk giving the wrong impressions, or, at the very least, raising the expectations too high, by calling this ‘a development round’.⁹ Moreover, failure could be costly, not simply for the participants but for the institution as well.¹⁰

Perhaps, it would have been more warranted to simply prioritize the positioning of developing countries in the WTO within the overall agenda and leave it there. Some people though, thought big time. Even so, when the name was chosen to denote the nature of the round, there were some obvious questions that trading nations should have first addressed:

- a. Trade liberalization was supposed to be the multilateral trading system’s contribution to development. Is such a trade liberalization model, as condoned in the various agreements, inappropriate for developing countries?
- b. Since the WTO already contains provisions for developing countries, was the Doha Development Agenda (DDA) designed to evaluate the existing rules, and if need be, negotiate new ones?
- c. What should be done about the tension between preferences and MFN-liberalization?¹¹ Preference erosion has occurred as a result of the latter, and numerous studies point to this effect.¹²
- d. Even though developing countries have a seat in all negotiations owing to consensus, they do not seem to participate effectively in the WTO.¹³ How can this change?

Item (d) was not discussed at all and the first three items were discussed in an oblique manner. Trading nations fell short of addressing the root causes of the current situation. Let us first turn briefly to history to see how we ended up in the current mess.

⁹ *Id.*

¹⁰ *Id.*

¹¹ MFN stands for ‘Most Favoured Nation’ and denotes that no WTO outsider will be treated better than WTO Members with respect to measures affecting trade.

¹² Most recently, Harry Flamand & Håkan Nordström, *Gravity Estimation of the Intensive and Extensive Margins of Trade: An Alternative Procedure with Alternative Data*, (CESifo Working Paper Series No. 3387, 2011).

¹³ See Håkan Nordström, *Participation of Developing Countries in the WTO—New Evidence Based on the 2003 Official Records*, in WTO LAW AND DEVELOPING COUNTRIES, 146-85 (George A. Bermann & Petros C. Mavroidis eds., Cambridge Univ. Press 2007).

A. *History Helps (but who cares about it?)*

When the GATT asked whether the developing countries were disadvantaged by the existing rules of trade liberalization, it commissioned a study by Gottfried Haberler on the GSP (generalized system of preferences) to examine the validity of these claims by the less developed trading partners. He concluded that similar claims were not entirely unjustified.¹⁴ In his report, he examined both the short- and the long-term trends in commodity prices and the factors influencing them. The report concluded, *inter alia*, that existing protectionist policies in the farm sector by developed (industrialized) nations, as well as tariff escalation practices by many developed nations were contributing factors to the lack of growth in developing countries.¹⁵ It is worth recounting in this respect, that the US had obtained a waiver in 1955, which allowed it to grossly subsidize its farm production over the subsequent years and essentially shield domestic producers from the challenges of international competition.¹⁶ The Haberler report made a series of recommendations to address the issue and suggested that the existing protectionism be reduced. More importantly, it sensitized the trading partners to the fact that not everyone gains alike from the existing regime and that something ought to be done to address the concerns of those who were being left behind (essentially the producers of labour-intensive goods).¹⁷

Haberler's report was not the only game in town. Hans Singer, a German Professor of Economics at Cambridge, and Raoul Prebisch, an Argentine economist, were advocating for industrialization through import substitution policies as the safest way to development.¹⁸ The argument for import substitution

¹⁴ GATT (1958), *Trends in International Trade*, Geneva. Gottfried Haberler, of Harvard University, was one of the best trade economists of his time.

¹⁵ *Id.*

¹⁶ See DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* (Princeton Univ. Press, 2d ed. 2005) (hereinafter IRWIN).

