Building on Bali

A Work Programme for the WTO

Edited by Simon J. Evenett and Alejandro Jara

A VoxEU.org eBook

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Foreword

With the avoidance of abject failure earlier this month of the WTO Ministerial Conference in Bali, the WTO has lived to fight another day but we can hardly count the outcome as a clear 'win'. There is still much to be done to rehabilitate the WTO's importance as international economic institution and restore 'WTO centrality' in global trade governance.

The megaregional trading agreements under negotiation – especially the Trans-Pacific Partnership (TPP) and Trans-Atlantic Trade and Investment Partnership (TTIP) – would shift governance of global trade massively away from the WTO. Never before has the WTO faced such intense institutional competition. Competition, however, can bring out the best in those involved.

This VoxEU.org eBook has been put together to collect ideas on how to give the WTO a fighting chance in this pending institutional competition. The contributions show how this organisation's work programme in the next two to four years can be structured so as to build on Bali's success.

It is hard to disagree with the editors when they conclude:

> "… a liberalisation-heavy, negotiation-dominated WTO work programme is a non-starter in the near term. For too long this approach has generated more heat than light. The polar opposite – drift – risks the WTO being left out in the cold as companies and governments move on. The recommendations contained in this volume persuade us that a work programme can be cooked up that satisfies enough palates, bearing in mind that some tastes are changing as the 21st century progresses and others have more settled preferences ... the resulting fare won't be the promised banquets of yesteryear – but it will provide a nutritious, more balanced diet from which the WTO can gain in strength over time."

The editors compare the recipes contained in this eBook to the porridge favoured by Goldilocks – neither too hot nor too cold. Whether they represent porridge or something grander, the recipes deserve the close scrutiny of the trade policy community.

Simon Evenett, the co-director of the CEPR's International Trade and Regional Economics programme, teamed up with Alejandro Jara, a distinguished trade diplomat and former Deputy Director-General of the WTO, to lead this effort.

Twenty-seven contributions were commissioned for this VoxEU eBook, titled *Building on Bali*. They cover not only the key strategic considerations that should inform the WTO membership's deliberations over its near-term work programme but also specific recommendations as what the WTO can do in seventeen policy areas. Simon, Alejandro, and I are very grateful to the contributors – all leading trade experts – for their succinct and incisive analyses.

We are also grateful for the dedication and commitment of Anil Shamdasani, who helped produce this ebook in record time. Many thanks also to Antoine Cerisier, who proof-read sections of this volume. Team Vox also edited the column that was published along with this eBook.

Stephen Yeo
Chief Executive Officer, CEPR
16 December 2013

Executive Summary

Simon J Evenett and Alejandro Jara

The successful conclusion of the Bali Ministerial Conference and its terrific reception in the international press and from government leaders means that the WTO now has the opportunity to restore its fortunes. Talk of the WTO's demise as a negotiating forum has been set aside, at least for now. If, in the coming months, the WTO membership takes the right decisions concerning its near-term work programme and assiduously follows up, then such talk might be banished for good.

For sure, the Bali deal addressed only part of the Doha Development Agenda and was sealed after its fair share of drama. Still, the run-up to Bali and the Ministerial Conference itself showed that creative solutions could be found, that the membership is prepared to rally around them, and ultimately, that the prospect of another damaging deadlock was unacceptable. How can the WTO build on Bali?

The purpose of this VoxEU eBook is to identify a number of pragmatic, near-term options for the WTO's post-Bali work programme. Twenty-seven contributions were commissioned covering both the strategic considerations that will likely shape near-term deliberations on the WTO's priorities and the steps that should be taken by the WTO membership in the coming years on a wide range of important topics, ranging from long-standing staples like agriculture to new big-ticket items, such as electronic commerce. What follows here are some reflections of our own, based on these contributions and recent developments.

The fate of the WTO should not hinge on the success of its negotiating function

The ultimate purpose of the WTO is not confined to the progressive reduction of state favouritism towards domestic commercial interests – it is to discourage the resort to favouritism in the first place. That discrimination can take many, many forms. Plus the forms of discrimination employed by governments evolve as corporate organisation changes (the development of international supply chains being a leading example) and new products and services are introduced (a modern example being services provided over the internet, to say nothing of 3D printing).

Successive trade diplomats were far-sighted enough to recognise these facts and they constructed a multilateral trading system that involved not only negotiating accords to lock-in reforms but also mechanisms to monitor government decision-making, to resolve disputes, and to deliberate on the merits of potential future initiatives. For sure, this architecture doesn't deliver results instantly but look at the stalled reform processes in many countries – it is not as if national processes operate at light speed either, witness labour and agricultural market reform efforts in many industrialised economies. Moreover, as the endless negotiations on climate change and voting weights on the IMF Executive Board have shown, it has been difficult to reach global deals.

A very good example of how the system works relates to the explosion in use of voluntary export restraints in the 1980s. Rather than raise tariffs by means of safeguard measures and thus having to provide compensation, governments induced trading partners to limit certain exports. This practice was picked up by the WTO's predecessor, the GATT, in its monitoring of protectionism in the early 1980s, raised alarm bells among diplomats in Geneva, was put on the negotiating agenda of the Uruguay Round, and a ban on the use of these restraints came into force in 1995.[1] This combination of the WTO's 5Ls (Look-Learn-Liaise-Legislate-Litigate) is how the system is supposed

1 Having said that, the resolution of the recent dispute between China and the EU over solar panels looks involves terms that look suspiciously like a voluntary export restraint.

to work. The 'legislate' component – the result of negotiation – is an important part but it is not the only part. Companies and their employees benefit from every step in what these days might be called the WTO's institutional supply chain.

With this in mind, it is unfortunate to say the least that, in recent years, the WTO's reputation in the eyes of many senior policymakers and commentators is seen solely in terms of its capacity to deliver negotiated agreements. To the extent that such agreements are associated with slashing trade barriers and the like, it has encouraged some business lobbies and negotiators to demand greater and greater levels of 'ambition' at a time when it is evident that there is not enough appetite for liberalisation among the WTO membership.

Still, as many of the contributions to this volume make clear, even with tempered ambition there is plenty that could be negotiated in the next two to four years. To the suggestions made by the contributors, we would add one more. Given the sustained tendency towards unilateral tariff reform in many developing countries and shrinking agricultural support in leading OECD jurisdictions, in the near term there is no harm dwelling on how to encourage WTO members to bind more of their autonomous initiatives. For example, a push to bind more zero applied tariffs on manufactured goods at that level could be part of a package negotiated over the next two to four years.

There is also plenty of valuable work to get done at the WTO that isn't about closing deals. A post-Bali work programme should give prominence to the deliberative as well as the dispute settlement functions of the WTO. With respect to dispute settlement this amounts to making a virtue out of necessity given this function is already entrenched in the WTO rulebook. This is not to imply that the current dispute settlement understanding works perfectly. Indeed, in this regard two of the contributions in this eBook contain recommendations for improving both compliance with and the utility to developing countries of dispute settlement.

With respect to deliberation, it is not immediately apparent which new multilateral trade rules are needed to address the challenges of '21st century commerce', so organised

processes of information collection, analysis, and discussion will be needed if sizeable constituencies for reform are to develop. Let us be clear, deliberation is meant to be an open-minded exploratory process—not a pre-negotiating phase with heavy-handed attempts to promote narrow proposals. Recent years have seen a scaling up of the transparency-promoting, monitoring, and surveillance functions of the WTO, so there is a good base of experience upon which to build.

We were struck by the number of contributors to this volume that have made recommendations that emphasise deliberation or the combination of deliberation and negotiation as parts of the work programme that the WTO membership could adopt in a number of important areas – ranging from Special and Differential Treatment and Aid for Trade to migration and assessing the crisis-era resurgence in industrial policy. Some of the steps proposed by our contributors would also have the benefit of strengthening the hands of trade ministries in national governments and in publishing information that story-hungry media outlets can use, which in turn puts on the defensive the proponents of beggar-thy-neighbour steps.

The mix of deliberation and negotiation will see growing payoffs over time, helping to restore the reputation of the WTO. At the moment a WTO work programme that delivers step-by-step progress in a number of significant policy areas may pale compared to ambitions associated with the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership. But that will change as the exalted ambitions of those mega-regional deals are confronted with domestic realities. Our money is on the tortoise beating the hare. If your money is on the hare, what's the harm in taking out some insurance?

21st century trade matters – but so does 19th and 20th century commerce

One often-heard gripe is that, after 12 years of negotiating the Doha Development Agenda, work at the WTO has drifted further and further from the realities of international

commerce in the 21st century. It is certainly true that corporate reorganisation and the growth of international supply chains, the rise of electronic commerce, and the resort to beggar-thy-neighbour measures since the onset of the global economic crisis have changed the landscape of world commerce. But many export-oriented farmers still face foreign trade barriers and subsidised rivals. And plenty of manufacturers' export plans are frustrated by tariff peaks and many more by a bewildering array of foreign regulations and procedures. Alas, cutting-edge commercial developments haven't obviated protectionism inherited from the past.

Indeed, the distinction between 21st century and earlier forms of commerce can be somewhat misleading. While it is true, for example, that the existence of international supply chains alters the interpretation of trade data and potentially national commercial policy priorities, it is worth recalling that what is 'supplied' in supply chains are goods and services, for which longstanding multilateral trade disciplines exist. Moreover, since optimising supply chains implicates many different types of government policy any future WTO initiative on such matters may need to cut across existing 'silos' of the multilateral architecture as well as addressing some matters that have hitherto lay outside the WTO's remit.

For these reasons, the reality is that what might be referred to as 21st century commerce matters, but so does the commerce of yesteryear. The next work programme of the WTO should reflect the diversity of contemporary global commerce and, to that end, this volume contains recommendations for the WTO's near-term work programme in 17 specific areas of public policy. The recommendations for each policy area can be found in Section Two of this eBook and the headline recommendations are reproduced in the table at the end of this Executive Summary.

For the newer issues, one theme of the recommendations made in this volume is that deliberation processes be established before the launch of any negotiation is contemplated, not least to help build confidence among the WTO membership. Here the less-than-successful experience of the working groups convened to consider the

Singapore Issues should inform the design of future deliberative initiatives. The reality is that if this matter is poorly handled then some won't move away from a default position of rejecting new areas for negotiation. Beefing up the capacity of the WTO Secretariat to provide informative analyses would benefit those WTO Members that have less analytical capacity to assess emergent commercial trends, options for multilateral cooperation, and supporting national measures.

Irrespective of the vintage of a trade matter (19th, 20th, or 21st century), many have raised the question of whether negotiations on new topics in the WTO must be conducted on a multilateral basis. Under what circumstances would the WTO membership agree to launch of a negotiation that does not involve every Member? The question further arises as to whether any new negotiations should be part of the Single Undertaking of the DDA.

In our view, despite their evident advantages, it is best not to put either multilateral accords or the Single Undertaking on pedestals. The principles underlying both approaches to negotiations have been honoured more in the breach during the past twelve years. How many categories of WTO membership were introduced during the Doha Round negotiations to accommodate different circumstances? If multilateral approaches were the only formula for success, how can one explain the progress made in government procurement in recent years? What about all those Special and Differential Treatment provisions included in the supposedly pure Single Undertaking employed during the Uruguay Round? Let's not make the perfect the enemy of the good.

A fresh look at ends and means is needed here. Many, including some of our contributors, advocate plurilateral and critical mass approaches. We would point out there is a third option, a good example of which being the Bali deal on trade facilitation. The latter accord included in it a pragmatic way of tailoring special and differential treatment for developing countries to national circumstances. Such 'bespoke multilateralism' is another option worth considering. The desirability of these three alternative approaches will almost certainly vary on a topic-by-topic basis, depending on the types of

obligations that might be negotiated and the potential adverse consequences of those obligations for any WTO Member that decides not to join a negotiation.

The Goldilocks solution – not too hot, not too cold

So, in general terms, how can the WTO build on Bali? The starting point is surely to recognise that, while the Bali Ministerial Declaration was a relief, a huge dose of realism is in order. The liberalising zeal of many is evidently not shared by enough of the WTO membership. Frustration has led some to undertake further trade liberalisation outside of the WTO – indeed, the mega-RTAs under negotiation may overshadow developments at the WTO in the near term. The move towards a multipolar world continues. In many WTO Members faltering economic recoveries haven't helped. For sure, this isn't going to be plain sailing.

Yet Bali has provided an opening and this opportunity must be seized. Clearly a liberalisation-heavy negotiation-dominated WTO work programme is a non-starter in the near term. For too long this approach has generated more heat than light. The polar opposite – drift – risks the WTO being left out in the cold as companies and governments move on. Like Goldilocks, our taste is for porridge that is neither too hot nor too cold.

The recommendations contained in this volume persuade us that a work programme can be cooked up that satisfies enough palates, bearing in mind that some tastes are changing as the 21st century progresses and others have more settled preferences. Plus the chefs involved need to deploy all of the utensils at their disposal, reflecting the full range of the WTO's functions. For now the resulting fare won't be the promised banquets of yesteryear – but it will provide a nutritious, more balanced diet from which the WTO can gain in strength over time.

Contents and organisation of the remainder of this eBook

The overall goal here is to provide in a single volume a comprehensive set of strategic considerations and topic-specific suggestions that can inform the deliberations among the WTO membership on the post-Bali work programme. We deliberately chose to release this VoxEU eBook once matters settled down after Bali – providing an input that governments and those interested in the WTO could digest over the calm of the holiday period and during the lull at the beginning of the new calendar year. Rome was not built in a day and the next work programme of the WTO need not be chosen overnight or in response to some artificial very near-term deadline.

Twenty-seven distinct analyses were prepared for this eBook by leading experts on international trade policy. Some contributors are current or former senior officials. Other contributors are legal practitioners and experts based in academia. A wide range of expertise was deliberately tapped. These analyses have direct implications for all three of the WTO's main functions – namely, negotiation, dispute settlement, and monitoring and deliberation. Furthermore, together the contributions speak to the interests of every group of WTO Members.

In almost every case, these analyses were prepared in the aftermath of the Bali Ministerial Conference. The few that weren't haven't become dated either because of the subject matter in question or because of the focus on longer-standing matters. No attempt was made to reconcile different positions, nor was there an attempt to come to a common view.

The only request made to all contributors was that they spelt out not only good ideas but also suggestions for a work programme for the WTO during the next two years and the two years that follow, that is, from Bali through to the next two Ministerial Conferences (MC10 and MC11, respectively).

It made sense to organise the contributions into two sections. The first section comprises seven contributions that make observations about the broader strategic choices available to the WTO membership as they decide the post-Bali work programme.

The second section comprises 20 topic-specific contributions, ranging from significant items that have long been on the WTO agenda to those that are relatively new. Some may object to the decision not to include non-agricultural market access as a separate item; however, as readers will discover, a number of contributors make reference to this important matter, as we did here.

In most cases there is one contribution per topic in Section Two. However, some topics are sufficiently broad in scope (specifically, agriculture, dispute settlement, and electronic commerce) that two contributions were included.

Each of the contributions in Section Two includes specific recommendations for the post-Bali work programme. To make it easier for readers to take away the most important recommendations, as well as to gauge the totality of those recommendations, these recommendations are summarised in the table that follows. Next to each entry are the page numbers where the recommendations are spelt out in more detail.

About the authors

Simon J. Evenett is Professor of International Trade and Economic Development at the University of St Gallen, Switzerland; Co-Director of the CEPR's programme on International Trade and Regional Economics, and Coordinator of the Global Trade Alert, the independent trade policy monitoring initiative.

Alejandro Jara is the former Ambassador of Chile to the WTO and Chair of the Services Negotiations (2000-2005), former Deputy Director-General of WTO (2005 – 2013), and presently Senior Counsel, King & Spalding LLP (Geneva).

