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978-0-521-86990-4 - Agreeing and Implementing the Doha Round of the WTO

Edited by Harald Hohmann

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## Introduction

The World Trade Organization (WTO) is a global success story, not least because of its efficiency in dispute settlement. Where else in the world is it possible to solve disputes within sixteen months (for Panel and Appellate Body)? This is especially astonishing in the case of global trade conflicts. Because of the unique efficiency of the WTO dispute settlement system, more and more cases are brought to the WTO panels. However, an efficient dispute settlement alone is not able to solve the crisis of globalisation, for which non-government organisations (NGO) like *Attac* or anti-globalisation campaigns are symbols. They underline that the WTO – especially because of its success up to now – needs more and more justification to correspond to the current aspirations of the world community.

Before the beginning of the Doha Round, *doubts arose whether the WTO was ready for the inclusion of some of the decisive items of globalisation*. The following questions have been asked:

- How can we reduce poverty of developing countries, especially of the least-developed countries (LDC)? How can we support capacity building especially for these countries?
- Is special and differential treatment a *must* to secure the development goals of the least-developed countries? If so, what does it mean in practice?
- Under what conditions will improved access to agricultural and industrial goods<sup>1</sup> and improved access to services be a win–win situation for industrialised and developing countries alike?
- How must trade policy (improved access to agriculture, industrial goods, services) and ‘rules’ (e.g. on subsidies, anti-dumping) be improved to support trade liberalisation and fairness at the same time? Must competition become a subject of the WTO and what role does trade facilitation play?

<sup>1</sup> The improved access to industrial products is now called NAMA (Non-Agricultural Market Access).

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- In case trade liberalisation *per se* cannot be regarded as the main driver for more sustainable development, what additional steps have to be taken for that purpose?
- How can the tension between a judicial and a diplomatic model of dispute settlement be solved? How is it possible to increase the transparency of panel proceedings and to improve the effectiveness of countermeasures? Is funding necessary to improve the access of developing countries (especially LDCs) to the WTO dispute settlement?
- Do the WTO panels or only the WTO Ministerial Conferences have the authority to resolve inconsistencies in the application of various treaty obligations?
- How must the relationship between trade liberalisation and ‘non-trade items’ like environmental protection, health and human rights/social rights be solved? What does a ‘WTO with a human face’ mean in practice? Can these ‘non-trade items’ be included in WTO law by diplomatic processes (e.g. by one of the WTO Rounds) or by WTO panels?

These were some of the most important questions asked at the beginning of the Doha Round, the first major trade round under the new WTO (established 1995), which was launched in 2001 at the WTO Ministerial Conference in Doha. The Doha Round, which focused especially on developmental issues, has also become known as the ‘Development Round’. The term ‘*Doha Development Agenda*’ – or *DDA* – thus refers to the (mandate of the) Doha Declaration, without being specific, whether it also implies reference to other major documents of the Doha Round, namely (1) the Decision adopted by the General Council on 1 August 2004 on the ‘Doha Work Programme’ – also called the ‘July package’ and (2) the Hong Kong Ministerial Declaration. *DDA* is thus a reference to the talks based on the Doha Declaration in light of the further development by these two other main documents of the Doha Round.

In the *Doha Declaration*, it was agreed to implement several trade issues (e.g. access to agriculture, industrial goods and services, improvement of ‘rules’, competition policy, trade facilitation, etc; see also paras.13–29 of the Doha Declaration) several development issues (e.g. debts, transfer of technology, technical co-operation/capacity building, LDC, special and differential treatment; see also paras. 35–44 of the Doha Declaration) a few non-trade issues (e.g. environmental protection and social rights, see also paras. 8 and 31–33 of the Doha Declaration) and one dispute settlement issue (e.g. the improvement and clarification of the DSU; see also para. 30 of the Doha Declaration) within the Doha Round.