¹⁷ *Id.*

¹⁸ For a comprehensive discussion of this issue, see PETROS C. MAVROIDIS, GEORGE A. BERMANN & MARK WU, *THE LAW OF THE WORLD TRADE ORGANIZATION (WTO): DOCUMENTS, CASES, & ANALYSIS* 191ff (Thomson/West 2010). For a critique of the Singer-Prebisch thesis, see how Viner [*quoted in* JOHAN VAN OVERTVELDT, *THE CHICAGO SCHOOL: HOW THE UNIVERSITY OF CHICAGO ASSEMBLED THE THINKERS WHO REVOLUTIONIZED ECONOMICS AND BUSINESS* 347 (Agate 2007)] reacted to it: "All that I find in Prebisch's study and in the other literature along similar lines emanating from the United Nations and elsewhere is the dogmatic identification of agriculture with poverty, and the explanation of agricultural poverty by inherent natural historical laws by virtue of which agricultural products tend to exchange on ever-deteriorating terms for manufactures, technological progress tends to confine its blessings to manufacturing industry, and agricultural populations do not get the benefit of technological progress in manufactures even as purchasers, because the prices of manufactured products do not fall with the

was justified as the adequate response to what was designated as ‘terms of trade pessimism’- the idea that exports of developing countries were progressing at a slower pace than total exports. Note that during that period, liberal market economies were discredited in the eyes of many observers especially in developing countries, and a strong argument in favour of government-driven economies was falling onto fertile ground.¹⁹ Prebisch and Singer had a head start over Haberler in some quarters. Instead of addressing the true issues (farm- and textile protectionism in developed markets) like the developed nations and the GATT, they preferred to consider how to provide developing countries with preferential access to markets in developed countries. However the essential issue was to find how developed countries could provide developing countries with preferential access in areas outside their export interest; especially since, over the years, first the US- and then the EU market were kept hermetically shut to textile- and farm products.²⁰

The Prebisch-Singer thesis has been the basis of the GSP (generalized system of preferences). These schemes were created to act as instruments to graduate developing countries to the status of developed countries.²¹ Instead, they became an addiction that overwhelming empirical evidence criticizes.

B. *GSP: Is the Candle worth the Flame?*

Grossman and Sykes, citing abundant empirical evidence to this effect,²² conclude that the flame is not worth the candle: there is little to support the

decline in real costs. These natural laws seem to me for the most part mischievous fantasies, or conjectural or distorted history.”

¹⁹ See IRWIN, *supra* note 16.

²⁰ The US gradually opened up its farm market, the EU did not. Only very recently, we observe a change. See on this score, PATRICK A. MESSERLIN, MEASURING THE COSTS OF PROTECTION IN EUROPE (Inst. of Int’l Econ. 2001); and ALAN SWINBANK & CAROLYN TANNER, FARM POLICY AND TRADE CONFLICT (Univ. of Michigan Press 1996).

²¹ GATT Doc. BISD 26S/203ff. GSP schemes are one way preference schemes where donors agree to lower their duties on various goods. They are not negotiated with beneficiaries, hence their preferences are not necessarily taken into account.

²² André Sapir & Lars Lundberg, *The U.S. Generalized System of Preferences and Its Impacts*, NBER Chapters, in THE STRUCTURE AND EVOLUTION OF RECENT U.S. TRADE POLICY 195-236 (Nat’l Bureau of Econ. Research, 1984); GUY KARSENTY & SAM LAIRD, THE GENERALIZED SYSTEM OF PREFERENCES: A QUANTITATIVE ASSESSMENT OF THE DIRECT TRADE EFFECTS AND OF POLICY OPTIONS (UNCTAD 1986); Craig R. MacPhee & Victor Iwuagwu Oguledo, *The trade effects of the U.S. Generalized System of Preferences*, 19(4) ATLANTIC ECON. J. 19-26 (1991); Drusilla K. Brown, *General Equilibrium Effects of the U.S. Generalized System of Preferences*, 54(1) S. ECON. J. 27 (1987); Drusilla K. Brown, *Trade and Welfare Effects of the European Schemes of the Generalized System of Preferences*, 37 ECON. DEV. & CULTURAL CHANGE 757-77 (1989).