Table 1 Topic-by-topic elements of a potential post-Bali work programme for the WTO

Topic	Elements of a potential work programme	Pages
Investment	Launch a preparatory process that would: • Raise awareness among WTO members of the profound changes in global investment flows • Undertake a systemic analysis of the terms and coverage of existing BITs and RTAs, including existing investment liberalisation commitments • Explore alternative definitions of investment and standards of protection • Examine investment-related aspects of sustainability and corporate social responsibility • Explore the relative merits of investor-state dispute settlement mechanisms • Examine potential plurilateral and other options for new WTO disciplines on investment	67-74
Plurilateral and Critical Mass Accords	By the next Ministerial: • Establish a framework and set of procedures for a critical mass and/or a club-of-clubs approach • Agree procedural modifications to the consensus rule. By MC11 at least two new agreements negotiated under the agreed procedures should be in place.	75-80
Aid for Trade	• Over the next two years WTO members should streamline the Aid for Trade Initiative by focusing solely on trade-related projects. In line with this approach, the Aid for Trade Work Programme for 2014-2015 should focus on aid for trade on projects associated with the Bali trade facilitation accord, with the implementation of unilateral reforms and regional trade agreements, with supporting the implementation of WTO rules by new members, and with building the trade policy infrastructure that many countries negotiating their accession are missing. • Before MC11, the WTO should establish independent body to undertake searching evaluation of Aid for Trade, highlighting where such aid has the biggest impact on trade and development.	81-86

Topic	Elements of a potential work programme	Pages
Special and Differential Treatment	To complement to the Review on S&D announced at Bali, WTO members should launch a preparatory process that would • Explore more objective, potentially quantifiable, approaches to differentiation among WTO members, bearing in mind the forms of SDT vary across policy domain • Examine alternative potential graduation mechanisms partly drawing upon the experience of such mechanisms in existing WTO accords (such as Articles 27.5 and 27.6 of the Agreement on Subsidies and Countervailing Measures) WTO members would commit to conclude negotiations on a graduation mechanism by the next Ministerial Conference.	87-92
Dispute Settlement	Steps could be taken to improve compliance by: • Giving more resources to the WTO secretariat so that panel and compliance proceedings are concluded in a more timely fashion • Consider alternative procedures that in effect "multilateralise" disputes so that all WTO members are parties to each dispute • Explore steps to simplify arbitration panel proceedings • Explore reviving the use of suggestions pursuant to Article 19.1 of the DSU • Consider means to strengthen penalties for late compliance With respect to the role of developing countries in dispute settlement, WTO members could: • Review associated S&D provisions, including considering the pros and cons of deleting Art. 22.3bis DSU and Art. 22.4 DSU in favour of Art. 28 DSU • Explore the pros and cons of building a bridge between 27.2 DSU to Art. 28 DSU, a move that would ensure that developing countries get an opinion about the legal merits of pursuing a dispute and the funding to launch productive consultations. The required text for this recommendation should be drafted for the next WTO ministerial. • Explore the pros and cons of building a bridge between Art. 27.2 and the Advisory Centre on WTO Law (ACWL).	93-104

Topic	Elements of a potential work programme	Pages
Agriculture	By the next WTO Ministerial: • Agree a market access package that includes tariff cuts (along the lines spelt out in the draft modalities in Rev4), a Special Safeguards Mechanism with appropriate provisions against long term abuse, and certain disciplines on export bans and taxes for basic grains and oilseeds • Secure agreement to finally eliminate export subsidies and other forms of export competition in agricultural trade according to a negotiated timetable, potentially as part of a plurilateral accord as such elimination does not implicate every WTO member • Agree terms on domestic support regimes (along the lines spelt out in the draft modalities in Rev4) and clarify the criteria for so-called blue and green box subsidies, including those relating to food security policies that were the subject of controversy at Bali Establish a separate work programme on the trade-related aspects of food security, identifying better practices for government initiatives in this area and implications for multilateral trade rules. This work programme would report on its deliberations at MC11.	105-120
Services	• Establish a Working Group to examine the operation of provisions in RTAs relating to "mutual equivalence" of regulations and their potential application at the multilateral level. Report to MC10 on the findings of this Working Group. • Before the 10th Ministerial Conference, Member States could agree on a broad decision, pursuant to Article VI(4) of GATS, to apply disciplines to national services regulation to ensure that they are not more burdensome than is necessary to achieve the relevant regulatory goal.	121-126

Topic	Elements of a potential work programme	Pages
Mutual Recognition	Over a four-year horizon, that is in the run up to 11th Ministerial Conference, Member States could agree on: • specific sectors in which they would engage in majority voting with respect to harmonisation of regulation for goods and services • provisions for opt-outs where important national concerns are implicated, as well as technical assistance to ensure full participation of developing countries In a complementary arrangement, Member States could also agree to interpret Article I:1 of GATT and the MFN provisions of the TBT Agreement and SPS Agreement to clarify authorisation for "open" recognition agreements relating to goods, similar to the permission contained in Article VII of GATS, in sectors not covered by their agreement for majority voting on harmonisation.	127-132
Local Content Requirements	Launch discussions in 2014 among interested parties on the elements and merits of a potential plurilateral accord on local content requirements that contain could include new disciplines on the use of such policies, reporting requirements, enhanced monitoring, expedited consultations for dispute settlement, as well as procedures to accede to any such accord.	133-142
Exchange Rates	Before the next Ministerial Conference: • WTO members should reassess the extent and instruments for cooperation with the IMF, including the joint preparation of *an external sector report (covering trade, financial, monetary and exchange rate policies)* • WTO members should invite the G20 to integrate trade and associated policies into its Mutual Assessment Process	143-148
Climate Change	By the next Ministerial Conference WTO member should commence negotiations on "green" trade liberalisation including • Agreeing a target date for the adoption of duty-free treatment of covered products • Negotiation of a plurilateral or critical mass accord that also included modification of the Agreement of Subsidies and Countervailing Measures for certain classes of "green subsidies" • Conclusion of an "informal" accord on the exercise of self-restraint in imposing new trade defence measures on "green" products • Preparation for negotiations on fossil fuel subsidies	149-154

Topic	Elements of a potential work programme	Pages
Electronic Commerce	Revive the WTO Work Programme on Electronic Commerce over the next four years by: Negotiating higher de minimis levels for customs procedures • Work closely with the United Postal Union to create binding rules for international postal communication and cooperation • Create an electronic platform containing information on each Member's consumer rights legislation • Discourage actions that seek to disconnect portions of the Internet or that give preference to certain services over others With respect to data flows and related digital trade barriers, should a review of existing multilateral disciplines identify deficiencies given the rapid development of electronic commerce, WTO members would negotiate a horizontal discipline to deal with all trade-related aspects of data for goods and services alike which would, where appropriate, include a necessity test for any state imposed restrictions on data flows motivated by non-commercial considerations.	155-168
State-Linked Enterprises	In the run up to the 10th Ministerial Conference the WTO membership could consider • Adopting more extensive rules on transparency and disclosure of internationally active state-linked companies • Reconsider the current interpretation of the relationship between Article XVII(a) and Article XVII:1(b) which implies that there is no separate obligation applied to state trading enterprises to operate in accordance with commercial considerations. Re-establishing such a commercial considerations obligation would be tantamount to having a competition-law-type obligation on state enterprises. • Explore the pros and cons of allowing, for the purposes of the Agreement on Subsidies and Countervailing Measures, state-linked enterprises to be considered as "state bodies" as a result implying that any subsidies granted by these enterprises fall within existing WTO disciplines.	169-176

Topic	Elements of a potential work programme	Pages
Crisis-era Industrial Policy	A Working Group would be established that, having established the relevant facts concerning crisis-era industrial policy interventions and experience from earlier eras, reports to the 10th Ministerial Conference on the results of the following work programme: • Identification, for each broad motive for industrial policy, the types of government intervention that do not raise concerns from the perspective of non-discrimination. "Safe harbours" for industrial policy interventions would thereby be established. • Identification of the circumstances where effective industrial policy intervention does not involve violating the Most Favoured Nation principle. • Identification and statement of better practices for the processes that WTO members should follow when considering industrial policy interventions, in particular those interventions that might harm foreign commercial interests. • Statement of principles for the periodic review of industrial policy interventions, including the potential for the removal or amendment of the intervention being reviewed. • Consideration of ways to encourage the phasing out of discriminatory industrial policy interventions taken in recent years or, where possible, the substitution of more discriminatory policy instruments with less discriminatory alternatives.	177-182
Export Taxes and Restrictions	The work programme would include: • Further consideration of existing proposals concerning export restraints (for example, that submitted by Japan) and any proposals subsequently submitted by WTO members • Consideration of the pros and cons of linking any multilateral disciplines on export restraints to new rules on import tariff escalation (as suggested by the Cairns Group) • Identification and examination of alternative potential exemptions from multilateral rules on export restraints on account of food shortages • Consideration of the treatment of acceded WTO members that already have legal obligations on the exercise of export restraints	183-188

Topic	Elements of a potential work programme	Pages
Technology Transfer	Before the next Ministerial Conference WTO members could commit to: • Complete the expanded International Technology Agreement • Conclude negotiations to open R&D services, ranging from equipment purchases and testing protocols to grant management and accounting and beyond, to competition, whether through GATS or, should it come into the WTO fold, the Trade in Services Agreement Before MC11 WTO members would negotiate a plurilateral agreement to significantly liberalise skilled-labour flows under the framework of an innovation zone work visa.	189-196
Migration	The WTO Secretariat should collect data on the migration agreements have been signed in the last decade to identify their scope and definitions and the extent of their discrimination between source countries. With this data WTO members could over the next four years: • Negotiate an agreement in which Mode 4 concessions are requested and offered but which all parties accept can be over-ruled by any party by reference to its visa policy • Consider the pros and cons of negotiating a framework agreement which governed bilateral arrangements in Mode 4, recognising their lack of MFN (i.e. their discriminatory nature) but nonetheless offering to make them enforceable through WTO processes	197-202

Section 1

Strategic priorities for the WTO after Bali

How to Reassert the WTO's Negotiating Authority

Stuart Harbinson

The WTO today: unique, inclusive, yet partly outdated

The WTO still provides the most inclusive forum for global trade rule-making. Nowhere else is it possible to have a policy dialogue between such a large number of governments responsible for such diverse economies. This diversity and (almost) universality is an enormous strength. It also makes it difficult to achieve results in trade negotiations. We should not be surprised about that, or become too despondent when the negotiating train sometimes hits the buffers. It's important to keep talking and keep trying. The WTO adds unique and irreplaceable value to discussions and negotiations about trade policy.

But some current WTO rules, inherited from the GATT, are still predicated on the outdated assumption that a product is made solely in one country and then traded across a border to another country. WTO rules are also compartmentalised; there are separate rules for trade in goods, trade in services, and for the trade-related aspects of intellectual property rights. These features are increasingly at odds with modern, integrated business practices, which have been revolutionised by technological progress over the past 25 years.

These practices are increasingly characterised by the fragmentation of production into global networks and value chains, by growing trade in intermediate products, by greatly increased use of digital interconnectedness for trade, by the integration of goods and services, and by the growth of services trade in itself. To be sure, not all economies and businesses share these characteristics. But nor can it be argued that they are the preserve

of advanced economies and big business. China and East Asia have used them as a powerful development tool to lift millions out of poverty. Technology-enabled small businesses, entrepreneurs and individuals around the world are also at the forefront of the transformation. Technology is empowering global consumers and driving the rise of the so-called 'micro-multinational'.

Act now or face a patchwork of regulations

At the WTO, the Doha Round has been in a state of paralysis. Success at the Bali Ministerial Conference, while extremely welcome, will not transform perceptions of the WTO's effectiveness as a negotiating forum overnight. In the short to medium term, governments will continue to put most of their energy into the slew of major preferential trade agreements (PTAs) already under negotiation. Too much political capital has been invested in these to permit a sudden change in course now. The WTO will still be on the backburner, but Bali has provided some breathing space in which governments can reflect on the WTO's future work programme and explore options for renovating the multilateral trading system over the longer term.

In terms of providing a rational policy framework within which businesses can operate to maximum potential, the landscape of current and potential PTAs is at best ambiguous. On the one hand there is an ever-increasing overlap of PTAs. For example, a world in which the Trans Pacific Partnership (TPP), Transatlantic Trade and Investment Partnership (TTIP) and other bilateral agreements such as EU-Japan co-exist would seem to be interconnected and open to possible consolidation in due course. Countries with common membership in such structures could assume the responsibility to minimise divergence.

On the other hand, the new generation of 'mega-preferential' PTAs – such as TPP, TTIP, the mooted Trade in Services Agreement (TiSA) and the Regional Comprehensive Economic Partnership (RCEP) – also appear to be driven, to varying degrees, by geopolitical/strategic considerations, which may in some cases cut across economically

rational production networks. The RCEP (comprising the ten ASEAN countries and their existing FTA partners) would include some countries which are also tied into the TPP – and possibly tied to the EU through separate bilateral arrangements as well. But it would also include countries such as China and India, which do not have those links.

These potential new 'mega-preferential' agreements also aspire to go much deeper than traditional PTAs in terms of addressing 'behind-the-border' issues. They cover regulatory coherence or convergence, and also deal with polocies towards competition, investment and the environment, which are currently largely outside the WTO framework. These negotiations are more about how to regulate than how to lower tariffs.

Unless the WTO can restore its primacy in rule-making we may be headed for a patchwork system of bewildering complexity in which different regulatory systems co-exist within the same country and/or in which different regulatory systems in groups of countries compete with each other. While this tendency may be mitigated somewhat by individual governments striving for internal and external coherence, such a framework is suboptimal for large businesses and unworkable for small businesses with limited capacity to grapple with the associated complexities.

It is also important to note that it is generally the biggest and most powerful economies which are driving these 'mega-preferential' agreements. The broad mass of small developing countries is being sidelined and disenfranchised and will simply have to live with the consequences. This is not a desirable model for a 21st century trading system.

What next? Work with what we have

The question is: Can the WTO reinvent itself with modern rules and an efficient negotiating system? It is tempting to suggest root and branch reform given the obsolescence of some aspects of the WTO model, but this is unlikely to happen in the real world. We have to work with what we have. Opportunities do exist to update the system and breathe new life into the WTO's negotiating machinery.

WTO Members should return from Bali in a much more flexible state of mind. Even if they have had some success, they should now explicitly acknowledge that the Doha Round, as originally conceived in terms of both scope and organisation, is no longer viable. They should review, amend, and trim down the Doha negotiating agenda and adopt a more flexible approach than the all-embracing 'single undertaking'. They should also be prepared to add new issues to the WTO's work programme, whether in terms of negotiations or exploratory discussions, with a view to updating the system. They should focus on making practical progress as, when, and how, they can.

By way of illustration, Members could:

- review the Doha mandate on rules negotiations: which elements of the mandate remain priorities, which might be discarded, and which might be strengthened?
- reactivate the working groups on investment and competition (which remain technically in existence), with a view to identifying elements for future negotiations;
- consider which elements of the work programme on electronic commerce might be prioritised for negotiations (for example, the interface between e-commerce and trade facilitation, which is a key issue for many small businesses); and
- consider whether and how to develop work to date on trade and exchange rates.

Members should also raise their sights in terms of considering the future direction of international trade policy and how the WTO can more effectively promote the multilateral trading system. We need serious debates about trade policy rather than political point scoring. A working group might be established with a mandate to make recommendations on improving the functioning of the WTO.

Some may regard this is as a betrayal of the Doha 'Development Agenda', but the truth is that this was always just a label. Doha was conceived as a balanced agenda rather than a one-way street, as the negotiating history amply demonstrates. The WTO's development mandate will endure through the composition of its membership.

The possibility of reaching plurilateral agreements within the WTO framework is one avenue that should be kept in mind, while being aware of the dangers of discrimination. Since plurilateralism is in vogue, it is better to contain this within the WTO where possible, rather than to run the risk of arbitrary fragmentation of the trading system through arrangements outside the WTO. The plurilateral approach may be useful as a testing ground for developing new rules in areas not presently covered by WTO. Proper safeguards would be needed for non-participants. It is not necessary at this stage to be prescriptive on the precise areas to which this technique might apply – better that this should emerge organically from deliberations under a revised work programme.