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The Doha Declaration stands for the 'Agreeing' on the issues of the Doha Round. The 'Implementing' of these issues started especially with the *Decision by the General Council of 1 August 2004*, since for the first time the Work Programme of the Doha Round was agreed upon (see also the Annexes concerning Agriculture, NAMA, Services, Trade Facilitation). Thus, the WTO needed more than three years to agree on the Work Programme of the Doha Round. When one has in mind that the Doha Round would not run much longer than five years altogether, some time constraints were put on the WTO Members. The *Hong Kong Declaration* has specified how far WTO Members have agreed to implement the Doha Work Programme (e.g. especially the Annexes on Agriculture, NAMA, Services, Rules, Trade Facilitation, Special and Differential Treatment).

The Doha Talks were suspended on 24 July 2006, but this suspension has been lifted and negotiations resumed in February 2007 (and since February–April 2008, there have been some indicators for a Doha success). As *Peter Mandelson* (EC Commission, *Chapter 1a*) and *Chiedu Osakwe* (WTO, *Chapter 1b*) point out there are a lot of indications, that the Doha talks will continue and be resumed in the near future, but there may be questions about the size of the final package. Because of the principle of Single Undertaking, which also applies to the Doha Round, nothing is agreed until everything is agreed. Thus the agreements reached so far in the Doha talks (see *Chapter 1b*) are conditional on the conclusion of the entire DDA negotiations themselves. This is why resuming and concluding the Doha Round is imperative for the world community. However, if a WTO Member wants to implement a few of these agreements, it must not wait until the entire DDA negotiations are legally binding (e.g. the EC is already implementing the 'Everything But Arms' initiative). *Peter Mandelson* (*Chapter 1a*) mentions several risks to the multilateral trading systems in the unlikely event that the Doha negotiations do not resume in the near future.

This book is the *first evaluation of the Doha Round by practitioners and scholars alike*. Its aim is two-fold: first, to make well-known and second, to assess the results of discussions and negotiations reached so far in the Doha Round, in order to analyse their importance for the further development of world trade law. *The book is divided into four parts:*

- Part One: Development policy
- Part Two: Trade policy and trade facilitation
- Part Three: Reform of the dispute settlement
- Part Four: Health, environment and social standards.

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The book will stimulate further discussion on how to implement the agreed principles of the Doha Round.

In Part One, **the developmental aspects of the Doha Round** are highlighted by the *WTO Secretariat* (*Chapter 2*), which gives an excellent overview of all the discussions inside the WTO and between the WTO Members. The political assessment of the development aspects in the Doha Round in *Chapter 3a* (*Philippe Duponteil*, EC Commission) and *3b* (*Faizel Ismail* for developing countries) is slightly different: Does the EU 'stand to be the main obstacle to progress in the Doha Round'? (*Ismail*) or 'has the EU from the outset supported a global trade round that is genuinely pro-development'? (*Duponteil*). It is up to the reader to decide. And another quotation from *Duponteil* is worth mentioning: Not so much 'the need for radical agricultural market access, but liberalisation in industrial products and services will be the key for pro-development'. Also the analytical assessments presented by *Ambassador Lilia Bautista* (coming from a developing country) in *Chapter 4* is very valuable for international discussion. She points out that trade liberalisation alone does not guarantee the eradication of poverty, if no adjustment measures are taken inside the developing country. In *Chapter 5*, *Asif H. Qureshi* adds an important aspect of developmental policy, namely the role of special and differential treatment. He is convinced that the dispute settlement system may be the right body for the implementation of this principle.

Part Two analyses **issues of trade policy and trade facilitation**, starting with the political assessments by *David O'Sullivan* from the EC Commission (*Chapter 6a*) and *Knut Brünjes* from the German Ministry of Economy (*Chapter 6b*). Both see the Doha talks at a critical stage – these two chapters were completed in June 2006, but later updated or rewritten – and they concentrate on conditions for further progress for the Doha talks (thus especially *O'Sullivan*: agricultural reforms by the US, changes concerning services and rules, differentiation between developing countries and increased South–South trade) or on the results achieved so far (especially *Brünjes*). In addition, *O'Sullivan* mentions a new EC strategic approach for the future. *Reinhard Quick* (*Chapter 7*) gives a very helpful analysis of what impact the NAMA and the trade–environment negotiations of the Doha Round have for trade in chemicals. He focuses on high bound tariffs for chemicals by emerging countries, two non-tariff barriers (export taxes, double pricing), tariff elimination for environmental goods, the MEA/WTO relationship, and regulatory co-operation (e.g. the EC REACH Regulation). *Harald*

