

Reinvigorating the WTO as a Negotiating Forum

David Laborde (International Food Policy Research Institute (IFPRI)),

Andreas Freytag (Friedrich-Schiller-University Jena)

Eduardo Bianchi (Escuela Argentina de Negocios – Instituto Universitario),

Sait Akman

Axel Berger (German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE)),

Manjiao Chi

Uri Dadush (Bruegel)

Jean Dong

Gabriel Felbermayr

Anabel Gonzalez

Bernard Hoekman

Junji Nakagawa

Sandra Rios

Sabyasachi Saha

Claudia Schmucker (Deutsche Gesellschaft für Auswärtige Politik e.V.),

Akihiko Tamura

Mark Wu

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The multilateral trading system is on the verge of a crisis arising from, among others, the dysfunction of the WTO as a forum for trade liberalization and trade related rule-making. The G20 should tackle with this challenge in a proactive and innovative manner by reinvigorating the WTO as a forum for negotiation. Possible policy options include multilateral agreements with multi-speed implementation, plurilateral agreements and critical mass agreements, but priority should be on multilateral agreements with multi-lanes. Possible themes for such negotiations can be e-commerce and investment facilitation.

Challenge

The multilateral trading system is on the verge of a crisis, arising from three distinct situations. First, trade restrictive measures and the reactions against them, many of which were recently applied by G20 countries, could place the global economic recovery in jeopardy (2), and some of the measures were applied without due regard to the relevant rules of the WTO (3). Second, the WTO dispute settlement mechanism is on the verge of crisis, as certain members obstruct the appointment of new members of the Appellate Body after the expiration of the terms of its members. Third but not least, the Doha Development Agenda (DDA) didn't work, and the initiatives since the 2013 Agreement on Trade Facilitation do not help update the 24-year-old WTO rules to reflect modern realities of global economy characterized by globalization of value chains and digitization of trade.

As the first and the second situations are dealt with in Policy Briefs 1 and 3, respectively, this Policy Brief will deal with the third situation, namely, the dysfunction of the WTO as a forum for trade negotiation.

This trend has caused serious issues which has eroded the centrality of the WTO as a forum for trade negotiation. First, substantive trade liberalization and trade related rule-making are being conducted outside of the WTO through so called mega-FTAs such as CETA, CPTPP and Japan-EU EPA. Second, a limited number of WTO members are the parties to such FTAs, to the exclusion of the vast majority of WTO members, most of which are developing countries and LDCs. It must be noted that the "Global" Value Chains in fact span across a small number of countries selected by leading firms in the light of optimum alignment of production processes across borders (4). Accordingly, if mega-FTAs cover existing "Global" Value Chains with no movement in the WTO, it risks locking in the current divide between those countries who join the "Global" Value Chains and those who do not. Third, as FTAs are not necessarily uniform, the rules overall might become fragmented. (5)

Proposal

It is high time that the G20 takes responsibility for the WTO again. Many G20 members have been playing significant roles in tackling pressing issues of global economic governance by swiftly developing innovative ideas and applying them. The G20, an informal body comprising relevant members of the WTO representing both developed and developing countries, should tackle the dysfunction of the WTO as a forum for trade negotiation in a proactive and innovative manner.

The WTO should be reinvigorated as a forum for negotiation

If the Doha stalemate persists and the mega-FTAs continue to set 21st century trade and investment rules, the WTO will fade over time, losing its centrality at least as a forum for trade negotiation. With the exception of the Agreement on Trade Facilitation, rules of the WTO date back to 1995. Substantive trade liberalization and trade related rule-making are being conducted outside of the WTO, particularly through the negotiation of mega-FTAs among those countries comprising GVCs. As this may result in the fixation of the current divide between those countries who join the GVCs and those who do not, the WTO should be revitalized as a forum for trade negotiation, so that its members, in particular LDCs, may have a better chance of joining the "Global" Value Chains.

We therefore welcome the recent initiatives by G20 countries for WTO reform, including the EU's concept paper (6), Joint Statement on Trilateral Meeting of the Trade Ministers of the U.S., Japan and the EU, 7 and Ottawa Ministerial on WTO Reform (8) as they address how to reinvigorate the negotiating function of the WTO. We also welcome the works that are being undertaken through the Joint Statements Initiatives from MC11 (9), as they aim at restoring the negotiating function of the WTO. A good news is that 76 members of the WTO announced the launch of negotiation on rules of e-commerce in late January (10).