Having said this, it should be recognised that we do not really know what the long-term consequences of adding new plurilateral agreements to the WTO might be. Possibly they would be 'multilateralised' in due course, in the same way the Tokyo Round codes were multilateralised in the Uruguay Round, but we cannot be certain that history would repeat itself in the same way. Furthermore, the difficulties of achieving the consensus necessary to include such agreements in Annex 4 of the WTO Agreement should not be underestimated.

The 'critical mass' technique may be a more promising avenue for building multilateral agreement. A major opportunity to test this approach has recently presented itself in the form of China's interest in joining the TiSA negotiations. China has hitherto been firm in its support for the fully multilateral approach of the Doha single undertaking. Here the domestic reform agenda appears to have triggered a change.

Some may point to recent experience with the ITA "critical mass" talks – which have again been suspended owing to the alleged dissatisfaction of other participants with China's offer – as an indication that China is unwilling to be sufficiently forthcoming in this type of negotiation. However, the final outcome of the ITA negotiations remains to be seen.

China's offer to take part in the TiSA negotiations presents an historic opportunity. Its inclusion in the TiSA talks would break the current WTO mould and potentially

reconfigure and re-energise services negotiations. It would make it much more likely that TiSA could be brought back into the WTO, since more countries would be likely to follow China's lead. Services negotiations would at last assume the importance they have long warranted in the WTO. Bearing in mind the potential of China's services economy, the inclusion of China in the TiSA talks could well be a game changer for the WTO, for China and for the world at large.

A crucial question is how China and other potential new participants might be brought into the TiSA negotiations. A deal concluded among existing participants and then offered to others on 'accession' terms may well be unpalatable. But if new participants can be included into the ongoing negotiations at an appropriate point, we may have the makings of a critical mass, leading ultimately to a fully multilateral agreement. A multilateral agreement in trade in services would be a huge accomplishment – and could be the catalyst for similar initiatives in other areas.

A five-pronged approach

In summary, the WTO could begin to reassert its negotiating authority and effectiveness through:

- reviewing the current work programme to prioritise practical, modernising initiatives;
- engaging in serious policy discussions on the future of the global trading system and how to improve the effectiveness of the WTO;
- concluding stand alone multilateral agreements (such as trade facilitation) wherever feasible;
- exploring possible avenues to update the rule book through new Annex 4 plurilateral agreements; and
- using 'critical mass' techniques to build multilateral agreement, especially in trade in services.

About the author

Stuart Harbinson was one of Hong Kong's negotiators in the Uruguay Round and then led the delegation of Hong Kong, China to the WTO in Geneva for a number of years. He subsequently became a senior official in the WTO Secretariat. He has chaired numerous WTO bodies, including the General Council at the time of preparations for the Doha Ministerial Conference, and was also the first Chairman of the Doha Round agriculture negotiations.

The Post-Bali Agenda

Gary Horlick

Numerous post-Bali agendas are already being discussed in wake of the 9th WTO Ministerial Conference. The most important outcomes of MC9, especially the successful role of DG Azevedo, lead to new opportunities for the WTO and its Members to move forward – if they can.

While the WTO cannot take on all of these agendas, or even solve any one of them completely, the Members have to be more ambitious than in the past 20 years.

It is literally inexplicable (meaning that I have tried without success to explain to very intelligent heads of businesses around the world) why the WTO in 12 years and counting since Doha was launched has not been able to get beyond its preoccupation with cutting a 7.4% tariff to 3.2% in six uneven tranches, rather than simply cut all tariffs to zero, as occurs in many RTAs (which, not at all coincidentally, eliminates a raft of paperwork concerning valuation and classification, although, not unfortunately, rules of origin). This includes taking seriously challenges in areas such as reforms of the DSU, where Members have been blocking even minor reforms while discussing whether there should be one hearing or two.

At least some of the 21th century agenda has been taken on by the WTO. The work on trade facilitation at Bali is a good start on the most traditional of trade issues. Why does it cost US$5.60 to send a small parcel from Washington to Los Angeles (approximately 4,000 km) but $19.95 to send the same parcel 1,500 km to Canada – a country with which the US has had zero tariffs for 15 years and a comprehensive free trade agreement?

The WTO has to take on the challenges of the trading system that will increasingly be driven by the internet, including but not limited to global supply chains, and

indeed dealing with the disaggregation of at least some global supply chains as they are replaced by direct contacts through the internet. The decision to adopt what is in essence a 'positive' list approach in TiSA is not encouraging in that regard.

Finally, the WTO does not need to take on all of the climate change/public health/other looming agendas, but there are major trade components in each of those areas and the WTO cannot afford to botch them, whether by action or inaction.

What are those agendas?

- Most obviously, there is an *agriculture* agenda, left over from prior GATT and WTO rounds. Excellent work was done in the Doha negotiations on domestic support, export subsidies and other areas, but it is still a challenge for the WTO to make sure that the topic is finally closed out. An effort needs to be made early to explore what other parts of the Doha negotiations can be salvaged. The effort in December 2013 is a very small sample of some of the excellent work done in areas ranging from agriculture, as discussed above, through rules on *regional trade agreements [e.g defining 'substantially all trade']* to even some common sense (though under-ambitious) reforms to the economic illiteracy of the *Antidumping* Agreement (which defines profit by excluding unprofitable sales, just as Enron, Parmalat, and, it appears, numerous large financial institutions did). But the Doha negotiations left out really important topics, notably on *subsidies disciplines* (especially for the environment and energy/minerals), *safeguards* (in the wake of several WTO dispute rulings), *state influence on enterprises* and so on.
- A serious examination of *development and trade*, based on the serious thinking about development going on around the world (except, perhaps, in some trade ministries that assume that development always requires high tariffs).
- There is a complex '*global value chain'* agenda. For example, agriculture includes transportation, marketing, research, and much else.

- Where does the *internet economy* fit? Is it Mode 5 of GATS or is it 'Mode 10 plus' (adding up Modes 1+2+3+4 which equals 10, plus the GATT, the GATS and still more)?
- Ignoring *climate change* will not make it go away, and resolving the climate change challenge will involve important considerations of the trading regime.
- Related to the climate change agenda, but separate, is the *energy/minerals* agenda. The WTO and its Members now struggle with issues long thought (mistakenly) to be outside the purview of the GATT/WTO system, in the form of dispute settlement cases on export restraints, local content, import substitution, forced localisation, and so on.
- A *public health* agenda, with trade issues including pharmaceutical prices and tobacco controls, starts to present itself in the context of rising healthcare costs.

It is probably too early to decide what the post-Bali agendas are for the WTO and the multilateral system, but it is certainly not too early to start developing that agenda. Perhaps the most interesting aspect of Bali was the cooperation of the EU, China, and the US, which bodes well for the future.

About the author

Gary Horlick is an attorney-at-law who provides high-level legal counsel and representation in international trade, investment and dispute resolution. One of the world's leading practitioners of international trade law, he has worked in senior positions in the U.S. Congress (International Trade Counsel, U.S. Senate Finance Committee) and the Executive Branch (Head of Import Administration, U.S. Department of Commerce), where he was responsible for all U.S. antidumping and countervailing duty cases, Foreign Trade Zones, Special Import Programs, and the negotiation of the U.S.-EU Steel Agreement. He has been Chairman of WTO and Mercosur panels, and has litigated in U.S. courts and administrative agencies; GATT and WTO tribunals; NAFTA Chapters 19 and 20 tribunals; and anti-dumping cases in 12 countries. He has

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Multilateral Trade Cooperation post-Bali: Three Suggestions

Bernard Hoekman

Efforts to negotiate liberalisation and new rules of the game have increasingly shifted away from the WTO. Major preferential trade agreements are being negotiated among small groups of countries, including the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), and a Trade in Services Agreement (TISA). These follow on a large number of bilateral trade agreements that have already been negotiated by countries that are pursuing aggressive trade liberalisation and integration strategies in Europe, Latin America and East Asia. Whatever the reasons for the lack of movement in the WTO to further liberalise trade and define new rules of the game (see Wolfe 2013), the action today has moved to other fora.

A key question is what the consequences will be for the many countries that are not players in the mega-regionals. The WTO as a multilateral institution is particularly important to small countries that do not have any market power. A breakdown in the ability of the WTO to extend the reach of disciplines to new policy areas may impact most detrimentally on the 100+ countries that are not included in the mega-regionals. These countries have options that they can pursue in the WTO. These include: (1) using the WTO as a forum to engage on policies that are currently not covered by the WTO; (2) learning about (from) the PTAs; and (3) using plurilateral agreements under the umbrella of the WTO to cooperate in new areas that are of interest to a subset of the membership.

1. The WTO as a focal point for policy dialogue and learning

There are many policies not covered by the WTO that generate negative pecuniary spillovers. A precondition for cooperation on such policy areas is a shared recognition of the extent of negative spillovers and the benefits of cooperation. No mechanism exists in the WTO that provides a platform to identify and discuss how policies impact on trade costs and investment location decisions. Creating mechanisms that help identify how policies impact on economic outcomes/incentives and whether there are important 'gaps' in the coverage of WTO rules would, at a minimum, be informative. But greater understanding may also support unilateral action by governments seeking to improve the competitiveness of firms located in their jurisdictions and, over time, prepare the ground for new agreements or the deepening of existing disciplines.

In Hoekman (2013a) I suggested one option to move in this direction while at the same time engaging more with business: establishing 'supply chain councils' that would focus on identifying the most binding regulatory policy constraints that affect negatively supply chain trade (SCT). Doing this for a number of 'representative' supply chain networks could help to both improve the understanding of policymakers of how a broad variety of regulatory policies affect SCT and identify priority policy areas that should be the focus of WTO members—including policies that currently are not covered by WTO accords. This type of exercise could become the basis of an eventual SCT agreement that addresses policy matters that are relevant to the operation of global value chains. Such an agreement could be plurilateral in nature and most likely would be, given differences in interests and preferences across WTO members.

2. Engaging with the PTAs: Transparency and learning

PTAs offer opportunities as well as potential downsides for non-members. Innovations in PTAs that are successful may be transferable. Over time, WTO Members may come to the view that approaches that have proved successful in a PTA context should be incorporated into the WTO. A precondition for this is learning about what is done and

what works. This can be facilitated by the WTO Secretariat. Ideally, PTA signatories would provide information and share their experiences of implementation with the broader WTO membership. But independent of whatever PTA members are willing to provide in this regard, the WTO Secretariat could be mandated to analyse and report on the specific processes or approaches that have been implemented in PTAs and to assess their economic impacts. Current monitoring of PTAs by the Secretariat focuses primarily on documenting the provisions of PTAs. This is not particularly informative for countries seeking to understand what is entailed in implementing those provisions and the outcomes that are generated.

3. Plurilateral agreements under the WTO umbrella

Article II.3 WTO offers a little used mechanism for members to form a club to advance an agenda of common interest without necessarily extending the benefits to other WTO Members: a Plurilateral Agreement (PA). The main PA extant is the Agreement on Government Procurement (GPA), which deals with a subject that is not covered by WTO disciplines. There has been limited use of PAs to date because WTO Members have taken the view that agreements should be multilateral and cover all Members. As the world increasingly fragments into different regional blocs, this rationale has become much less compelling – variable geometry is unavoidable. Given that the counterfactual increasingly is a PTA, greater effort to pursue PA among subsets of WTO Members – on subjects such as global value chains, green goods and services, investment policies, competition policy, and so on – offers a viable mechanism for new rule-making in the WTO.

PAs offer a number of benefits relative to PTAs. They can be – and most likely will be – issue-specific; there is no need for complex issue linkage. They are open; any country can join if, and when, it perceives membership and implementation of the relevant disciplines to be in its interest. This is not the case with mega-regionals such as the TPP, TTIP or most PTAs. PAs can make use of the WTO dispute settlement mechanisms.

They are also more transparent to outsiders. Any PA will involve the establishment of the types of WTO bodies that assist Members in the implementation of agreements, such as a committee, with regular (annual) reporting on activities to the Council, and documentation that is open to all WTO Members. A constraint in pursuing PAs is that their adoption into the WTO is subject to consensus. While presumably intended to ensure that any PA is consistent with the objectives of the WTO (for example, a proposed PA does not address an issue that has very little to do with trade), consensus is arguably too strong a constraint. Relaxing the consensus requirement – for example, by accepting that 'substantial coverage' of world trade or production is sufficient (Hufbauer and Schott 2012) – would still ensure that truly controversial issues can be rejected.

Moving forward

A necessary condition for operationalising the forgoing suggestions is leadership by some WTO Members. Given that the US and EU are fully engaged in mega-regional initiatives, this leadership must come from other countries. In the GATT years, one approach that was used to identify potential gains from multilateral cooperation on new issues was to agree on a work programme. Services provide an example. After the failed 1982 Ministerial where a US suggestion to negotiate on services was rejected, a work programme was agreed involving a series of national studies and dialogue on services policies. A similar approach can be followed now. In the next two years (that is, in the period leading up to the next Ministerial), countries that are out of the mega-regionals and/or want to move forward in new areas can create working groups where technical issues are worked out and specific proposals developed. This would include matters such as establishing what information members of mega-regionals are willing to provide, what the Secretariat should be asked to do, and how to organise a mechanism to promote policy dialogue and learning. The objective would be to put forward a proposed agreement on enhancing the transparency of – and learning from – PTAs and a mechanism to promote greater analysis-based dialogue and interaction on economic policies affecting trade and investment at the next Ministerial in 2015.

Working groups can also be formed in the post-Bali period to focus on specific policy areas that are of interest to a subset of the WTO Members. This would be similar to the groups formed to assess the Singapore issues after 1997, with the difference that the presumption would be that the focus of cooperation would be to conclude new plurilateral agreements. A two-year period of deliberation should suffice to identify an agenda for negotiation-cum-cooperation. Specific agreements and modalities of cooperation could then be negotiated with a view to putting them forward at the 11th Ministerial Conference in 2017, i.e. four years from now.

The lack of progress in the DDA should not be taken to imply a lack of relevance of the WTO. Multilateral negotiations have become more complex *because* developing countries have interests they are pursuing and objectives they want to achieve. At the end of the day, it is likely that the majors – China, India, the EU and the US – will come back to the multilateral negotiating table, whether or not the mega-regionals are successful. Much can be done in the interim to use the WTO to better understand what is done in the new vintage PTAs and whether this is worth emulating, and to pursue the opportunities that exist for subsets of countries to agree on plurilateral cooperation under the umbrella of the WTO. The proposals sketched out above would support such processes.[1]

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Simplify and Complete the DDA

Clemens Boonekamp

Negotiators at the WTO's 9th Ministerial Conference (MC9) in Bali deserve enormous credit for arriving at a deal. It greatly improves the credibility of the WTO. However, it is a small deal, low hanging fruit, and it does not clearly strengthen the system: the trade facilitation accord is largely 'best efforts' and food security leaves a potential hole in the disciplines on agricultural support. Nevertheless, the result in Bali could present an opportunity to complete the Doha Development Agenda (DDA) and to leave no doubt that the WTO is the *sine qua non* of international trade. Failing this, enthusiasm could continue to grow for regional trade agreements (RTAs), such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). In fact, they carry the seeds of an alternate trading system, which would not be global and is potentially very divisive.

Matters such as these, and others including the now wilful breaches of agricultural support commitments, should be handled fully in accord with WTO principles and jurisprudence; the aim should be to strengthen a welfare-enhancing single system, rather than drift away from it. For Members to do so, however, belief in the system needs to be firmly re-established and, for that, getting the DDA done quickly would be a very valuable plus. With Bali now as a first, confidence-building step, the rest may be possible.

A problem with the DDA as it stands is that it is too complicated, with each of a large number of technically awkward decision points a stumbling block. The Uruguay Round was even more intricate, but then there was political will. That will is now only barely present, as shown by the difficulty in arriving at the Bali deal. A possible way to proceed in the months ahead is a drastic simplification of the DDA, while retaining a

single undertaking. Start with agriculture, where simplification requires more detail than in other areas because of its three pillars.