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*Hohmann (Chapter 8)* proposes to include additional aspects into the WTO discussion on trade facilitation. After an analysis of the main barriers for global export, import and transit trade and of the recent efforts of international organisations like the WCO, ECE and WTO on this topic, he presents a draft agreement which has enough international support to be accepted by the WTO Members. *Karl Meessen (Chapter 9)* proposes to drop competition policy from the Doha talks (see paras. 23–25 of the Doha Declaration), since the informal non-binding inter-agency agreement of the International Competition Network may be a better forum for reaching some convergence of competition law. *Paul de Waart (Chapter 10)* finally resumes a discussion of Doha trade liberalisation from the perspective of sustainable development<sup>2</sup> (see para. 6 of the Doha Declaration) and of the legal principle of integration, under which an integrated approach of economic, social, environmental and human rights concerns is needed for current and future generations. From this contribution, which offers insights into new developments of international law and the most recent codification efforts of three committees of the International Law Association (concerning the humanisation of international law), valuable conclusions may be drawn about under what conditions the Doha Round talks may be a win–win situation for industrial and developing countries alike.

Part 3 analyses questions of the **reform of the dispute settlement from three different angles**: (1) improvements and clarifications of the DSU (see para. 30 of the Doha Declaration), (2) the competence of WTO panels in trade–environment disputes (see para. 31 of the Doha Declaration) and (3) technical co-operation and capacity building concerning the use of WTO panels by developing countries (see paras. 38–41 of the Doha Declaration). The first aspect (improvements and clarifications of the DSU) is comprehensively treated by *Eric White* from the EC Commission (*Chapter 11*) and by *Wolfgang Weiss (Chapter 12)*. Both resume the historical development of the GATT/WTO dispute settlement system and the current DSU review, and comment on proposals concerning transparency, effectiveness of counter-measures, functioning of panels and Appellate Body, flexibility and state control, etc. While *Eric White* pleads for some experimentation with new procedures in order to codify them into a new DSU at a later stage, *Wolfgang Weiss* seems to prefer the codification of a new DSU now. The second aspect (the competence of

<sup>2</sup> See the EC Study by the University of Manchester on Sustainable Impact Assessments of the Results of the Doha Round.

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WTO panels in trade–environment disputes) is analysed by *Debra Steger* in *Chapter 13*, thus bridging Parts 3 and 4 of the book. She argues as follows: Article 3, para. 2 of the DSU should not be regarded as a broad mandate for incorporation of all principles of international law into the WTO Agreements; inconsistencies between various treaty obligations should be solved by an improved WTO legislative process, rather than asking the Appellate Body for a decision. The third aspect (technical co-operation and capacity building concerning use of WTO panels by developing countries) is the subject of *Chapter 14*. *Patina Gappah's* evaluation of the role of legal aid in international dispute settlements compares the role of trust funds (e.g. concerning disputes at the International Court of Justice) with that of technical assistance from the WTO Secretariat and especially with the role of the Advisory Centre for WTO Law (ACWL). Such an analysis of the work of the ACWL has been missing up to now.