proposition that GSP schemes have had substantial positive welfare effects on recipients.²³ Take the EU scheme for example, which distinguished between *non-sensitive*, *semi-sensitive*, *sensitive*, and *very-sensitive* products. Grossman and Sykes calculate that developing countries roughly receive tariff reductions of 100% (for *non-sensitive*), 65% (for *semi-sensitive*), 30% (for *sensitive*), and 15% (for *very sensitive* products) from the usual MFN rate for goods in each category. The export interest of most developing countries is, of course, concentrated on the *very-sensitive* category of products, the one that receives the smallest preference margin (this is where one typically finds farm- and textile goods).²⁴ Dean and Wainio discuss the effects of US GSP to beneficiaries and conclude that high utilization rates should not hide the fact that preference margins for non agricultural goods (preference erosion here is the direct result of the low US MFN tariffs) and agricultural goods are low.²⁵ Dean and Wainio argue that this is largely because products that face high tariffs are excluded from GSP schemes.²⁶ Their data supports the view that the US is more generous towards its preferential trade agreement (“PTA”) partners, than it is to its GSP beneficiaries.²⁷ Candau and Jean conclude that the EU GSP scheme is quite important for sub-Saharan LDCs but not so for South Asian LDCs, essentially because of the constraints imposed by rules of origin on textile and clothing exports.²⁸ In a similar vein, Kowalski points to the fact that the welfare impact of Canadian preferences is very small for developing countries.²⁹ Lippoldt concludes that the Australian GSP scheme has had unambiguous beneficial effects only for those developing countries that are in geographic proximity to the donor.³⁰

Özden and Reinhardt in an empirical study, show that countries that gradually extricated themselves from the GSP schemes, subsequently undertook greater liberalization than those that chose to retain their eligibility to participate in them.³¹

²³ See Gene M. Grossman & Alan O. Sykes, *A preference for development: the Law and Economics of GSP*, 4(1) WORLD TRADE REV. 41 (2005).

²⁴ *Id.*

²⁵ Judith M. Dean & John Wainio, *Quantifying the Value of U.S. Tariff Preferences for Developing Countries*, in TRADE PREFERENCE EROSION: MEASUREMENT AND POLICY RESPONSE (Bernard Hoekman, Will Martin & Carlos A. Primo Braga eds., Palgrave MacMillan & World Bank 2009) (hereinafter Hoekman, Martin & Braga eds.).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Fabie Candau & Sébastien Jean, *What are European Union Trade Preferences Worth for Sub-Saharan African and Other Developing Countries?*, in Hoekman, Martin & Braga eds., *supra* note 25, at 65-102.

²⁹ Przemyslaw Kowalski, *The Canadian Preferential Tariff Regime and Potential Economic Impacts of its Erosion*, in Hoekman, Martin & Braga eds., *supra* note 25, at 131-72.

³⁰ Douglas Lippoldt, *The Australian Preferential Tariff Regime*, in Hoekman, Martin & Braga eds., *supra* note 25, at 173-218.

³¹ Czaglar Özden & Eric Reinhardt, *The Perversity of Preferences: GSP and Developing*

Sachs and Warner have shown that developing countries with more liberal trade policies have achieved higher rates of growth and development than countries that are more protectionist.³² A number of more recent studies point to the same result as well. Trefler shows how tariff cuts can increase the industry level-productivity of the country performing similar cuts.³³ Tokarick examines import protection in 26 developing countries.³⁴ The sample is quite disparate and hence largely representative of the situation prevailing across all developing countries: Argentina, Brazil, Botswana, Malawi, China, India, Albania and Romania. His main objective was to quantify the extent to which import protection acts as a tax (implicit) on a country's export sector. He found that this is indeed the case and arrived at a rather substantial tax level- 12% for the 26 countries in his sample.³⁵ Mostashari shows that tariff cuts by countries exporting to the US market are more important in explaining the success that these countries have enjoyed, than the US import tariff cuts.³⁶

GSP schemes have become some sort of a wicked version of the Jevons paradox: preferences were supposed to help beneficiaries graduate to the non-beneficiaries status, instead, beneficiaries have become 'hooked' to the benefit granted, and use it more than before (or as much as they can), and never graduate. The countries that got out of this vicious circle are those that liberalized and enjoyed gains from trade: this is exactly what Korea did.