Simplify agriculture

The draft modalities in agriculture are no longer acceptable as a basis to negotiate for a number of delegations; the environment has changed too much since the start of the DDA. For example, China's Producer Support Estimate (PSE) rose from 3.96% in 2001 to 16.81% in 2012 while over the same period those of the EU and the USA fell by 68% and 37%, respectively. In absolute terms, China's PSE in 2012 exceeded the combined PSE of the EU and the USA by a significant margin.[1] Indeed, including China, the value of agricultural production has increased very significantly in some major developing members, entitling them under the modalities to high levels of (trade-distorting) support, while that of many other Members, particularly industrialised countries, declined markedly. Also, there are what many consider potential 'loop holes', like the developing country exemption for public stock-building for food security. This leaves some wondering whether the playing field would be made more level under the current modalities – as is the aim of the negotiations – or be tilted once again.

Moreover, significant differences remain including over the Special Safeguard Mechanism (SSM) for developing countries. The SSM was agreed at MC6 (Hong Kong), but not how it would function. Also, under the modalities, notification requirements would increase considerably, both in number and complication. Under the present Agreement on Agriculture, few Members are up to date in their notifications and presentations differ – difficulties that would compound and monitoring and transparency could suffer.

1 Source: OECD countries: Producer Support Estimates by country, Agricultural Policy Indicators, OECD Statistics, www.oecd.org.

The goal should be a more market-oriented, transparent agricultural trading system that allows Members the maximum amount of policy (and instrument) choice while minimising the damage to others. This suggests a simple framework, perhaps as follows:

1. On *overall trade distorting support* (OTDS), define base OTDS, as per the modalities but with a more recent reference period (eg 2005-2010), and bind it (except perhaps for LDCs), possibly with modest reduction commitments. Members would be allowed to use their OTDS in any way they wish, subject to a percentage per product, say 10%, to avoid concentration (and which would be halved for cotton, to meet the MC6 commitment). The Development and Green Boxes would remain, but the need for the Amber and Blue Boxes and for *de minimis* would be obviated. Reports should be annually (every two years for LDCs and perhaps net food importing developing countries).
2. On *market access*, restrict the decision points to average tariff cuts and the SSM, dropping sensitive and special products and the like. Base the SSM on GATT Article XIX (Safeguards), replacing 'serious injury' with 'injury'. Average tariff reductions should be easily doable, to compensate for the absence of flexibilities – say, 18% for developed and 12% for developing countries, with an exemption for LDCs. This would bring some improvement in market access, especially to developed markets, where applied are close to bound rates. Bear in mind here that there has been little improvement among major traders since 2001, except for China in its WTO accession. Furthermore, Members could encourage the EU's tariff simplification and seek to multilateralise the EU's deal on tropical products with a group of countries. If the latter proves elusive, put them into a 'built-in agenda' (BIN).
3. On *export competition*, the modalities here are clean. If they are hard to retain, repeat the MC6 agreement on export subsidies and seek consensus on export credits, with the rest in the BIN, along with export restrictions and geographical indications.

Market access for manufacturing goods

The rest of the package is 'easier', at least to describe. In Non-Agricultural Market Access (NAMA), Members should focus only on the coefficients, ignoring 'sectorals', environmental products and so on, which could be for the BIN. The coefficients should be relatively easy to implement – say, 12 for developed and 25 for developing countries (with LDCs exempted) – a step that would nevertheless reduce tariff peaks. If needed, allow flexibility to double the coefficients on 5% and 10% of lines for developed and developing countries, respectively. Encourage more bindings, but that could be taken up in the BIN.

Rules and Services

On trade rules, note there is a provisional Transparency Mechanism for RTAs. It has a review clause in the context of closing the DDA with difficult legal implications; replace it with a review of the operation of the Mechanism. For trade remedies, agree on a transparency mechanism, as for RTAs, and abide by the status quo and the work programme for fisheries subsidies. In the area of Services, seek binding of actual conditions and for those Members who find this too hard, engage in an 'offer-request' procedure. Members could continue the regulatory and gradual liberalisation processes in the BIN.

Trade facilitation, as agreed in Bali, and implementation issues could fit into the above package. To the extent that they hold up matters, they could go into the BIN. The latter would be activated after a Council review, within a year, of the implementation of the DDA and would be conducted in the respective negotiating groups.

A slimmed down yet ambitious package all the same

The package described here is surprisingly ambitious. In agriculture, OTDS and export competition would see significant improvements; there would be an overall gain in

market access for farm products, an area where the WTO did not excel, and monitoring and transparency would certainly get better. The deal is also balanced: China, in OTDS, and the USA, in tariff peaks and in not getting zeroing, would be major contributors. Furthermore, with base OTDS on a more recent reference period, India and others would retain the room for stock-building, but within disciplines, and other parties would make minor, doable contributions. The WTO would be immeasurably strengthened to plan for the future of the trading system. It is a deal worth having.

How to get there? It would be best if, with the Director-General (DG) fully involved, the process were started in early 2014 by China and the USA; trade relations are a good, relatively easy place to start addressing the many issues between them. After this, under the guidance of the DG, a deal could be built to a critical mass and then to consensus. Alternatively, early in 2014, the DG could float the ideas in a 'green room', launching the process with a non-paper, perhaps in cooperation with the Chairs of the Negotiating Groups, and following this with intensive informal consultations of the sort that led to the success in Bali.

About the author

Clemens Boonekamp was director in the WTO of both the Trade Policies Review and the Agriculture Divisions. He holds a Ph.D (Economics) and taught at the University of British Columbia and worked at the IMF before joining the then GATT in 1991. He is presently a consultant with World Trade Advisors.

APEC-like Duties for a post-Bali WTO

Richard Baldwin

Bali's success got multilateralism out of the emergency room and into intensive care unit – but we don't know whether the operation was a success. The Bali package is only distantly related to the heart of the 2001 agenda (WTO 2013). Indeed, the 'Bali Package' should really be called the 'Bali Ribbon', since very large parts of it had already implemented unilaterally by members.

Moreover, what little that could be done of the original Doha Agenda was done in Bali. This means that the WTO looks set to drift for the next few years. Unless the WTO finds some new initiative, WTO centricity in world trade governance will continue to erode – perhaps even slipping past some sort of 'tipping point'.

Tipping into a Great Powers system of trade governance

In the 20th century, the GATT/WTO was central to almost all major trade liberalisations. A 'GATT/WTO first' attitude was ensconced in the strategic thinking of all leading Members. No longer. Almost no WTO-led liberalisation has occurred. The WTO mechanism that still works well – dispute settlement – is increasingly used as a substitute for negotiated liberalisation. As a result, *de facto* compliance is eroding. India may be next non-complier on agricultural subsidy disciplines.

Erosion of WTO centricity is dangerous (Baldwin 2008). Anchorage to WTO-norms allows each Member to view its own policies as minor derogations. Yet, at some point derogations become the new norm.

- The steady erosion of the WTO's centricity will sooner or later bring the world to a tipping point – a point beyond which expectations become unmoored and nations feel justified in ignoring WTO norms since everyone else does.

No one knows what would happen beyond the tipping point. My guess is that trade would continue to grow and the system would continue to function – but not equally for all nations. Before the GATT was set up in 1947, the Great Powers system settled trade disputes by gunboats or diplomats depending upon the parties involved. Only the naïve thought market access should be reciprocal or fair. A return to this *Belle Époque* extreme is unlikely, but a new Great Powers trade system is likely to emerge from the mega-regional agreements being brokered. China and Russia might set up competing or complementary networks.

All would lose in this post-tipping point world, but not equally. The US, EU, Japan, China and a few others have enough market leverage to defend their interests; small nations much less so.

This chapter considers what the Bali outcome means for the WTO. It suggests a programme that the WTO could realistically undertake in the next two to four years – one that would slow or help reverse the erosion of WTO centricity.

Paradox of WTO success and Doha failure

The Bali outcome highlights a paradox: How can the WTO be such a success while the Doha Round is such a failure?

- WTO membership is wildly popular; nations – even powerful nations like Russia – agree to massive domestic policy changes as the price of membership (Racz 2011). Basic WTO principles are more universally recognised than any others – far more than, say, basic human rights. The WTO 'court' is as influential as any international tribunal in the world.

- But Doha is a dud. Bali and the 2011 and 2008 failures before it show that not all WTO Members view the Doha agenda as win-win – neither the full agenda nor various mini-packages were seen as win-win in 2008, 2011, or 2013.[1]

Liberalisation everywhere but in the WTO

The paradox resolution is not that trade liberalisation is unpopular. Trade liberalisation has been and is proceeding rapidly since Doha was launched – just not inside the WTO.

- Developing nations did, unilaterally or regionally, what they refused to do multilaterally in the WTO – slashing tariffs, opening services sectors, and embracing strong disciplines on foreign investment, intellectual property, etc.
- Rich nations did, unilaterally or regionally, what they refused to do multilaterally in the WTO – slashing tariffs on imports from poor nations, reducing agriculture distortions and providing technical support for developing nation trade (aid for trade and trade facilitation).

Indeed, one of Doha's major problems is that many of the gains from finishing it have been realised via unilateralism and regionalism.

Paradox resolution

Understanding this is simple. WTO rules and disciplines are essential for 20th century trade, i.e. trade in what could be described as made-here-sold-there goods. Since all nations still engage in such trade, WTO membership is helpful and thus popular. The Doha Round, however, is largely irrelevant to the most dynamic form of trade – trade linked to the internationalisation of the manufacturing production, which has been called supply-chain trade even though it also involves cross-border flows of knowhow, investment, services and people.

1 See Evenett (2007a,b, 2008 and 2011) for analysis of the failures and contemporaneous suggestions for reinvigorating the Doha Round.

Since governments listen to their trading firms and the most dynamic of these are focusing on 21st century issues, the Doha Round suffers a chronic lack of business interest. This leads to a chronic unwillingness of governments to make compromises. To put it colloquially, if the omelette is not going to be very tasty, why break the eggs?

Much of the liberalisation we have seen is driven by the enormous win-win opportunities that arise from international production unbundling. It happened outside the WTO, since the Doha Agenda locked the WTO firmly on last century issues. WTO members quite naturally reacted by constructing win-win agreements outside the WTO. 21st century disciplines for global supply chains were established via regional trade, investment agreements and unilateral reform by developing nations.

In short, the centricity of the WTO to global trade governance has been severely eroded. It is now just one of several pillars of global trade governance. This erosion of WTO centricity is the real threat that the Bali debacle poses to the world trade system (Baldwin 2008). Redressing the erosion tells us what the WTO should be doing.

Task for the WTO: Keeping the Organization relevant

Plainly the best way forward would be to expand WTO coverage to include 21st century trade issues (Hoekman and Jackson 2013). But getting there involves a large detour. The logic behind this assertion rests on three facts:

- **Fact #1**: The WTO cannot move on the 21st century issues until it accomplishes the Doha goals of 'rebalancing' the trading system in the eyes of developing nations.

The topline Doha Round goal – rebalancing the trade system by liberalising agriculture and labour-intensive manufactured goods (Nassar and Perez 2011) – is the key gain for a large number of developing nation WTO Members. They justifiably view the Doha Declaration as a promise that they are unwilling to let slide. That is why the WTO cannot address 21st century trade issues separately.

- **Fact #2**: The rebalancing issues cannot be completed on their own (as Bali and half a dozen other failures have shown).

As the long string of failures makes clear, the Doha Agenda is not broad enough to provide a win-win outcome for all members.

Oversimplifying to make the point, the Doha agenda is unrealisable today since the 2001 agenda was designed to ask nothing from China. Having granted (in 2001) a large number of special interest 'wins' to WTO Members in the course of its WTO accession, no-one expected China to get or give additional special interest 'wins' in the Doha Round.[2] As such, China has been uninterested in offering the sort of special interest 'wins' (say tariff cuts on chemicals) that would induce rich nations to make the deep rebalancing concessions that other WTO Members demand. There was some hope that a mini-package could work around this fundamental flaw, but now we know such hope was in vain.

The thrust of all this is simple. It is impossible to think of Doha finishing without expanding the agenda, but this brings us to the third fact:

- **Fact #3**: Until the mega-regionals conclude or die, no serious negotiations on 21st century issues can be held in the WTO.

Most of the WTO's largest Members – including the old 'quad' of the US, EU, Japan and Canada – are engaged in mega-regional negotiations, namely the Trans-Pacific Partnership (TPP), and Transatlantic Trade and Investment Partnership (TTIP). These talks involve deep changes which would fundamentally alter their members' stance in any WTO negotiations. They could not possibility negotiate both in the mega-regional and WTO setting – the logic of exchanging trade concessions precludes it.

Thus restoring WTO *centricity in trade negotiations* is years away in the best of cases. Even if the mega-regionals finished in 2014, it would take, at best, several years to

2 Recall that China acceded to the WTO at the same meeting where the Doha Agenda was set.

negotiate an update of the Doha framework, i.e. an expansion of the topics that would great a broader arrange of 'wins' for key Members.

These three facts and their implications clarify thinking on what the WTO could do.

'Globalise APEC': WTO-led evaluation of mega-regional disciplines

Global optimists view mega-regionals as a vanguard effort. To optimists, TPP is a smallish group of diverse nations working out ways to cooperate on international trade rules. The plan is to invite others to join as and when they are ready. Note the optimistic order:

- Step 1: Negotiate the mega-regionals.
- Step 2: Consider how they might be multilateralised.
- Step 3: Negotiate inclusion of some mega-regional disciplines in the WTO, thereby providing sufficient gives-and-takes to finishing the Doha Round agenda.

My proposal is to compress this order. Think of it as globalising APEC.

As Asia is furthest along in the global value chain revolution, it is also home to most of the world's deep regional trade agreements. From the mid-2000s, Japan has had a series of deep bilaterals with the large ASEAN nations; the US has had them with Australia, Singapore, Peru and Chile for almost as long. And the first deep RTA among large nations – NAFTA – is also in the region.

This Asian-Pacific deeper bilateral integration has all along been accompanied by regional-wide discussions and analysis. APEC forums discussed such beyond-WTO disciplines among a very wide range of nations – including many who have no such bilaterals. This two-way dialogue has certainly made the Japanese and US bilaterals less threatening to third nations, while at the same time making Japan and the US more mindful of the impact on third nations.

Timeline

My proposal is to start an APEC-like discussion of mega-regionals in 2014 on a global scale, and to put the WTO in charge of them. The World Bank and UNCTAD are undertaking some studies along these lines, but both have institutional perspectives. These discussions would be better placed in the WTO – a member-driven organisation that is truly global.

In a nutshell, I propose a compression of steps 1 and 2 above. WTO-led discussions and analysis (not negotiations) should be undertaken on:

- How will TPP and TTIP disciplines affect excluded nations?
- Which of the TPP- and TTIP-like disciplines should be brought into the WTO, and how?
- Which would require special and differential treatment?
- Which would require technical assistance to least developed nations?

Using its convening power, the WTO could help nations develop fully informed views on questions. This would help identify the key issues that arise from moving the WTO into the governance of 21st century trade disciplines (see, for example, Jara 2013).

This would also start to lay the groundwork for enlarging the Doha Agenda in a manner that would have a chance of constructing a win-win for all WTO Members – a package that would provide gains sufficiently large to induce all members to agree difficult compromises.

Concluding remarks

The WTO's choice is really rather simple. Given that the Doha Agenda is manifestly not 'self-balancing', the agenda has to be expanded to be concluded. The natural expansion items are those that many WTO Members have negotiated or are negotiating in deep RTAs. The problem is that the WTO is now at the back of queue when it comes to 21st

century trade governance. Key WTO Members could not negotiate then in the WTO until the mega-regional deals are done or dead.

On the mega-regionals' current trajectory, that means at least two idle years for the WTO. More likely, nothing will move until after the current Director-General's term is up in 2017.

The obvious way forward is to use the WTO's power of convening and its uniquely legitimate structure to prepare the ground on 21st century commercial issues. This is really the substantive outcome the WTO can accomplish in the medium run.

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Trade, Global Value Chains and the World Trade Organization

Grant Aldonas

Introduction

Given the breadth of the original Doha Development Agenda, many will say the outcome at the 9th WTO Ministerial in Bali represents highly qualified 'success' at best. The protracted Doha round negotiations dented the WTO's credibility and led many to question the utility of multilateral trade liberalisation generally. The trend toward preferential trade arrangements suggests that many member countries have absorbed that 'lesson' from the Doha round.