These are our proposals for reinvigorating the WTO as a forum for negotiation. They consist of two sets of proposals, namely, proposals on negotiating and decision-making procedure and proposals on the subject matter for negotiation.

1. Proposals on negotiating and decision-making procedure

Opinions abound on introducing flexible approaches to WTO negotiations, instead of the single undertaking formula with consensus decision making. (11)

Ironically, the Doha stalemate was a victim to the success of the Uruguay Round single undertaking. Developing countries, after experiencing the North-South "grand bargain" of the Uruguay Round (12), raised their level of expectations from the Doha Development Agenda, as they claimed that the "grand bargain" did not deliver the benefits that they had expected. Their high expectations contrasted with developed countries' demand of securing substantively improved market access from emerging market economies, and this gap resulted in the prolonged disagreement between these two groups of WTO members. (13)

In light of this, the WTO members gave up the single undertaking approach at MC8 in December 2011, and they agreed to reach partial agreements earlier than the full conclusion of the single undertaking, where progress can be achieved on the elements of the agenda items (14). This enabled the adoption of the Agreement on Trade Facilitation at MC9 in December 2013, and, among others, the agreement on the abolition of export subsidies on agricultural products at MC10 in December 2015. The WTO members should maintain this approach, and aim at the early harvesting of as many items in the remaining Doha agenda items as possible, in such areas as disciplining fisheries subsidies

(15).

In the forthcoming negotiations of the WTO, the single undertaking approach should be avoided (16). The WTO members should rather pursue as many options as practicable. They include multilateral agreements (e.g., most WTO Agreements and the Agreement on Trade Facilitation), plurilateral agreements with a limited membership but open to accession (e.g., Agreement on Government Procurement), and “critical mass” agreements negotiated by a subset of WTO members, whose benefits are extended to all members on an MFN basis (e.g., Information Technology Agreement in 1996 and its expansion in 2015, GATS Protocols on Basic Telecommunications and Financial Services in 1997, and an agreement on environmental goods currently under negotiation).

1.1 A critical mass approach is preferable for trade liberalization

Experiences tell us that a “critical mass” approach is effective and efficient in reaching agreement on sectoral market access on trade in goods as well as services. This approach should be a priority in this type of negotiation at the WTO. On the other hand, this approach may not be adequate in rule-making negotiations, as this will create a situation where rules (obligations) negotiated and agreed among a limited number of WTO members will be applied to those members who did not join the negotiation. According to the fundamental rule of consent (*pacta sunt servanda*) under international law, those countries who are not the parties to an agreement are not obliged to apply the rules of the agreement. Accordingly, rule-making negotiation should result in either a multilateral agreement where all the WTO members join the negotiation, or a plurilateral agreement applied only to those WTO members who joined the negotiation.

1.2 A multi-speed multilateral agreement is preferable for rule-making

A multilateral agreement and a plurilateral agreement have both advantages and challenges. A multilateral agreement creates rules that are applied to all WTO members. It should, therefore, be a preferred approach from the viewpoint of inclusiveness and universal application of rules. On the other hand, this approach will take longer to negotiate than a plurilateral approach, and WTO members may have varied ambitions and readiness in reaching agreement. One way to overcome the difficulty in negotiating a multilateral agreement would be to introduce multi-speed implementation for developing countries and LDCs, and for developed countries and the WTO Secretariat to provide implementation assistance to LDCs. The Agreement on Trade Facilitation is a good example.

A multilateral agreement with multi-speed implementation has three advantages. First, it enables all WTO members to join the agreement according to self-determined selection of provisions with self-determined grace periods. Second, it is consistent with the GATT/WTO practice of self-designated developing country status, while it provides developing country members incentives to full implementation. 17 Third, it creates a sense of solidarity among the WTO members through the implementation assistance from developed countries. Its downsides are that it could take longer to negotiate than a plurilateral agreement, and even longer to achieve full implementation.

1.3 An open plurilateral agreement can be an alternative for rule-making

A plurilateral agreement is binding among those who joined the negotiation. It does not extend its obligations to non-parties. As it is an agreement among likeminded members, its negotiation may be concluded earlier than that of a multilateral agreement on the same topic. The downside of plurilateral approach is that it may result in a divide in the WTO membership, and the WTO may become a two-track regime, where a subset of countries or a “club” play according to the plurilateral agreement. Furthermore, latecomers face a series of pre-determined rules that they have not negotiated and may not be ready to adopt.