The evidence is overwhelming and yet trading nations have turned a blind eye: with a caveat that we discuss next.

C. DDA: Aid for Trade (*next to GSP*)

Trading nations in the Doha Round implicitly accepted that something is wrong with GSP schemes, noting that Aid for Trade marked the return to aid, not trade. However, they did not go the full nine yards and went ahead to introduce Aid for Trade irrespective of the initial apprehensions. Moreover, Aid for Trade was thought to be complementary to and not a substitute for GSP. The irony was

Country Trade Policies, 1976–2000 (World Bank Working Paper No. 2955, 2003) (Korea is the example they use most in this study).

³² Jeffrey D. Sachs & Andrew M. Warner, *Economic reform and the process of global integration*, 1 BROOKINGS PAPERS ECON. ACTIVITY 1–95 (1995).

³³ Daniel Trefler, *The Long and Short of the Canada–US Free Trade Agreement*, 94 AM. ECON. REV. 870-95 (2004).

³⁴ Stephen Tokarick, *Does Import Protection Discourage Exports?* (IMF Working Paper No. WP/06/20, 2006).

³⁵ *Id.*

³⁶ Shalam Mostashari, *Trade Growth, the Extensive Margin, and Vertical Specialization* (2010) (Ph.D. Dissertation, Univ. of Texas).

to continue with GSP without questioning its success even in the presence of evidence that GSP schemes had not fulfilled their original promise. Adding Aid for Trade to the agenda cannot cure the many misgivings of GSP schemes as Aid for Trade is not a perfect substitute for adopting sound policies at home, and this is an area that escapes the WTO mandate. Aid for Trade typically deals with infrastructure projects and technical assistance. It does not deal with privatization or market opening policies, which are left to the sovereign choice of each and every WTO Member. One might legitimately ask what the marginal benefit of one extra port is if its usage is confined to a domestic monopoly? It would probably be more efficient to adopt and enforce competition laws.

Gamberoni and Newfarmer in one of the first few critical papers on the subject have constructed an index for potential demand for Aid for Trade-money based on ten indicators for trade performance and trade capacity.³⁷ They conclude that those who score the lowest receive most of the money.³⁸ They also conclude, however, that some countries have received much less money as compared to their needs.³⁹ Hoekman and Nicita point to the problems that might eventually be posed by the absence of a central entity or global financial coordination mechanism since the whole enterprise builds on existing mechanisms, and coordination might prove to be a formidable task.⁴⁰ Delpuech *et al.* while not denying that there is an impact (probably indirect) on poverty reduction, find no evidence supporting the thesis that Aid for Trade has had a beneficial effect on trade.⁴¹

D. Preference Erosion

At the same time, preference erosion (as a result of successive rounds cutting down tariffs) has turned many beneficiaries of GSP schemes into enemies of multilateral liberalization.⁴² It is not by accident that developing countries have not tabled market opening proposals in the NAMA group. The Doha Round was meant to address this issue in detail and a group was even established to focus on this score. Nothing has come of it.

³⁷ Elisa Gamberoni & Richard Newfarmer, *Aid for Trade: Matching Supply and Demand*, (World Bank Policy Research, Working Paper No. 4991, 2009).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Bernard M. Hoekman & A. Nicita, *Assessing the Doha Round: Market Access, Transaction Costs and Aid for Trade Facilitation*, 19 J. INT'L TRADE & ECON. DEV. 65-80 (2010).

⁴¹ Claire Delpuech, Marie-Agnès Jouanjean, Alexandre Le Vernoy, Patrick Messerlin, & Thomas Orliac, *Aid for Trade: A Meta-Evaluation* (OECD Working Paper, 2011).

⁴² For an overview of proposals tabled by all partners, see WTO Doc. TN/MA/6 Rev.1 of April 1, 2003.