There is nonetheless cause for optimism. The outcome in Bali represents a pragmatic recognition of the changes globalisation has wrought in the pattern of trade and the organisation of production in the two decades since the conclusion of the Uruguay Round and the founding of the WTO.

Changing patterns of trade and the organisation of production

The failure to deliver on the promise of the original Doha Declaration had many authors, but the most powerful reason for that failure is often overlooked. The Doha Development Agenda was already dated by the time negotiators met in Qatar in late 2001.

In the interim, however, the forces driving the integration of world markets had fundamentally altered the economics and politics of trade in ways inconsistent with the premises underlying both the Doha agenda and previous multilateral rounds. Those

forces, working their way through the global economy, transformed world trade from a series of arms-length sales largely of finished products between vertically integrated buyers and sellers to a global economy into an integrated market in which more than half of current trade consists of intermediate goods traded within a firm, its affiliates, and the broader reach of its global supply chain.

The changing pattern of trade reflected a changing pattern of industrial organisation. Firms are organised as a means of reducing or avoiding costs that would otherwise arise from trying to achieve the same result through a series of market-based exchanges. An environment of high transaction costs favours vertical integration of production within a single firm. That pattern prevailed throughout the post-war period when the GATT focused on reducing tariff barriers that had been introduced between the two World Wars in the midst of the Great Depression.

A low transaction cost environment, on the other hand, enhances the ability to engage in impersonal exchange and, therefore, reduces the need for vertical integration. It favours de-verticalisation, greater horizontal reach, and softer boundaries at the edges of an enterprise.

Globalisation extends that logic to world markets. By erasing political divisions in the world economy, creating a much broader space within which the institutional underpinnings of markets applied, and introducing technologies that allowed for a radical reduction in the cost of doing business internationally and a broad diffusion of technology, globalisation created an environment in which firms could source goods, services, labour, capital and technology worldwide.

The resulting rise in global value chains has reshaped the way production is organised, how we trade and, ultimately, the political economy of trade negotiations like the Doha Development Agenda. In a high transaction cost environment, firms basically had only one option – exporting. Their interests were best served by lowering market access barriers to access outside their home market and they pressed negotiators to liberalise world trade as a result.

In a low transaction cost environment, firms have more options. Most importantly, they can invest and produce abroad as an alternative to exporting. But, they can also diversify their sourcing and organise production on a globally efficient basis to serve a global market.

The pressure for trade liberalisation – at least in a conventional sense – has waned as it has become easier for firms to 'work around' the remaining obstacles to organising production efficiently. What matters more to a firm organising or participating in a global value chain is reducing the overall cost of operating in global markets, reducing the uncertainty that undermines just-in-time delivery on a global basis, and expanding its ability to collaborate and, increasingly, to innovate with other partners in the same value chain. Industrial tariffs, agricultural export subsidies, antidumping rules, and the various exceptions and carve-outs from the rules for developing countries that made up the bulk of Doha Development Agenda are simply less relevant when seen in that light.

Instead, what matters more are initiatives aimed at lowering practical obstacles to moving goods, services, capital, people and know-how through a global value chain. No surprise, then, that what the Doha Development Agenda ultimately produced was an agreement on trade facilitation. Of the many parts of the Doha agenda, trade facilitation was, from the start, the one item that most closely corresponded to the emerging pattern of trade and the organisation of production that globalisation drove.

Implications for the WTO After Bali: An agenda for a networked world

The cause for optimism post-Bali is that the outcome marks a departure from the preoccupation of the WTO and its members trade policies designed for the mid-20th century. That preoccupation has come at a cost. It has inhibited the WTO's ability to turn to the challenges that a more networked global economy presents. The WTO's continuing relevance as a pillar of global economic governance and its capacity to

foster further trade liberalisation depends on the organisation's ability to rise to those challenges.

The question, then, is how to build on the outcome at Bali and ensure that the WTO's agenda corresponds to the global economy as it is, rather than as it was a half century ago. Answering that question depends heavily on understanding the changing pattern of trade and industrial organisation that the rise of global value chains embodies.

Competition in a more networked world depends heavily on the capacity of firms and of economies to integrate themselves into the value chains that serve global consumer markets. Participating in a global value chain presents a fundamentally different challenge from that presented by the textbook example of an arms-length sale of goods.

In the case of arms-length sales, price is both the principal determinant of competition and the principal means of conveying information about the value that buyer and seller attach to the good or service exchanged. Very little more needs to be shared between buyer and seller to effect a transaction, particularly if the exchange is an isolated, rather than repeated, event.

To join a global value chain, on the other hand, firms must find ways to participate, add value and specialise. That not only requires considerably more in the way of communication and collaboration, it increasingly requires an ability to innovate with other links in the chain. All that entails a higher level of both technological sophistication and human capital.

The new basis of competition explains why removing conventional barriers to trade has less traction in a networked world. A tariff affords protection by virtue of its impact on the delivered price of imports, whether inputs or finished goods. Even in a more networked global economy, the price wedge can have a substantial impact. But, to the extent that price is less relevant to the decision to buy, a tariff necessarily has less impact on firm's sourcing decisions.

By the same token, a trade policy aimed solely at reducing tariffs in potential export markets has less to offer local firms confronted with the challenge of connecting to global value chains. From the local firm's perspective, tariffs are only one of any number of transaction costs associated with engaging the international exchange of goods and services. In this networked world, steps aimed at increasing the quality and reliability of goods and services, decreasing time-to-market, and enhancing the ability to innovate matter more than lowering the price wedge that tariffs can create.

Trade policy and the WTO's agenda should be geared toward facilitating that process. That has broad implications for how we define 'market access' in a more globalised world economy and how we pursue 'liberalisation' within the WTO. It implies a more practical focus for an organisation that purports to be the 'trade' pillar of global economic governance.

That points toward a new methodology for future negotiations. One that focuses explicitly on reducing the cost of participating in particular value chains, rather than focusing on individual instruments, like tariffs, or sectors, like agriculture, textiles and apparel, or financial services. The value of that approach, much like the success of the negotiations on trade facilitation, is that it will focus on the world of trade as its users comprehend it, rather than as the conventions of trade policy demand.

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Speaking Truth about Power: The Real Problem in the Multilateral Trading System

Craig VanGrasstek

The paltry package of reforms that ministers approved at the WTO's 9th Ministerial Conference offered only the latest evidence of the hard times on which the multilateral trading system has fallen. Analysts point to an eclectic range of problems that call out for equally diverse solutions, but they typically share in common an implicit argument that the WTO's problems are endogenous to the trading system. One way or another, most critics argue, we must find some fix — whether in the objectives we set for trade negotiations, how we package and pursue them, or who we let take the lead — that will invigorate the multilateral system with new energy.

The real problem is not energy but power. That is a point that economists and lawyers are loathe to address or even to acknowledge, as both professions are founded upon intellectual traditions that promote alternatives to power as the organising principle for relations between states. Both favour a system in which economic competitiveness matters more than military competition, and in which states of manifestly unequal size will nevertheless enjoy true juridical equality. It would require an almost deliberate blindness, however, to ignore the critical importance of power in the establishment and maintenance of open markets, and the tremendous changes in the global distribution of power since the advent of the WTO era. No amount of tinkering within the trading system can evade the inescapable fact that the balance of power has changed radically over the past two decades, and that we are still in a period of rapid yet uncertain transition.

The structure of the international trading system has always been subordinate to the international distribution of power among states. That was as true for those periods in which there existed a dominant power as it has been for those periods in which the world system was in flux. The system of trade treaties in the 19th century was a reflection of the Pax Britannica, just as the creation of both the GATT and the WTO were products of the Pax Americana at the start and end, respectively, of the Cold War. Conversely, the protectionism that preceded the emergence of Britain as a leading power, and that came in the unhappy interval between British and American leadership, were economic manifestations of political chaos.

The power dynamics in our own time more closely resemble the disruptive period between the First and Second World Wars than the stability achieved at the height of the British and American hegemonies. The WTO era has coincided with a great acceleration in the speed with which global economic and political power are redistributed, with the traditional leaders of the GATT system now in relative decline and emerging economies such as Brazil, India, and (above all) China rising rapidly. This has prompted a crisis of leadership and recurring disputes over burden-sharing, while also casting a new light on the importance of regional trade arrangements (RTAs).

The GATT system succeeded because it needed to reach consensus only within a small circle of like-minded states. It was founded upon a hierarchy in which the US took the lead, its principal negotiating partner was Western Europe, and agreement between these transatlantic partners was both the necessary and sufficient condition for resolving every round. Nearly all other GATT contracting parties were either developed countries that broadly shared these same objectives, or developing countries that managed to avoid making serious commitments until, during the Uruguay Round, many of them recognised that their interests were better served by market-oriented than state-centric policies. Apart from Cuba and a few Eastern European countries, the communist countries remained outside the club.

The WTO is now a virtually universal organisation, but that economic asset is a political liability. The divisions between developed and developing countries have grown with the dissipation of the Washington consensus, and are more difficult to resolve now that all members are expected to adopt all agreements. Ever since the Cancún Ministerial of 2003 it has been evident that agreement between the US and the EU may still be necessary, but is far from sufficient, to bring a round to a successful conclusion. Those perennial North-South divisions are joined in the WTO by the even more destabilising problem of how the traditional and the emerging leaders will share power.

The great powers that dominated the GATT have been unwilling or unable to exercise the same authority in the WTO. The Doha Round was the first multilateral trade negotiation in which the US was not the principal *demandeur*, and the only time that US officials showed real enthusiasm for the round was from the immediate aftermath of 9/11 to the failure at Cancún. Their efforts thereafter focused principally on RTAs, first with relatively small countries and now mega-regionals. The EU initially tried to take up the earlier US role, having been the principal proponent of a new round, but has not played that part very effectively. That was amply demonstrated by the failure of European negotiators to win lasting support for the new issues they had advanced at the start of the round, dropping two of them (labour and the environment) even before the round was launched and jettisoning three others after a few years of fruitless negotiations (investment, competition policy, and government procurement). It is hard for a Member to supply leadership when it will not even stick to its own demands.

The decline of the WTO is matched by the concurrent rise of RTAs, a development that implies much more than a reversion to the economics of the second-best. While smaller and more trade-dependent countries may view discriminatory trade agreements as just another means of pursuing their economic objectives, for the bigger players they are also instruments of foreign policy. At a minimum, the promise of an RTA can be used to induce or reward cooperation on some other issue; RTAs may go much farther, forming the economic component of competing alliances. Consider here the differing uses to which the US and Russia have put RTAs. Nearly all of the agreements that the

Bush administration initiated were intended to promote goals in US foreign policy, being directed to countries that helped it either to wage war with Iraq or secure peace with Israel. The links between RTAs and foreign policy have been even tighter lately for Russia, which has pressured countries in the 'near abroad' not only to join its own bloc but to stay out of the EU.

Geopolitical competition is also key to RTAs in Asia. Most of the participating countries in the Trans-Pacific Partnership (TPP) see that initiative in economic terms, but the same cannot be said for the world's two largest economies. For many US policymakers, the TPP is defined more by the exclusion of China than by the inclusion of any other partner. That aspect of the TPP could be multiplied if, as some leaders in Taiwan and the US urge, the 'renegade province' were to join the group. That seems unlikely to happen in the near future, but nevertheless serves to illustrate the degree to which economic and political competition are once again becoming intertwined. The same may be said for the rising tensions between China and its neighbours over the control of sea lanes, airspace, and land borders.

In brief, the vast changes that have taken place in the world over the past two decades have greatly complicated the problem of concluding substantive agreements in the WTO. The traditional leaders are in decline, the emerging powers are still emerging, and other developing countries are divided between those that can get most of what they want in RTAs and those that are leery of trade liberalisation in any form. In this environment, it is doubtful that any set of technical fixes can cure what ails the WTO.

How then can be done? If the fundamental problem can be reduced to the decline of the US and the rise of China, perhaps it is once more time to try a green room built for two. The last such effort was admittedly a disaster, with the rest of the WTO membership coming to regret that in 2003 they asked the US and the EU to devise a joint proposal to resolve the Doha Round. There is certainly no guarantee that having Beijing stand in for Brussels would prove more successful. One could well imagine reluctance on the part of China and the US to take on the task, not to mention the concerns this would

raise on the part of both those members that are invited to all other green rooms and those that rarely make it into these gatherings. Big problems call for bold solutions, however, and when all possible configurations have been tried and failed it is worth trying the seemingly impossible. Any agreement that is acceptable to both China and the US deserves a fair hearing, just as any agreement that is unacceptable to either of them would be moot.

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Craig VanGrasstek is an Adjunct Lecturer in Public Policy at the Harvard Kennedy School, and also teaches courses at the universities of Barcelona and Bern on the political economy of trade. His firm, Washington Trade Reports, provides analytical and capacity-building services to private firms, national governments, and international organisations. His most recent book is *The History and Future of the World Trade Organization* (Geneva: WTO, 2013).

Section 2

Recommendations for Specific Commercial Matters

The Rationale for Bringing Investment into the WTO

Anabel González

The current investment scenario

Foreign direct investment (FDI) is an engine for growth and sustainable development. First and foremost, it creates jobs; it also contributes to the transformation of productive structures, increasing productivity, enhancing access to technology and fostering innovation. Most countries aim at attracting FDI and have put in place policies and agencies to do so.

FDI and international trade are closely linked, in particular in the context of global and regional value chains. Baldwin (2011) has coined the term 'trade-investment-services nexus' to refer to this relationship where investment is a key driver of trade flows as firms invest in different locations to put together the international production networks that underpin a large part of global trade today – some 80% (UNCTAD 2013). These links vary depending on the type of FDI, but are in any case quite significant.

Since 1980, the stock of FDI has expanded 20 times over the past three decades (Hufbauer and Draper 2013). This is a huge increase. Nevertheless, at US$1.35 trillion in 2012, FDI flows have not recovered yet to the levels reached before the economic crisis. The global economy, in particular developing and least-developed countries, need more investment. For example, it is estimated that to support a future global population of 9 billion people, about US$ 5 trillion per year up to 2030 needs to be invested in infrastructure (water, transportation, energy, etc.), and an additional annual $0.7 trillion if investments are to be 'greened' to secure future growth (Green Growth Action Alliance 2013). Private flows are essential to close the investment gap.

Economic fragility and an uncertain business climate constrain FDI flows; restrictive policies also prevent the full realisation of the potential of FDI. These barriers include measures that constrain investment in certain sectors; limit the flows of capital, technology, people or other resources necessary to establish or conduct FDI operations; condition investment on technology transfer and the like; condition access to local markets on local content requirements or the holding of local assets in country; and restrict the availability of certain raw materials to locally invested firms, among others (Bhatia 2013). Investment subsidies also distort FDI flows (Dadush 2013).

While there is no shortage of rules on investment, at the global level there is no single, comprehensive agreement, nor institution to govern FDI. Under the umbrella of the WTO, the Agreement on Trade-Related Investment Measures, the Agreement on Subsidies and Countervailing Measures, and the General Agreement on Trade in Services include some investment-related rules. In the context of the Organisation for Economic Cooperation and Development (OECD) and the Asia-Pacific Economic Cooperation (APEC) for instance, investment disciplines are incorporated in agreements applicable to their respective members. The rule-making activity in this area is at its most frantic at the regional and bilateral levels, with many regional trade agreements (RTAs) incorporating an investment chapter and almost every country having signed one or more of the close to 3,000 bilateral investment treaties (BITs) currently in force. Divergent interpretations of these rules, resulting from decisions of international tribunals, further complicate this scenario (Stephenson and Dadush 2013).

This confusing, fragmented regime for FDI, while reflecting countries' interest in establishing disciplines in this area, fuels uncertainty and additional costs that do not bode well for investors or for governments. Mega-regional agreements, like the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership, which are expected to incorporate investment chapters, could bring about some level of harmonisation of the disciplines in this area, but then again, only to participating countries.