Part 4 of the book summarises the **discussion on the famous non-trade items: the environment, health, social standards and human rights**. First human rights. Again, the paragraphs in the Doha Declaration remain vague: What does the WTO 'takes note of the work under way in the International Labour Organization (ILO) on the social dimension of globalisation' (para. 8) mean? Is this a legally binding commitment to respect and integrate the binding ILO standards? In *Chapter 15*, *Andreas Blüthner* underlines the practical importance of the inclusion of human rights, labour and environmental standards into trade commitments by summarising the efforts of WTO panels and an ILO Declaration (interpretation of 'social clauses') and by underlining the work of the UN–Global Compact, which may serve as a model for the WTO. Second, Health and food safety. This is another non-trade item, which is not sufficiently treated by the Doha Declaration, except in the more general paragraphs on environmental concerns. In *Chapter 16*, *Mitsuo Matsushita* analyses the conditions (under Art. XX GATT, the SPS and the TBT) under which WTO Members may take protective measures (e.g. for food with GMO content) – one of the questions here is the role of the precautionary principle, especially under Art. 3.2 SPS. Third, the Environment. The three paragraphs of the Doha Declaration (paras 31–33) remain vague, except for some minor aspects (like eco-labels, see para. 32). In *Chapter 17*, *Shinya Murase* gives a very valuable in-depth analysis of the relationship between trade and the environment, first generally, and then by paying particular reference to the Kyoto Protocol on Climate Change. He then describes an alternative regime on climate change under the WTO, by proposing a new framework model treaty according to WTO provisions.

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This chapter draws some general observations on the relationship between free trade and environmental protection. The same is true of *Satoru Taira's* analysis in *Chapter 18*. He argues with some principles of the Vienna Convention on the Law of Treaties (good faith, harmonious interpretation with some other rules of international law, *lex specialis*, *lex posterior*), with four principles developed by the EC, and finally, with the evolutionary interpretation of WTO law. These five chapters are summarised and reviewed in *Chapter 19* by *Lutz Strack*. He compares these visions with the necessary reforms and the results already achieved under the Doha Round thoroughly, in order to find out what will be the most likely result of the Doha Round concerning environment, health, social standards and human rights.

*Chapter 20* contains the Conclusions by the Editor. Due to lack of space, the Doha documents are now published electronically at [www.cambridge.org/resources](http://www.cambridge.org/resources), and at [www.hohmann-partner.com/wto-law/doha](http://www.hohmann-partner.com/wto-law/doha).

Thus, the book gives several insights into the hotly debated topics of international trade law within the WTO. The reader gets a clear analysis of what outcome is to be expected from a resumption of the Doha Round, and what improvements will be possible in the long run.

The book goes partly back to an ILA post-conference (after the ILA-Berlin Conference in August 2004) in the chateau of Büdingen (near Frankfurt/Main, 23–24 August 2004). In addition to conference speakers, some leading scholars and practitioners of WTO Law have been invited to contribute in this book.

My special thanks are due to *Finola O'Sullivan*, *Richard Woodham*, *Daniel Dunlavy* and *Paula Devine* (Cambridge University Press) for the publication and final editing of the book, to all the authors who worked very hard to publish the book directly at the end of the Doha Round and who did several updates, to my teacher of WTO Law Professor *John Jackson* for writing the Foreword, to my colleague Attorney *Brigitte Dönges* (Hohmann and Partner) for her support in proofreading, to *Otto Hospes* and *Otto Geneh* (Dutch Ministry of Foreign Affairs) and several members of the WTO Secretariat for valuable recommendations on who to contact, to my colleagues *Satoru Taira* (Osaka City University) and *Eckard Pache* (University Würzburg), who were the co-organisers of the Büdingen conference, and to *Satoru Taira* for organising a research stay at Osaka Law School in April 2006 to discuss several items of the book. I would also like to thank the three sponsors of the Büdingen conference (Dean of the Law School of Osaka City University, BASF AG, Hohmann & Partner

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Attorneys) and the participants of this very stimulating conference: Where else does it happen that people from various countries of the world come together in a medieval castle to discuss current topics of WTO Law, allowing an exchange between scholars and practitioners from three different continents? We do hope that the reader will also get this stimulating atmosphere we had during the conference. (Any correspondence concerning the contents of the book may be sent to [info@hohmann-partner.com](mailto:info@hohmann-partner.com)).

This book is dedicated to my daughter Viktoria Letizia Wen-Lin, who came from an emerging developing country to us: she is now four years old and represents the aspirations and requirements of present and future generations as well as globalisation at the same time.