E. *Developing Countries and PTAs*

Another question that should have attracted the attention of negotiators, but did not, has to do with the difference across the multilateral and the preferential agenda, and the attitude of developing countries when signing PTAs. They are prepared to bind their discretion in the context of PTAs, but not so in the context of the WTO. Thus, the preferential agenda has hijacked to a large extent the multilateral agenda, and the developing countries that resist discussions on various topics at the WTO, happily sign on the dotted line in the context of preferential schemes. This discrepancy was first noticed in a study conducted with Henrik Horn and André Sapir,⁴³ Horn et al. demonstrate that PTAs signed with the European Union and the US typically include items such as investment-, environment, and often competition and anti-corruption policies. These instruments are not at all discussed at the WTO, where by virtue of Art. III GATT, domestic policies are unilaterally defined and must observe only the non-discrimination principle as embedded in Art. III GATT. A number of studies have confirmed the same.⁴⁴

Should the WTO stay idle in such a situation? If the preoccupations of the trading nations, *when negotiating trade deals*, extend beyond the 'classic' agenda, should the WTO continue within the four corners of its current mandate? I am not arguing necessarily in favour of an extended mandate, and one which might not even be necessary. However, it is imperative that one starts thinking whether institutional links should be established between the WTO and other institutions that deal with the subject-matter of the preferential agenda. In theory, similar steps can be taken in between rounds. Practice, so far, amply shows that there is a mere theoretical possibility of links being established. In this respect as well, the Doha Round was an opportunity lost.

F. *Bottom Line: no Hard Questions asked*

The WTO is not a development agency, it is a trade agency. It serves to contribute towards development by opening up trade and not by educating personnel, or even guaranteeing investment protection. So why not concentrate on our issue of interest and simply ask the question: Do GSP schemes work? If not, why? Instead of doing this, the WTO has embarked on the Aid for Trade agenda, leaving this very important question unanswered.

The conclusion is that nothing of substance has been decided on WTO's main

⁴³ Henrik Horn, Petros C. Mavroidis & André Sapir, *Beyond the WTO? An Anatomy of the US and EU Preferential Trade Agreements*, 33 *WORLD ECON.* 1565-88 (2010).

⁴⁴ See WTO Annual Report (WTO 2011).

instrument of development – GSP schemes. This is highly disappointing, especially because the evidence cited above raises many questions on the usefulness of the instrument.

III. WHY WE SHOULD KEEP THE BALL ROLLING

The analysis above depicts a round that, has so far not managed to produce anything meaningful in favour of developing countries. The logical consequence would be to ditch it as it is, cut the losses for everyone and turn the page. Yet, in my view, this would do more harm than good. Let us first revisit, in greater detail, the content of the three options highlighted by DG Lamy.

A. Fast (but almost Empty) Track

The LDC list is a disappointment by any reasonable account. What was announced as a ‘development round’, ornate with ‘catch the imagination’ acronyms such as the DDA (Doha Development Agenda), ends up probably delivering something close to nothing, more than 10 years after the launch of the round in Doha.

This note is not questioning the importance of the DFQF package. Though this could be the only tangible outcome and maybe a harbinger of hope, it is a very small part of the original promise by any account. But there is no unanimity on this score as well. The US delegation neither opposed nor embraced this part of the message during the TNC meeting, leaving it open as to whether it would eventually comply with the cotton initiative.⁴⁵ Moving the DFQF from 100% to 97% of all exports of LDCs would provide the US with enough ammunition to keep Bangladeshi textiles outside the US market. And it is highly unlikely that the US will join the cotton initiative either. As things stand, the fast track looks like 97% DFQF for LDCs, which is the deep bottom of the bottom billion. Did we really need ten years of talks to reach this result? The amount of trade liberalized is probably dwarfed by the negotiating costs so far.