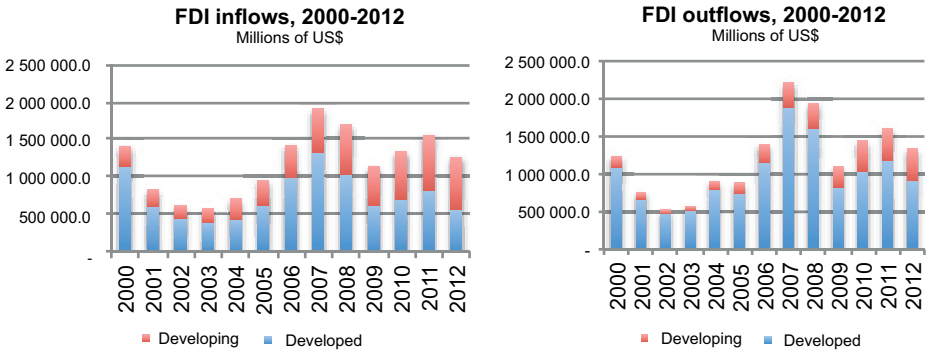
A renewed case for a multilateral framework on investment

The time is ripe to begin the discussion of a multilateral framework on investment, which would bring coherence to the governance of FDI, define clear and consistent rules, tackle barriers and distortions, and thus promote much needed, increased global investment and trade flows.

A renewed case has been made for such an agreement for example, by the World Economic Forum (2013) and by individual experts (for example, Aslund 2013). Other organisations have proposed alternative frameworks, such as UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD 2012) and the OECD's Policy Framework for Investment (OECD 2006). Despite their differences in approach, these proposals share the view that the new global investment scenario merits a more cohesive approach towards developing a sound investment regime.

One of the main arguments against trying to devise a multilateral investment agreement stems from the fact that past attempts were unsuccessful. These include the negotiations in the OECD of a Multilateral Agreement on Investment in 1995-98, which were ultimately suspended, as well as the effort to launch negotiations on the topic in the context of the Doha Round, which despite being part of the original mandate, was dropped from the agenda in 2004. The underlying concern is that the strong political opposition that derailed these efforts could again prevail.

The world is not the same today, however. Circumstances have changed dramatically in the past 10 to 15 years. First, the geography of investment is very different. Emerging economies are significant players in both inflows and outflows of FDI, as the figures below show. According to UNCTAD, in 2012, developing countries absorbed more FDI than developed countries, accounting for 52% of global flows; in addition, they were responsible for almost one third of global FDI flows.



Source: UNCTAD (2013).

Second, global and regional value chains are very much prevalent today, and the fragmented FDI regime does not adequately reflect the interconnected nature of economies in global value chains (GVCs) (OECD, WTO and UNCTAD 2013). Developing countries have a stake in this, as many of them are part of international production schemes, as shown by their share in global value added trade increasing from 20% in 1990 to over 40% today (UNCTAD 2013).

Third, new actors in the FDI landscape, in particular state-owned enterprises and sovereign wealth funds, while opening new, huge sources of capital to tap, also pose significant challenges that countries – both developed and developing – are struggling to address.

In light of the above, the fundamentals of the North-South divide that have traditionally underpinned negotiations on investment are being *de facto* rapidly eroded. Emerging economies are now interested in protecting the investment of their own companies abroad through a rules-based system, whereas developed countries are keen on maintaining the host country right to regulate in the public interest. The on-going BIT negotiations between China and the US are illustrative of the above. This is a 'paradigm shift' (Sauvant and Ortino 2013), which could pave the way for a global investment regime, one based on a balanced approach between investors' rights and governments' prerogatives.

To begin the discussion

An agreement on investment would need to address both substantive and procedural issues, albeit maybe on different tracks. The first would include the definition of investment, standards of protection, investment liberalisation commitments and potential new disciplines, among others. Other issues, such as sustainability and corporate social responsibility could also be discussed. On the procedural side, the question of an investor-state dispute settlement mechanism merits close exam.

In charting a course for a potential multilateral framework on investment, a venue for the negotiations must be selected. UNCTAD and the OECD have done very valuable work on the matter, but given the strong links between trade and investment, the WTO is the natural place for housing such an agreement, alongside agreements on key trade areas. In addition, a negotiation conducted in the WTO has the potential to yield more equitable outcomes and to ensure non-discrimination; it would also provide access to an effective dispute settlement mechanism (Draper et al. 2013).

Opposition to initiating investment discussions in the WTO comes not only from those who object to global rules on FDI on ideological grounds. Others fear that bringing the topic to the WTO could poison the environment and reduce the possibility of achieving any meaningful result. Others still point out the difficulty of reaching agreement among the large and diverse WTO Membership.

Two comments are in order. First, it is clear that a preparatory process would need to take place. It is important that WTO Members are sensitised on the current investment context, the huge transformations that have taken place in the global economy and FDI's potential contribution to growth and development. A systemic analysis of the terms and coverage of existing BITs and RTAs could also lay the ground for a multilateral framework in this area (Hufbauer and Schott 2013). The WTO, with the support of UNCTAD and the OECD, is ideally placed to conduct such a process –though others

have suggested that one or a few governments could take the lead (Sauvant and Ortino 2013).

Second, the question about the feasibility of reaching agreement on investment at the multilateral level relates to the broader question of what is the most conducive negotiating format for reaching agreement in the WTO. Given the current state of affairs, negotiations for a multilateral agreement on investment could be conducted under a plurilateral format, among countries willing to enter into such negotiations. There is no need to prejudge at the outset whether the agreement would be extended on an unconditional MFN basis to all Members, as the decision could be taken at a later stage depending, among other things, on the share of world investment that ends up covered by the agreement.

Final remarks

The economic and political rationale for strengthening multilateral cooperation on international investment is very strong. WTO Members should avail themselves of this opportunity to launch in 2014 an informed process that would prepare the ground for future negotiations of a multilateral agreement on investment.

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Depth and Breadth in the WTO: Can We Square the Circle?

Patrick Low[1]

Introduction

The GATT/WTO's membership is highly varied in terms of level of development, national priorities, and government capabilities. Rules that are of considerable benefit to some Members, and perhaps to the world in aggregate, can be harmful to the national interests of others. This reality is reflected in differing levels of obligations among Members, and in the particular case of government procurement, also of rights. Tariff bindings and levels are different for every Member. In addition, various special and differential treatment provisions provide developing and least developed countries with options involving both the substantive content of certain provisions and on occasion longer phase-in periods for introducing new obligations.

While no Member has ever said such differentiation is inappropriate, few issues are discussed so readily and in so many contexts as the appropriate balance of rights and obligations for Members at different stages of development. Contention runs deep, particularly when it comes to larger emerging economies. An additional challenge for the system, and one which many would argue is partly responsible for the demise of the WTO's centrality, is that views differ as to the desirable coverage of WTO rules. These differences have been manifest in such areas as competition, investment, transparency in government procurement, labour, and trade and the environment.

While the balance of rights and obligations among members and the coverage of WTO rules go to the heart of differences in Members' priorities and possibilities, the

1 The opinions expressed here are those of the author and should not be attributed to Fung Global Institute (FGI).

consensus decision-making rule has in practice become a key element of the stasis afflicting the WTO. This is because consensus can be easily turned into veto. One suggestion for addressing these difficulties is referred to as the 'club of clubs' approach. Robert Lawrence is a prominent proponent of this approach (Lawrence 2006).

The 'club-of-clubs' approach

The essence of this approach is to encourage voluntary associations among parties who would pursue shared objectives in respect of particular issues or rules. These clubs would comprise a subset of the WTO's membership, and they would define rights and obligations applying to those in the club. Those outside the club would not share in the rights and obligations. This would introduce another element of permitted discrimination into the multilateral trading system, alongside existing provisions on preferential trading arrangements (PTAs), non-reciprocal preferences extended to some developing countries, and special and differential treatment provisions. The fundamental question for the WTO's future is whether the institution would be able to sustain this kind of arrangement without fracturing beyond repair.

The case for a club-of-clubs approach is that it would allow like-minded Members to pursue their national interests without falling foul of opposition from those who believe that embracing the obligations in question would harm their economic interests. At the same time, it would prevent the latter countries from being inappropriately pressurised into accepting obligations that they considered an undue burden. Lawrence sees clubs formed along these lines as an alternative to the single undertaking at the close of the Uruguay Round, which obliged all Members of the new WTO to subscribe to all agreements.[2] In retrospect, this arrangement is seen by many as an error. It left a large number of counties feeling aggrieved, and has diluted trust among parties that need to cooperate in order to carry forward a WTO agenda.

2 The most significant exception to this is the Agreement on Government Procurement, where provisions apply only to signatories, both in terms of benefits and obligations.

Lawrence's proposals are sensitive to the risks of exclusion and coercion under a club-of-clubs approach. He recommends a protocol for forming clubs that would ensure membership was genuinely voluntary, that the clubs were not a stalking horse for forcing obligations on Members at a later date, that clubs were welfare-enhancing (not by redistributing welfare from outsiders to insiders), and that they were aligned to the objectives of the institution. All Members would be able to negotiate on the substantive content of club rules, even if they subsequently did not join.

Of particular significance is the principle articulated by Lawrence requiring consensus among Members that the WTO is the appropriate institutional setting for a club. This could, in effect, be the Achilles heel of the entire proposal because it requires that members bless clubs inside the WTO that would discriminate against them in terms of benefits. It is tempting to argue, on the other hand, that if the obligations of being in a club are considered onerous by a Member, then perhaps the benefits are inconsiderable and exclusion does not matter. The option of joining later would always be open.

The Agreement on Government Procurement negotiated in the Tokyo Round is the only significant[3] instance in GATT/WTO history of a discriminatory agreement being blessed by consensus. All the other 'codes' negotiated at that time, covering antidumping, subsidies and countervailing measures, customs valuation, import licensing and standards, did not discriminate against non-signatories. The path for a discriminatory outcome in the case of procurement was facilitated by the fact that no provisions on the subject existed previously in the GATT, unlike in the case of the other codes.

Is a 'critical mass' approach an alternative?

A way of avoiding the discriminatory downside of the club-of-clubs approach would be to use a critical mass decision-making approach.[4] The distinct element of this approach

3 The Tokyo Round Agreements agreements on bovine meat, dairy products and civil aircraft all contained discriminatory elements, but these agreements never gained much traction and were non-controversial.

4 For a more detailed discussion of critical mass, see Low (2011).

is that it does not discriminate against those who are outside a new arrangement or agreement. The notion of critical mass derives from the idea that new obligations will only appeal to potential takers if there is a sufficient number of other takers with a certain weight in the market. If key players refuse to sign up, the agreement does not get done. The composition of the critical mass is decided by those who commit if there is sufficient support and refrain from doing so if they consider the contrary to be the case. For all practical purposes, the critical mass requirement eliminates free-riding, if one assumes that parties too small to destabilise an agreement cannot free-ride to a degree that would worry parties to that agreement.

This approach to decision-making has been adopted on a number of occasions, namely in the post-Uruguay Round agreements on basic telecommunications and financial services and in the Information Technology Agreement. In the latter, it is interesting to note that a critical mass was considered to have been attained without the inclusion of Brazil and Mexico.

Speaking in favour of this approach is the fact that it would avoid a contentious and quite possibly futile process of trying to fashion discriminatory deals approved through a consensus decision taken by the entire WTO membership. On the other hand, some may fear that even if non-participants were unimportant in the market today, this may cease to be the case in the future. What would then induce these members to accept obligations rather than merely free-riding?

Conclusions

It may be that a hybrid solution would be best. A club-of-clubs or critical mass approach could be adopted depending on the issue at hand and the economic implications of exclusion from the benefits of an agreement blessed by the WTO. The choice would have to weigh the perceived risks of coercion on the one hand, and free-riding on the other. Either way, institutional integrity would call for a consensus. Certain guarantees

would have to be crafted to buttress mutual trust among Members – a commodity that has been greatly eroded in the WTO in recent years.

A priority for a post-Bali work programme must surely be to find a better way of fostering progress on important issues of international economic cooperation within an inclusive, multilateral setting. Progress will be conditioned in part by agreement on appropriate negotiating techniques and decision-making processes, and a shared sense of legitimacy. These matters need to be the subject of urgent deliberation.

Regardless of the Bali outcome and how governments choose to interpret it, an ineluctable certainty is that the WTO will find itself on an accelerating path to obscurity if it cannot more effectively address the exigencies of modern economic and political realities. If they fail to act, governments may rue their Munich moment, when they let go of the hard-won high ground of multilateralism.

A practical means of proceeding would be for the membership to agree that by the time of their next ministerial meeting, they would have established a framework and set of procedures for a critical mass and/or a club-of-clubs approach to advancing the WTO's agenda. At the same time, Members could usefully agree to make procedural modifications to the consensus rule. These would require that when very few countries were opposed to a consensus, they would be required to offer a reasoned explanation for doing so and be willing to discuss it. By the time of the next but one ministerial meeting, four years from now, at least two new agreements negotiated under the agreed procedures should be in place.

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Revamping Aid for Trade for the post-Bali WTO Agenda[1]

Jean-Jacques Hallaert

Developing countries' requests for financial and technical assistance acquired a high profile during the Doha Round negotiations. To answer them, the WTO had to cooperate with donors and development agencies (Hallaert 2013b). In the first half of the 2000s, donors facing calls to scale up aid to achieve the Millennium Development Goals were ready to support trade reforms. This convergence of interests led to the Aid for Trade Initiative.

The Initiative succeeded in mobilising a large amount of financial resources. However, because the Doha Round talks stalled, these resources could not support the implementation of a multilateral agreement. Instead, they were spent on various projects, some not clearly related to trade. As a result, developing countries are increasingly questioning the additionality of aid for trade. Indeed, 'without evidence of additionality and a clear distinction between projects that would have occurred anyway under development programmes, it is challenging to assess whether the initiative has delivered incremental benefits to developing countries' (Stiglitz and Charlton 2012). To make matters worse, facing a fiscal crisis, donors are reducing their aid envelope and are requesting evidence that the money spent has had an impact.

The future of the Aid for Trade Initiative and its capacity to support the post-Bali WTO Agenda will depend on its capacity to address these concerns. To do so, a change in approach is needed. In its Aid for Trade Work Programme 2012-13,[2] the WTO answered the challenges by expanding its scope of the Initiative. Post-Bali, it should instead narrow the scope of the Initiative, in order to make it more focused and efficient.

1 This chapter draws heavily on Hallaert (2013a).
2 WT/COMTD/AFT/W/30.

A change in approach: From expanding the scope of the Aid for Trade Initiative...

The Aid for Trade Initiative has helped to increase donor financing to the productive sector of the economy at a time when the overall resource envelope was expanding. It has also been successful in increasing donors' and developing countries' awareness of the role trade can play in development.

These achievements are worth preserving, but with bleak prospects of raising additional resources, with a monitoring framework that has reached its limits without managing to build confidence, and limited capacity to show results, the Aid for Trade Initiative needs to reinvent itself.

The WTO is trying to do so by expanding the scope of the Initiative. Its Aid for Trade Work Programme for 2012-13 covers new issues such as gender empowerment, green growth, and climate change. It also gives a higher profile to topics, such as the role of the private sector in development, which have always been part of the Initiative but have recently attracted more attention of the development community.[3] The role of the private sector in aid for trade was emphasised at the Third Global Review of Aid for Trade in 2011 and, for the Fourth Global Review in 2013, the monitoring framework has been extended to include a private sector questionnaire.

Expanding the scope of aid for trade is said to show the Initiative's capacity to adjust to the evolution of the global trade realities. In fact, it reflects more its ability to adjust to the evolution in donors' priorities in order to maintain their interest and, hopefully, protect aid for trade from the cuts in aid budgets.

However, aid-for-trade commitments fell by 14% in real terms in 2011. This was the first decline since the launch of the Initiative and was larger than the 11% fall in total official development aid (excluding debt relief) (OECD-WTO 2013).

3 The role of the private sector is at the core of the global development partnerships discussed at the Fourth High Level Forum on Aid Effectiveness held in Busan (South Korea) in 2011.