It is, therefore, critical for any plurilateral approach to ensure mechanisms that safeguard the interests of those WTO members who either did not join the negotiation or do not become parties to the agreement. First, a plurilateral agreement should be open to all WTO members in the negotiation stage. Second, it should also be open to all WTO members after its entry into force. However, these are not enough, as LDCs are least likely to engage in the negotiation and implementation of plurilateral agreements on rules. So, as a third mechanism, a plurilateral agreement should be equipped with an aid-for-trade component, which assists LDCs in improving their domestic regulations to the level that is required under the agreement (18).

Another challenge is that the addition of a new plurilateral agreement to Annex 4 must be decided by consensus (Article X.9 of the Marrakesh Agreement Establishing the WTO). This means that any WTO member can veto the adoption of the proposed plurilateral agreement (19). As it is unrealistic to expect that WTO members will agree to amend this provision, a method should be developed to relax the consensus requirement in adding a new plurilateral agreement to Annex 4. One possibility might be to require those members who do not agree to the

requirement in adding a new plurilateral agreement to Annex 4. One possibility might be to require those members who do not agree to the addition to explain the reasons for their opposition (20).

2. Proposals on the subject matter

2.1 Liberalization of trade in goods and services

Forthcoming negotiations at the WTO should aim at enhancing WTO members' liberalization commitments in trade in goods and services, and at modernizing its rules to meet the changes in global trade since 1995. Priority should be put on those areas that are already under negotiation, such as liberalization of environmental goods and trade in services. The G20 countries should support the process of these negotiations. A critical mass approach including as many developing country members as possible can be a method of facilitating multilateralization and liberalization. While the negotiation of the environmental goods agreement is conducted by a "critical mass" approach, the Trade in Services Agreement (TiSA) is being negotiated as a plurilateral agreement, whose benefit will be applied solely to participants (21). In light of the stringent consensus requirement under Article X.9 of the Marrakesh Agreement for adding a plurilateral agreement to Annex 4, the TiSA is likely to become a preferential trade agreement, rather than a plurilateral agreement. As this could contribute to sidelining the WTO as a forum for trade negotiation, countries negotiating the TiSA should pursue the adoption of a "critical mass" approach, as appropriate, so that it may be located within the WTO.

2.2 Candidates of negotiation for rule-making

There are two sets of rules that the WTO should focus on. The first set relates to modernizing the rules of the WTO in new areas that didn't fully exist when the WTO was established. The second set relates to tightening or expanding the existing WTO rules to deal with trade distorting practices in such areas as subsidies and state-owned enterprises (SOEs).

On modernizing the rules of the WTO, priority should be put on those areas that are covered by the Joint Statements Initiatives from MC11 (22), namely, (1) MSMEs (micro, small and medium-sized enterprises), (2) electronic commerce, (3) investment facilitation for development, and (4) services domestic regulation. It must be noted that 76 members of the WTO announced the launch of negotiation on rules of electronic commerce in late January. G20 countries should support these initiatives, and those G20 countries who are currently not the parties to these initiatives should consider joining them.

In deciding the form of negotiation and decision-making, priority should be placed on multi-speed multilateral agreements where all WTO members join the negotiation and implementation, as they will become important regulatory infrastructure for streamlining the GVCs. MSMEs and electronic commerce are also important themes for securing inclusiveness in international trade (23). As previously mentioned, WTO members may have varied ambitions and readiness in reaching agreement, so that a multi-speed implementation by developing countries and LDCs with implementation assistance should be adopted to ensure the gradual and universal implementation of these multilateral agreements.

An open plurilateral agreement might be an alternative form of negotiation, but its adoption should be conditioned on the aforementioned mechanisms to secure its openness and inclusiveness, namely, (i) it must be open to all WTO members at the negotiation and the implementation stages, (ii) it should be equipped with an aid-for-trade component, and (iii) consensus requirement for addition to Annex 4 should be mitigated.

Another area that should be considered as a candidate for rule-making at the WTO is related to the tightening or expansion of existing rules to deal with trade distorting practices, such as industrial subsidies, SOEs, transfer of technology and trade secrets, and transparency (24). As these issues are deeply political among G20 countries, a realistic first step for G20 countries will be to start discussion and study and framing of these issues, so that they may deliver the result of discussion at the MC12 in Astana in 2020.

A summary of recommendations:

G20 countries should strive to reinvigorate the WTO as a forum for trade liberalization and trade related rule-making.

For trade liberalization, priority should be on a critical mass approach.