B. Between Now and Eternity: The Middle Lane

The LDC+ list is about to be shaped between now and December 2011, despite a reluctance to negotiate. The odds are against a meaningful list. This list should include, in theory, all the mechanisms that will effectively support the DFQF-regime and probably extend to other areas as well. The discussions at the TNC were inconclusive as there were substantial disagreements across the trading

⁴⁵ See WTO Doc. JOB/TN/11 of May 31, 2011; and WTO Doc. JOB/TN/14 of June 26, 2011.

nations regarding its content. Since the negotiation has to respect yet another self-imposed (and probably unrealistic) deadline (December, 2011) the middle lane could also suffer from the Doha syndrome and become middle-light lane with little, if any, content. The opportunity cost of the fast track should be the content of the middle lane, which looks like it's approaching tomorrow's agenda at a very fast pace.

C. Take a Rain Cheque for all remaining issues

Market access in goods and services, as well as almost all the legislative work that was supposed to be concluded during the round will be left for later.⁴⁶ Essentially, we will take a rain cheque on almost everything that has been discussed for the last ten years. We might cash it in one day; we might cash in a different cheque as well; or we might never cash it at all.

D. The Real Trichotomy

There is no need to re-discuss why we ended up where we are now. Suffice it to make a couple of points. From day one, the most seasoned observers cautioned against the use of the term 'development round'.⁴⁷ Why raise the hopes when *ex ante* we know that trade contributes only a little to the achievement of development? Development is function of dozens of other instruments for which WTO has absolutely no mandate.

Overlooking the cost of failure was also a mistake. Every round so far has been about market access. The last rounds were about law making in order to ensure effective market access. They all succeeded, some faster than the others. The level of ambition in the previous rounds, especially of the Uruguay Round, was quite high. The Uruguay Round, for example, successfully covered diverse issues like subject services and intellectual property to the WTO disciplines. The Doha Round was the first time trading nations ever focused on the needs of developing countries and they have not been able to deliver anything, having tried longer than any previous time to achieve the stated objectives. There is, at this stage probably, a re-fashioned collective action problem: no major WTO Member wishes to invest substantial political capital to push the round ahead and we lack the structures that could address this issue. The old Quad (Canada, EU, Japan and US) of like-minded countries (more or less) has moved away from centre-stage. It is now occupied by a complex, amorphous structure where the new Quad (EU, US always present but this time flanked by unlike-minded countries such as Brazil and India), the G 20 and the gradually omnipresent China participate. Communication

⁴⁶ Lamy, *supra* note 1.

⁴⁷ Srinivasan, *supra* note 7.

costs have increased across these groups and the relative heterogeneity of the various members (and the ensuing repercussion in the prioritization of issues) has exacerbated the magnitude of the investment needed to bring the rounds to a successful conclusion.

What do we do at this stage? It seems that five options (with variations) were available to the members at the TNC meeting in May 2011:

- (a) Drop the round as it is;
- (b) Continue negotiating as if nothing happened;
- (c) Reduce the package, and opt for what has been colloquially termed a 'Do-half' (or Doha-light) instead of a Doha agenda;
- (d) Conclude quickly on whatever agreement can be found and continue negotiating the rest;
- (e) As per (d) but the fast lane should be full of items of interest to LDCs, and not any item on which fast conclusion was an option in theory.

The real emerging trichotomy is thus: Doha, Dohalf, or Dohaha? Should we continue talking knowing that (almost) no one is interested in concluding the round? Should we substantially revise and reduce our ambitions? Or should we ditch the whole thing and remember it in the future as a bad joke?

Option (a) is the funeral option: the WTO would be sending the wrong signals everywhere by throwing away the baby and the bathtub together. Options (b) – (e) were the only ones realistically available to the negotiators. At the end of the day, option (e) was privileged by Lamy and most participants in the TNC. It was also the most reasonable option available. Option (b), if employed, would amount to asking 'crisis? what crisis?' when the world sees that the Doha endeavour is running out of steam; Do-half would probably have opened for new negotiations on what should be included in the mini-package; (d) would not do justice to the quintessential feature of this negotiation as it would send a bad message that in 10 years the TNC could only conclude on issues that are of no interest to developing countries while negotiating under the banner of a 'development round'.