Moreover, expanding the scope of the aid for trade makes the challenge of showing results even more daunting. It also gives additional reasons for suspicion because the new areas have only remote relations (if any) to trade or with the trade and development nexus and are not among developing countries' priorities.

… to narrowing it down

Therefore, instead of expanding the scope of the Initiative, the WTO should narrow it and make sure that aid for trade is more efficient. A streamlined Initiative should focus on clearly trade-related projects. This has two implications.

First, providing financial resources to support the implementation of trade agreements and to cope with adjustment costs should remain the core objective of a revamped Aid for Trade Initiative. Concluding the Doha Round negotiations could take time but, in the meantime, aid for trade can be more focused on helping implementing other trade agreements:

- For WTO Members, aid for trade can support unilateral trade and customs reforms and the implementation of regional agreements, which often have a trade facilitation component.
- For countries that have recently joined the WTO, aid for trade can help implement WTO rules and accession commitments.
- For countries negotiating their accession to the WTO, aid for trade can provide support to clarify the implications of membership and to build the trade policy infrastructure that most of them lack but that is crucially needed.

In doing so, aid for trade would build trade capacities that will be useful for the implementation of future multilateral agreements, would demonstrate its capacity to support implementation of trade agreements, and thereby address suspicions.

Second, projects that do not have a clear trade impact should not be reported as aid for trade. Aid for trade should help build trade capacities, but trade capacities do not

include projects that, however important for development, are not clearly related to trade. This is the case of support to productive capacities, to gender issues, and to some infrastructure projects. It is difficult to argue that urban infrastructure projects are trade-related and should be reported as aid for trade.

The purpose of narrowing the scope of the Initiative is to increase the focus on key elements of the trade and development nexus in order to make aid for trade more effective, build confidence, and secure donors financing. However, this may not be sufficient. The Initiative must also show convincing results.

The best way to show that aid for trade makes a difference would be to gather evidence from evaluations. But robust impact evaluations are rare. This is in part due to methodological problems but, more importantly, to insufficient incentives to evaluate aid for trade projects. Donors often undertake evaluations more for accountability reasons than to investigate the impact of a project. Thus, it should not come as a surprise that a meta-evaluation of aid for trade projects concluded that 'the evaluations' conclusions provide little insight as to whether aid for trade works and why' (Delpeuch et al. 2010). Evaluation should not be limited to the impact of aid for trade but also assess if aid for trade resources are allocated effectively (Do they go where they are needed? Do they finance the right projects?). Unfortunately, such studies are also rare.

Thus, the streamlining of the Initiative needs to be complemented by independent and robust impact evaluations and research on the allocation of aid for trade. A major obstacle to such analysis was lifted when the OECD made the Creditor Reporting System database accessible, allowing researchers to gather data on financial flows and details on the various projects.[4]

4 Predefined aid-for-trade queries are available at http://www.oecd.org/dac/aft/aid-for-tradestatisticalqueries.htm.

Aid for trade post-Bali

Post-Bali developing countries' requests for assistance will remain high on the WTO agenda. Such assistance is even required for the implementation of a trade facilitation agreement. Annex D 'Modalities for Negotiations on Trade Facilitation' of the so-called 'July Package' stipulates: 'in cases where required support and assistance […] is not forthcoming, and where a developing or least-developed Member continues to lack the necessary capacity, implementation will not be required'.[5]

Therefore, the Aid for Trade Initiative will remain relevant but it also faces serious challenges. Assuring developing countries that actual assistance is available has become more challenging. Developing countries are suspicious of the additionality of aid for trade and of the reality of the reported financial resources. Moreover, for many donors, in the absence of a Doha Round agreement, trade capacity-building is falling out of favour as new priorities emerge. The threat to the resource mobilisation is further increased by the fact that the aid envelope is shrinking as a result of the fiscal crisis experienced by most donors.

So far, the WTO's answer to these challenges was to expand the scope of the Aid for Trade Initiative to new areas. Post-Bali, its approach needs to evolve.

In the short term, the WTO should promote the streamlining of the Initiative to make it more efficient and focused on clear trade objectives. The Aid for Trade Work Programme for 2014-2015 should herald this change in approach and call donors to focus aid for trade on trade facilitation issues, on the implementation of unilateral reforms and regional trade agreements, on supporting the implementation of WTO rules by new Members, and on building the trade policy infrastructure that many countries negotiating their accession are missing.

5 http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm#annexd.

Over the medium term, because streamlining the Aid for Trade Initiative may not be enough to maintain donor support and restore developing countries' confidence, the WTO should promote the setting up of an independent body to undertake robust and convincing evaluations, highlighting where aid has the biggest impact on trade and through trade on development.

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Moving Towards a Refined Special and Differential Treatment

Sébastien Jean

While there is widespread recognition that rights and obligations under the multilateral trading system should be adapted to each country's level of economic development, dissatisfaction is growing about the way special and differential treatment (SDT) is currently applied. Many developing countries claim that SDT as it currently applies to WTO disciplines has proved insufficient in balancing commitments and fostering economic development. Meanwhile, advanced economies have repeatedly claimed that SDT should be revamped to allow a better focus on those countries 'most in need' (e.g. as in the US-EU proposal in August 2003).

What's wrong with SDT at the moment?

The way SDT is implemented presently is inaccurate, inequitable, and inefficient. Inaccurate, because SDT is granted to countries classified as developing in the WTO, while this category, built out of self-declaration, includes countries which are now industrialised. Inequitable, because the same treatment is offered to countries with very different levels of economic development.

Inefficient for two reasons. First, because the focus on exemptions did not prove helpful in fostering economic development: it relaxes some obligations without necessarily paving the way towards adopting good policies, while risking making beneficiary countries' requests inaudible (as illustrated by the exclusion of agriculture from the GATT and by the long-standing specific regime applied to textiles and apparel). Second, inefficient because SDT now largely appears as an obstacle to reform, making

it difficult to strike the kind of grand bargain between developing and industrialised countries, which is necessary for multilateral trade negotiations to move forward.

Why is this system so unsuitable? Two reasons should be emphasised. The first is that SDT relies upon a ternary typology, whereby countries are classified as developed, developing, or least-developed countries (LDCs). The second reason is that the system is static, relying on a once-and-for-all classification of countries. This is an unfortunate characteristic in an era where changes are so rapid in world trade. The increasing economic clout of emerging countries has been a 'game changer' over the past decade with, in particular, China turning itself into a trading superpower. In the meantime, policies themselves also changed a lot. This is reflected in the increasing gap between bound and applied tariffs: for agricultural and food products in developing countries, the latter now amount on average to less than a third of the former, meaning that any reasonable cut in bound tariffs will, in many cases, have little or no bearing on applied rates of protection.

Domestic support to agriculture is another striking example: the OECD estimates that total support to Chinese farmers amounted to the equivalent of $193 billion in 2012, almost half the total for all OECD countries ($415 billion, according to OECD 2013). Moreover, domestic support in India (not included in OECD estimates due to lack of information), although smaller in absolute value to the one in China, also amounts to a huge figure, likely comparable in magnitude to those for the US or the EU (see, for example, Hoda and Gulati 2013). The time when domestic support could be thought of as a specificity of rich countries is long gone. Policies also significantly changed as far as exports are concerned: while multilateral disciplines focus on export subsidies, export restrictions proved during the last decades that they can be at least as, if not more, disruptive for world markets. This is largely due to developing countries' practices.

As a result of this static nature, reform is all the more difficult when multilateral disciplines are 'path-dependent', i.e. when they have been set with reference to policies carried out in the past. As time elapses, the legitimacy of such discipline may become

questionable when political circumstances and applied policies change significantly. This is in particular the case with bound duties and ceilings set for domestic support under the Aggregate Measurement of Support. Recognising the need to update such historical reference points would also be most helpful.

The increasing importance of trade-related rules also calls for a profound change in the way SDT is thought about. Exemptions are often useless, if not impracticable, when disciplines deal with rules. Standards set by advanced economies can, for instance, be very difficult for the poorest countries' exporters to meet. Thinking about the way to make agreed rules friendly to the weakest economies is therefore far more important than exempting them from their application.

The defects of the SDT system are not new but they are increasingly apparent, to the point where an update now appears inevitable if the negotiating function of the WTO is to be preserved. The core issue is the need to refine this treatment so as to make it more attuned to countries' needs and to policy challenges. Creating different groups of developing countries does not seem to be a practicable option. It has been consistently resisted by many member states, and it is unlikely that any single criterion (or even group of criteria, for that matter) would allow sensible, general-purpose differentiation.

Meanwhile, differentiation is already practiced in several areas (see, for example, Novell and Paugam 2006). Examples include the Agreement on Subsidies and Countervailing Measures (SCM), where a sub-category of countries, based on a GNP per capita criterion, receive specific treatment. The URAA also identified Net Food Importing Developing Countries as a distinct category. While the DDA does not propose creating new categories of countries, special provisions target small and vulnerable economies, small island developing states, landlocked developing countries or recently acceded Members. The specific ceiling put on China's domestic support *de minimis* (8.5% of the value of agricultural output, instead of 10% for developing countries) can also be put forward as an example of differentiation (Matthews 2007), as could unilateral preferences, even though this case is arguably different.

If any doubts remained about the consistency of such differentiation with WTO agreements, they have been articulated by the Appellate Body of the Dispute Settlement system. For example, following the Indian complaint about the EU's so-called 'GSP-drugs' scheme of unilateral preferences, the Appellate Body report concluded that 'non-discriminatory' should be understood as requiring that 'identical treatment is available to all similarly-situated' beneficiaries, thus opening the way for differentiation, provided it is carried out based on an objective – and relevant – criteria (WT/DS246/AB/R).

Towards an objective approach

Against this background, moving towards finer differentiation on a case-by-case basis appears a practicable option going forward. Clearly, this would require making such differentiation conditional on policy topic, while taking into account the costs of implementation and development needs. Finding objective, possibly quantitative, criteria to rely upon is certainly difficult but not necessarily impossible, in particular if such an approach is combined with an appeals procedure. Their use could take the form of graduation mechanisms, as already included in the SCM agreement (Article 27.6).[1]

In any case, implementation will not be easy, both for obvious political economy reasons and because of technical difficulties. A gradual and focused approach is thus required. Ministers left Bali pledging to negotiate an agreement for a permanent solution on public stockholding for food security purposes. This is an obvious area to start talking about a refined notion of SDT. In the context of this discussion, WTO Members should seek to agree upon a graduation mechanism by the next Ministerial Conference. For example, many analyses have shown sensible, quantitative approaches to food security.

The next issue to deal with should be market access, separately for agricultural and non-agricultural products, and possibly for services. No ambitious agreement is possible without concessions in this area. Discussions should be held to clarify the

1 I am grateful to Christian Häberli for attracting my attention on this point.

policy objectives of SDT in market access commitments. Economic development is the paramount objective, but the protection of smallholders may be another objective when it comes to agriculture, as might be financial stability in services, for instance. Once these objectives are reviewed, negotiations could be held on meaningful, objective criteria to assess the relevance of eligibility to SDT. These criteria could then be used as (more or less flexible) graduation mechanisms. Agreeing upon such mechanisms should be a negotiating goal over the next two years. Of course, finding the right criteria and parameters can only result from negotiations. But agreeing upon such matters could be a way to create new space for a landing zone.

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How can the Extent and Speed of Compliance of WTO Members with DSU Rulings be Improved?

James Flett[1]

Some commentators characterise the WTO compliance record as good. Relatively few of the 500 or so cases have gone to compliance panels; and fewer still to arbitration panels under Article 22.6 of the Dispute Settlement Understanding (DSU). One must also account for the many issues settled on the basis of the WTO Agreement itself and the clarifications provided by the dispute settlement system. WTO Members are generally law abiding and do not wish to be seen in any other light. Compliance has sometimes taken a while, but in the long term what is important is that it is ultimately achieved, even if domestic firms obtain relatively long periods to adjust. The system works well enough. Other commentators have focused on particular cases where full compliance has not been achieved, or where it has taken a long time. Of growing concern are the issues of recidivism and self-help (in the form of tit-for-tat trade remedy measures or DSU proceedings). Leaving aside the more general lines of this debate, this contribution focuses on what could be improved, particularly in the legal as opposed to the diplomatic mechanisms for inducing compliance.

The issues of extent and speed are obviously linked: justice delayed can be justice denied. Nevertheless they are distinguished below and for each, four areas of potential improvement are identified. For extent: make WTO and municipal law work together; multilateralise the compliance process; simplify arbitration panel proceedings (and recognise the possibility of appeal); and revive the use and significance of suggestions. For speed: provide the system with the necessary resources; target as such measures;

1 Any opinions expressed are attributable to the author and not the EU or the Commission. The author frequently represents the EU in WTO litigation.

broaden the scope of compliance proceedings; and account for nullification or impairment arising after the end of the reasonable period of time.

This contribution is built on the assumption that the DSU should not be modified because this is unnecessary and hazardous for its key feature, negative consensus, and therefore equally a threat to the dispute settlement system and thus the WTO. Thankfully, the current DSU review seems to be limited to harmless improvements, such as with respect to sequencing. Sequencing is in fact a non-issue that has the incidental positive effect of keeping diplomats occupied and away from more important issues. It is the perfect example of a narrow textual approach; context, object and purpose obviously dictate that a Member electing to go for compliance proceedings does not lose its retaliation rights. Even if the DSU is modified following the current DSU review, this contribution is built on the assumption that no further modifications should be considered in the immediate future. Consistent with this approach, these proposals are not directed at the Membership as a whole, but rather at WTO adjudicators, those that advise them, and Members that litigate.

A general threshold point is that the extent and speed of compliance is greatly facilitated by the quality of reports, because it allows Members to persuade domestic stakeholders to comply. Attention to detail and rigour in the treatment of the facts, evidence and procedures, and full rational and reasonable explanation are essential. Also, WTO judges should not overreach. Accusations of gap-filling are almost always irrational and driven by vested domestic interests: judges are paid to apply the law to the facts. But there is one area where special care is needed: the balance between trade restriction and regulatory autonomy. The WTO Agreements do not impose harmonisation, whether through positive or negative processes, but reserve to Members the right to identify and weigh legitimate regulatory objectives; there is no pure proportionality test. If WTO judges want Members to comply with their rulings, they must respect these limits.

Turning to the four ways to improve the extent of compliance, the first is to make WTO law and municipal law work together. This is a lesson provided directly by EU

law. EU national judges are in fact EU judges. WTO law requires direct effect and/or interpretation in conformity and/or dualism that at least permits timely compliance. Furthermore, beyond these formalities, there are other more subtle ways in which WTO law and municipal law can work together. Even if municipal judges deny that they take account of WTO rulings, there is no doubt that they do so as a matter of fact. It is increasingly common for litigants to pursue a twin track, getting justice at the WTO and a remedy in (for example) the European Court of Justice. A particular expression of this is the way in which municipal injunctions can be obtained to suspend execution until after the end of the reasonable period of time, as occurred in the zeroing cases. This model is susceptible to being used in all areas of WTO law.

A second way to improve the speed of compliance would be to multilateralise the compliance process. In effect, every case could be brought by the entire Membership as a sort of class action. Article 9 of the DSU already foresees this. A number of cases have already been brought by multiple complainants using standard terms of reference, and the model could easily be scaled to the entire Membership. All other Members could simply free-ride to the retaliation phase. The defending Member would then face far more pressure, both diplomatically and economically, to comply.

A third way to improve the speed of the compliance process would be to simplify arbitration panel proceedings. They should be more legal and procedural. They should see retaliation as a blunt instrument to induce compliance, not as a re-balancing that requires fine calibration. They should be much more imaginative about the potential scope of the nature of retaliation measures. Retaliation may be bad for trade, but it is a necessary evil to ensure compliance, and this needs to come more to the fore. As part of this, it should be recognised that arbitration panels can be appealed pursuant to Article 17.1 of the DSU. The extra procedural burden is worth it in order to bring some order into this otherwise casuistic area of WTO law.