Harald Hohmann  
Büdingen, May 2008

P.S. In Geneva on 29 July 2008 the Doha Round of talks seemed close to success. Conflict over certain details of the Special Safeguard Mechanism in the Draft Modalities for Agriculture is not so insurmountable that it should jeopardise the entire process. We think it likely that this second suspension of talks will be lifted in order to allow a successful conclusion of the Doha Round.



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## 1a

Doha *a posteriori*PETER MANDELSON<sup>1</sup>

Most politicians are understandably reluctant to make predictions. A week, as we are constantly reminded, is a long time in politics. Politics, like the successful outcome of a trade negotiation, is a bet in which there are dozens of variables. So a politician who is also a trade negotiator should be doubly cautious. I am writing this at a time when the Doha Round of negotiations is approaching what is widely recognized as a moment of truth. It is not just another of the multiple moments of truth that all trade rounds pass through on their way to a hard-fought consensus – old hands in Geneva will always remind you that the *Uruguay round was older than Doha is now, when it was successfully concluded*. Rather Doha is approaching a potentially terminal impasse defined by the combination of the US political calendar and the fact that the round has reached a point where the parameters for a final agreement are relatively clear and the gaps to close are political as much as technical. By the time you read this, that moment will have come or gone. I cannot predict what will happen, but I can set out what I believe should happen. Thus, *what follows is either a posteriori defense of the path WTO negotiators have chosen, or it is a measure of lost opportunity, of the deal we may have let slip through our fingers*. As both of those things, it is a guide to some of the political problems that are likely to confront WTO trade rounds and the multilateral trading system in the future.

## The package on the table

By November 2007, the Doha negotiation has produced the outlines of a final agreement that, as a whole, would do credit to the multilateral trading system. Especially *in agriculture, there is a package on the table that offers two to three times the outcome of the Uruguay Round*, a package that

<sup>1</sup> The author is EU Trade Commissioner. This Chapter was written on 25 October 2007.

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was independently described as “by far the largest liberalization of farm trade in history”.<sup>2</sup> At the centre of this package is the EU’s offer to cut its farm tariffs by an average of 50%, within a banded system that ensures that, unlike the Uruguay Round, the highest tariffs would be cut the most. Alongside these cuts to border protection, the EU is also proposing a cut to overall trade-distorting farm support of at least 70% and the elimination of all export subsidies if others agree to do the same. In the EU market alone, the EU has calculated that its proposed tariff reductions for products like beef would create hundreds of thousands of tonnes of new market access. As the steep drop in trade-distorting support saw EU farmers withdraw from global export markets for products like milk and poultry, these markets would become available for the exports of others, not least farmers in the developing world.

It is easy to forget that Doha *is the first round to treat agriculture seriously*. It is impossible to forget that the politics and economics of agriculture globally are such that it would never have been able to catch up with 40 years of liberalization in manufactured goods trade overnight. Under those circumstances, the offer of a 50% cut in farm tariffs in developed countries and a revolution in trade-distorting farm support is exceptional, far beyond the wildest expectations of negotiators in the Uruguay Round.

*Industrial goods negotiations* have taken a backseat to agriculture for much of the Doha Round. Yet even here the outline of a potential package is emerging. At least based on the ranges proposed by the chairs of the negotiating groups in Geneva in July 2007, Doha has the potential not only to consolidate the new openness created in the system by liberalization of border protection for industrial goods in emerging economies like India, but also to create new market access for exporters in these same economies. It has the potential to basically eliminate all remaining industrial tariff peaks, and to eliminate virtually all remaining industrial tariffs in developed markets. *In the EU, there would be almost no duties above 5% left*, which would provide new market access for producers in the emerging economies, but also help streamline production within the huge transatlantic marketplace.

This package has substantial economic value in its own right, especially once a moderate but meaningful services agreement, a new rules agreement and greater protection for intellectual property rights in

<sup>2</sup> Polaski, Sandra, *Breaking the Doha deadlock*; Carnegie Endowment for International Peace, January 2007.