There are important institutional externalities as well: ditching the round is a sign of weakened cooperation within an institution that is so far the only true multilateral institution. In a world of increasing number of global concerns, is this really the message that nations want to send to all possible addressees?

Under these circumstances it is hard to find fault with those privileging the option to keep the ball rolling, so to speak. As explained in the next section, the role of the WTO Secretariat should end here. The ball is now in the camp of the parties negotiating; they must decide what to do with it.

IV. THE WTO AND TRADE ROUNDS

A. Should the WTO be pro-active?

In my view, the role of the WTO Secretariat is to administer the WTO: make sure dispute settlement functions well and the committees are adequately served. The WTO should, upon request, also be there to serve the trading nations, being a common agent for many principals. However, the key word in the sentence is 'upon request'. A pro-active attitude can, besides personal perks, be translated into credit for the institution in case of success, but might be quite costly in case of failure. There were enough warning signals to dissuade the WTO Secretariat from emulating past examples and mimicking, for example, the 'Dunkel Draft'⁴⁸ through a 'Lamy Draft'. The former did not win the argument the day it was presented but managed to gather momentum and provide the quintessential elements of the Marrakesh Agreement; there was absolutely no guarantee that the latter, had it seen the light of day, could have even come close. Moreover, Dunkel produced his draft knowing that it would not be accepted as such by the trading nations. But he wanted them to have something to think about and negotiate upon. We are not in a similar situation now.

On the other hand, the WTO has a very important mandate which is independent of the success/failure of rounds - discussions in the various committees that manage to produce better communication across trading nations and resolve many disputes as well. A look into the Technical Barriers to Trade Committee for example, suffices to persuade the observer that dozens of specific trade concerns are being resolved at this level without the need to go to dispute settlement and the ensuing administrative cost for the WTO.⁴⁹

Servicing negotiators is stretching existing administrative capacity to its limits. Making the Secretariat co-responsible for the observed failure to conclude negotiations is unfair. Those arguing that this is a member-driven institution should be prepared to assume the consequences of their understanding of the WTO.

In a nutshell, the WTO would be better served if it were limited to preparing 'useful papers' for its principals, the WTO Members.

⁴⁸ DG Dunkel produced a draft back in 1991 where he outlined the quintessential elements of a successful conclusion to the Uruguay Round, the draft WTO Agreement and its Annexes. *See*, the discussion on the Dunkel Draft *in* Juan A. Marchetti & Petros C. Mavroidis, *The Genesis of GATS*, 22 EUR. J. INT'L L. 1-33 (2011).

⁴⁹ WTO Doc. G/TBT/M/53 of May 26, 2011 contains all disputes raised in the TBT Committee, only for two of them has so far the establishment of a Panel been requested.

B. Where do we go from here?

Irrespective of what the content of the LDC+ list will finally be, anything beyond the LDC list has effectively been put on the back burner. At this stage, it is too speculative to hypothesize about the future, as a number of variables might influence the (eventual) outcome (assuming one reaches the end of the road). Factors ranging from US elections to change of personnel at the WTO could be relevant and even decisive in shaping the ongoing round. The Doha mandate has been effectively divided into a deliverable- and a (probably) undeliverable part. It is time for those with the responsibility to deliver to do so. This should be the motto between now and December 2011.

In the medium run, trading nations need to have a serious discussion on PTAs which seem to be running away with the trade agenda. The WTO itself might be gradually reduced to irrelevance, unless it is sensitized to today's realities. Trading nations sign PTAs for dozens of reasons and include in such agreements issues that are a far cry from today's WTO agenda. I am not necessarily advocating that the WTO mandate should be extended. However, we must find out why the developing countries are increasingly turning to PTAs. And what kind of arrangements the WTO should be prepared to do in order to regain its relevance.

People focus on the number of PTAs and it is true that numbers tell a story here, but the true threat for the WTO comes from their content.