A multi-speed multilateral agreement is preferable for rule-making, but an open plurilateral agreement can be an alternative. Rule-making should aim at modernizing rules to meet the current challenges (e.g., e-commerce and investment facilitation), and at tightening existing rules to deal with trade distorting practices (e.g., subsidies and SOEs).

2 See IMF, World Economic Outlook Update, January 2019, which observes that “The global growth forecast for 2019 and 2020 had already been revised downward in the last WEO, partly because of the negative effects of tariff increases enacted in the United States and China earlier that year”. Available at < <https://www.imf.org/en/Publications/WEO/Issues/2019/01/11/weo-update-january2019>>.

3 See WTO, Report on G20 Trade Measures (Mid-October 2017 to Mid-May 2018), 4 July 2018, p.26, para.3.18.

4 See Baldwin (2012: 11). (Stressed that “the vast majority of WTO members are only tangentially involved in supply-chain trade. ... The parties that would really have to agree would be the old Quad and the new manufacturing giants, particularly China.”)

5 For instance, the rules on E-commerce in the TPP and the Japan-EU EPA (Economic Partnership Agreement) are different in several respects, for instance the prohibition of requiring localization of computing facilities (Article 14.13.2 of the TPP, while the Japan-EU EPA does not provide for this.).

6 See European Commission, Concept Paper, WTO modernization. 18 September 2018. Available at

7 Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union. 25 September 2018.

8 The following countries attended the Ottawa Ministerial Meeting: Australia, Brazil, Canada, Chile, EU, Japan, Kenya, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland. See Joint Communiqué of the Ottawa Ministerial on WTO Reform, 25 October 2018. Available at ; Strengthening and modernizing the WTO: Discussion paper communication from Canada

9 See: Joint ministerial statement: Declaration on the establishment of a WTO informal work programme for MSMEs (WT/MIN(17)/58); Joint ministerial statement on investment facilitation for development (WT/MIN(17)/59); Joint statement on electronic commerce (WT/MIN(17)/60); Joint ministerial statement on services domestic regulation (WT/MIN(17)/61), 13 December 2017.

10 See, Joint Statement on Electronic Commerce, 25 January 2019. WT/L/1056.

11 See, Basedow (2018) (Argues for a carefully crafted approach to plurilateralism in the WTO); Collier (2006: 1433-1436) (Proposes linking plurilateralism to transfers to developing country members.); Cottier (2015: 17-18) (Emphasizes the need of sectorial negotiations, resulting in specific agreements, which may be universal, plurilateral or “critical mass” approach.); Hoekman and Mavroidis (2015) (Support greater use of plurilateral agreements.); IMF/World Bank/WTO (2018: 32-36) (Argues for alternative approaches to single undertaking.); Lawrence (2006: Proposes supplementing the core WTO obligations with a club-of-clubs approach.); Trebilcock (2015) (Argues for the need to be more accommodating of plurilateral agreements among sub-sets of WTO members that are open to subsequent accession by other members, primarily on a conditional MFN basis.)

12 See Ostry (2002).

13 See Elsig (2016).

14 See WTO 8th Ministerial Conference, Chairman’s Concluding Statement, 17 December 2011, WT/MIN(11)/11, p.3.

15 See WTO 11th Ministerial Conference, Ministerial Decision of 13 December on Fisheries Subsidies. WT/MIN(17)/64.

16 Note that alternative to abandoning the Single Undertaking should not be a WTO á la carte, but the approaches encouraging the eventual participation of all members, while preventing a blockade in the process.

17 Note that incentives come from (1) implementation assistance provided by developed country members, and from (2) the fact that those

countries who implement the agreement fully may attract private firms that constitute GVCs.

18 See Hoekman and Mavroidis (2015: 338).

19 See Draper and Dube (2013: 3-4).

20 See Hoekman and Mavroidis (2015: 341).

21 See European Commission, Trade in Services Agreement (TiSA) Fact Sheet, p. 2.

22 See WTO 11th Ministerial Conference, Joint Ministerial statement – Declaration on the establishment of a WTO informal work programme for MSMEs (WT/MIN(17)/58); Joint ministerial statement on Investment Facilitation for Development (WT/MIN(17)/59); Joint statement on Electronic Commerce (WT/MIN(17)/60); Joint Ministerial statement on services domestic regulation (WT/MIN(17)/61).

23 See IMF/World Bank/WTO (2018: 28).

24 See European Commission, Concept Paper, WTO modernization, supra n.5; Joint Communiqué of the Ottawa Ministerial on WTO Reform, supra n.7.

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