The fourth and final way to improve the speed of the compliance process would be to revive the use and significance of suggestions pursuant to Article 19.1 of the DSU. Their

importance was diminished in the Bananas III case, which was a lost opportunity. They offer a flexible tool for differentiating between those cases where additional compliance pressure is necessary and those where a more patient approach is reasonable. It is not too late to revive them.

Turning to the four ways to improve the speed of compliance, the first is to provide the system with appropriate resources. Whilst the Appellate Body has generally respected the 90 days rule, panels and compliance panels are systematically and significantly late. The lapse of time makes compliance foot-dragging excessively attractive. The secretariat needs to be properly resourced.

The second way to improve compliance is to get at the root of a given problem: the measure that is as such inconsistent. This is a particularly effective means of countering the current tendency for recidivism or repetition. Complaining Members who fail to do this find themselves locked in an interminable game of catch-me-if-you-can. Adjudicators therefore need to be particularly open to apprehending unwritten measures, indirectly evidenced, so that continuing situations can be efficiently addressed by the dispute settlement mechanism.

The third and related way to improve the compliance process is to maintain and further extend the broad approach to the scope of compliance proceedings. Resources being limited, WTO judges cannot be expected to resolve every aspect of a measure's WTO consistency in original proceedings, and are going to exercise judicial economy of necessity. Nevertheless, defending Members have been put on notice that the measure is suspect, and must be expected in the compliance process to re-consider all aspects of its WTO consistency. Protestations of innocence in this respect generally ring hollow. As a matter of fact, following compliance proceedings, defending Members generally have an additional period of time in which they could comply if they would really wish to.

The fourth and final way to improve the compliance process would be to account for nullification or impairment arising after the end of the reasonable period of time. WTO

adjudicators have so far indicated an unwillingness to do this, because the WTO is perceived as focused on prospective compliance as oppose to reparation for past injury (although a rigorous judicial analysis of WTO law on this issue in the light of public international law has not yet been forthcoming). This means that the passage of time plays in favour of the defendant. This reasoning is difficult to justify after the end of the reasonable period of time. Suspension of concessions could account for such nullification or impairment by allowing retaliation with respect to a third product (not subject to the main retaliation) for a temporary period, corresponding to the period between the end of the reasonable period of time and the commencement of the main retaliation. In this way, defendants would be reasonably penalised for late compliance.

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Developing Countries and DSU Reform

Marc L. Busch and Petros C. Mavroidis

There has long been a desire to help developing countries make more of dispute settlement at the WTO. Ever since the subject of Dispute Settlement Understanding (DSU) reform was taken up in the Doha Round, Members have proposed various ways to help developing countries gain more *ex post* compliance. In the Chairman's current text (JOB/DS/14, Art. 22), DSU receives a lot of attention in this regard, the aim being to make retaliation more viable for developing-country complainants as a matter of special and differential (S&D) treatment. Two proposals merit careful attention: Art. 22.3*bis* DSU provides for developing countries to ask for authorisation to cross-retaliate as a first option (contrary to the current text which provides for cross-retaliation only if retaliation in the same agreement is ineffective); and Art. 22.4 DSU changes the way that the level of nullification and impairment is calculated for these complainants (the current standard being equivalence between damage inflicted by the author of the illegal act and the amount of retaliation authorised).

We worry about both proposals, less because of their mechanics than the mindset they create with respect to the efficacy of retaliation as being the key to compliance. We would prefer more S&D provisions focused on *ex ante* settlement.

Ecuador's request for cross-retaliation in *EC-Bananas III* made the idea nearly irresistible, and it is now routine for developing countries to at least weigh this option. *US—Gambling, US—Upland Cotton and US—Clove Cigarettes* have drawn added attention precisely because cross-retaliation by Antigua-Barbuda, Brazil and Indonesia (respectively) looms large. We see the lessons of *EC-Bananas III* differently. First, Ecuador never followed through on its authorisation to cross-retaliate, fearful that the suspension of copyrights on European music would only hurt foreign direct investment

(FDI). Now that cross-retaliation is synonymous with poor countries hitting back against the intellectual property of rich countries, our concern is that it is *not* credible to fast-track cross retaliation, especially in light of the web of north-south bilateral investment treaties (BITs) that cover intellectual property. Indeed, respect for property rights is among the most salient country-risk factors shaping flows of FDI, and threats to undermine intellectual property on an ad hoc basis can only hurt in this regard.

We are not saying that cross-retaliation should be ruled out, but rather that it should not be fast-tracked. On the contrary, the harm done to FDI by cross retaliation might actually be lessened by adhering to a more formal vetting of why other forms of retaliation (as per the hierarchy established in Art. 22 DSU) are not within reach. The current case law has probably gone too far by imposing too much of a constraint when it comes to deciding on cross-retaliation. We are afraid, though, that by going too far in the other direction through the proposed text, developing countries might rush to cross-retaliation without giving adequate thought to negative externalities stemming from similar actions. The risk to do so depends, of course, on inter-agency coordination across national administrations.

Second, more central to *EC-Bananas III* than Ecuador's threat to cross-retaliate was the US's implementation of *carousel* retaliation. By raising uncertainty on the part of EU exporters as to whether they would be named on the US list, carousel retaliation had the effect of prompting widespread lobbying in favour of compliance. True, it may be difficult for some developing countries to retaliate in-kind or under the exact same agreement, but if they can, something modeled on carousel retaliation could be the preferred S&D provision to cross-retaliation. If, on the other hand, cross-retaliation is the only option, it should be shown to be so, not fast-tracked as per Art. 22.3*bis* DSU.

Carousel retaliation is not necessarily DSU-consistent, of course, since there is no guarantee that all lists for retaliation respect the discipline established in Art. 22 DSU (equality between damage inflicted and amount of retaliation), unless if the requesting Member presents various lists for authorisation. In this case, the surprise effect is

somewhat mitigated since all potential addressees will have been ex ante revealed. On the other hand, revelation might induce them to form wide coalitions to address the potential for retaliation through lobbying efforts.

Art. 22.4 DSU is a step in the same direction, adding to the level of concessions that a developing country complainant might suspend. This may well seem enticing. Something like it happened in *Canada—Aircraft*, where the WTO factored in a punitive cost to what it saw as the harm done to Brazil when Canada announced its *ex ante* unwillingness to comply. Art. 22.4 DSU formalises this for developing countries, such that "the level of nullification and impairment shall also include an estimate of the impact of the inconsistent measure on the economy of such Member". We doubt that this "estimate" would be within reach of an Art. 22.6 DSU arbitration. But this is beside the point. Even if it were, this is a highly 'incomplete' provision which could be interpreted in various ways by judges; there is no guarantee that it will be meaningful. More importantly, if developing countries struggle to retaliate, adjusting the level of nullification and impairment higher is not going to help. Small economies, by definition, cannot be much of a threat to recalcitrant big players, even if economy-wide effects enter the calculation for lawful retaliation. Worse still, it may motivate complainants to pursue a big judgement, rather than negotiate a solution to their dispute up front.

Our concern is that both proposals create a mindset that compliance must be pursued through retaliation, Art. 22.3*bis* DSU making it easier and Art. 24 DSU making it bigger. Ideally, we would like to see similar proposals in practice and then 'measure' how much they have contributed to securing compliance. Alas, we do not have this luxury. What is clear to us, though, is that developing countries suffer from procrastinated compliance. In the absence of retroactive remedies (an issue that no one wants to touch upon in the current negotiations), it is in their interest to look for legislative solutions that will promote fast-track solutions, as opposed to *ex post* compliance (which might, if at all, come at the earliest five years down the road, e.g. from the moment that a request for consultations has been submitted).

Developing countries are at a disadvantage in negotiating *ex ante* settlement. The focus of S&D provisions should thus be to help make consultations work these complainants. The DSB Fund proposed in Art. 28 DSU can help in this regard.

Over the years, there have been many proposals to reimburse developing countries' legal fees in the event that they prevail against a developed country. The problem is that this only increases the incentive to go the legal distance, looking for a favourable ruling. Art. 28 DSU explains that those countries that cannot access the DSB Fund, for lack of budget, may nonetheless be reimbursed where the developing country wins as a complainant, or does not lose as a defendant. The spirit of Art. 3 DSU is to settle whenever possible, not prevail in litigation at all costs. In fact, where rich countries do better than poor ones in dispute settlement is in negotiating mutually satisfactory solutions. Importantly, developed country complainants do not win more, nor do they get more compliance with the rulings they win. The DSB Fund should therefore invest in helping developing countries make more of consultations. We would start with the proposed reimbursement rate. First, the amount allocated for consultations should be increased so that developing countries can retain counsel earlier in deciding whether to file, and keep counsel longer should consultations go on for the additional 15 days that are provided for under the proposed Art. 4.10(b) DSU.

The next step is to affirm that all legal expenses for consultations are to be covered by the DSB Fund, *even if the case does not proceed to the panel stage*. This should not be viewed as subsidising 'fishing expeditions' – which is why we know that, as an S&D provision, Members would never go along with the idea that rich countries should underwrite the legal expenses of poor ones in consultations. But in the context of the DSB Fund, we submit that there is already an untapped architecture in place that would guard against fishing expeditions: namely, Art. 27.2 DSU, which is in need of revitalisation, potentially as a precursor to tapping the DSB Fund. And while DSU has never gained much traction, we would submit that this mechanism can do much to improve the experience of developing country complainants in consultations.

In line with these recommendations, we suggest the following work programme:

1. Delete Art. 22.3*bis* DSU and Art. 22.4 DSU in favour of Art. 28 DSU as a more viable S&D provision, focused on consultations, as we outline above.
2. Bridge 27.2 DSU to Art. 28 DSU to ensure that developing countries get an opinion about the legal merits of pursuing a dispute *and* the funding to launch productive consultations. The required text for this recommendation should be drafted for the next ministerial. We are well aware that this will change the nature of Art. 27.2 DSU; one of us (Mavroidis) has provided legal advice under this mechanism. Developing countries have always needed more from Art. 27.2, and we would submit that this is a relatively easy fix.
3. We further propose building a bridge between Art. 27.2 and the Advisory Centre on WTO Law (ACWL). This would facilitate the exchange of information between the two institutions and enable developing countries to tap a wider pool of information in the process. The required text for this recommendation, like the one above, should be drafted for the next Ministerial Conference.

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A Post-Bali Agenda for Agriculture

Tim Josling

The agenda for agricultural trade negotiations is still full after the successful Bali agreement. Bali considered two elements already on the table in the Doha Round (administration of TRQs and phasing out export subsidies) and one item that has been added recently (the purchase of domestic foodstuffs for stocks). In addition, the cotton issue has been included in the LDC agenda, though still very much relevant to agriculture. The remaining parts of the agenda have yet to be agreed – though the 2008 Revised Draft Modalities (known as Rev. 4) still provide a strong starting point for the final push (WTO 2008). Much of this agenda could be considered within a revived Doha Round, though some items can be handled by negotiation between smaller groups of countries.

So what items on that agenda are most urgent, and hence should be included in a two-year WTO horizon? And what other items have arisen that should be advanced up the list of priorities for consideration in a next phase?

Market access

The most important item on the DDA agricultural agenda items for the next two years is market access. Agriculture is still sheltered, and world markets distorted, by high tariffs – about three times the level of non-agricultural tariffs. Until these tariffs are substantially reduced, the global trade in foods and farm goods will fall short of its potential for meeting the challenges of feeding the world, responding to price instability and adapting to weather-related events. The DDA formula as specified in the draft modalities spelled out in Rev. 4 for reducing both the levels and the dispersion of such

tariffs is sound.[1] Bilaterals and RTAs can move quickly to remove tariffs on all but a few sensitive products, but in the multilateral negotiations such liberalisation does not seem possible. So an agreement that included the DDA tariff cuts for agriculture would be a welcome sign that the multilateral negotiation process can still deliver.

The question is what can be offered to the food-importing countries (represented by the G10 of protected developed countries but also by the G33 of developing countries with large small-holder populations)? Two elements of the agenda fit that criterion. First, the Special Safeguards Mechanism (disagreement over which was in part to blame for the collapse of the talks in July 2008) should be speedily concluded with some proviso that it could not be used for long-term avoidance of increased market access. Of course, such a safeguard will inevitably limit the benefits of greater market access, but this is a price the exporters should be willing to pay. Second, the exporters of basic grains and oilseeds should agree to avoid export bans or excessive export taxes in times of supply shortage. This agreement could be part of a DDA package or a self-contained agreement in the name of food security.

Export subsidies

The second priority for the negotiators as they reconsider the post-Bali agenda is to finally get agreement to eliminate export subsides and similar practices. An agreement at Bali to keep subsidies below current levels and to maintain progress towards their elimination should provide a boost to this objective. Once again the wording in Rev. 4 is suitable, and the text is now 'stabilised'. Of course an agreement on export competition could be rolled into a larger Doha package, but as it would apply to only a handful of countries it might also be considered as a stand-alone (plurilateral) item. The countries concerned are actively negotiating on these issues in the context of the bilaterals and

1 The level of tariff cuts would be significant (a minimum of 54% cut for developed countries and up to 36% for developing countries), with the higher tiers of tariffs being cut by more. A ceiling of 100% would be placed on most products, though for a limited number of 'special' and 'sensitive' products the market access would be through expanded low-tariff quotas.

regional agreements, and it would help in such talks if the WTO were to come to closure on a new set of rules.

Domestic support

The most difficult part of the post-Bali DDA agenda will be getting an agreement on domestic support. In many ways the significance of this item is small compared to the gains from better market access and the removal of export subsidies, but it directly impinges on farm policy decisions in industrial countries. Trade negotiators have to be cautious to avoid the perception that they are trading away farmers' support programmes. But the domestic political backing for these support programmes in developed countries has eroded considerably in the dozen years since the DDA was started, and a period of high prices has made many of these support instruments redundant. So the time is ripe over the next two years for an agreement along the lines of that suggested in Rev. 4 on domestic support.[2] Moreover, by general agreement this issue is being left off the table in the bilaterals and regionals, on the assumption that only the WTO can successfully tackle the problem.

To reach an agreement in this area over the next two years may be feasible as well as desirable. The 'negotiating leverage' that the developed countries once considered they had – trading domestic support cuts for market access in emerging markets – no longer seems so valuable. Domestic support constraints are more likely in the future to impinge on developing countries. So reaching an early agreement in this area is in the self-interest of the developed countries (particularly the US and the EU).

One aspect of the domestic support agenda has now become more highly charged. The green box (of minimally trade-distorting domestic policies) was originally intended as a convenient refuge for the conversion of price supports to income supports in developed

2 The Draft Modalities call for a reduction of between 50% and 85% of price-distorting subsidies in developed countries (tiered by their present level) with caps on individual support instruments. An additional obligation, to limit the Overall Trade Distorting Support, would be agreed.

countries. So long as they conformed to the various criteria of the green box spelled out in the UR Agreement on Agriculture, the expenditures were not counted against the support limits. So the green box criteria directly affect the amber box constraints (on policies that are deemed to be trade distorting). Developing countries in the main did not notify such policies in the base year and thus are constrained to a '*de minimis*' amount of support under the Agreement. This has become an issue in the context of the Bali Ministerial, with the G33 led by India arguing for more flexibility in the green box to allow purchases on the domestic market to be put into storage without being counted as an element of price support for the domestic producers. The Bali compromise is to introduce a 'peace clause' to avoid challenges to such expenditure. But the issue has to be resolved eventually, and should by included in a two-year post-Bali agenda.

Although the food stocks issue was one of the more contentious at Bali, several aspects of the green box criteria are in need of clarification or updating. Some of these relate to the greater emphasis on developing country compliance with the criteria (not seen as a major issue in the UR). Development policies that come under the heading of 'general services' often do not fit well into the existing green box categories; correcting this has been a part of the Bali package on agriculture. But some of the green box issues relate to developments in industrial country policies. The rapid growth of policies such as crop insurance in the US (until now not compliant with the green box criteria) and domestic food aid (which is supposedly compliant) has made the revisiting of the definitions crucial to maintain the credibility of the green box rules. If these rules are applied ambiguously then the dispute settlement process may get overloaded with cases. Better to have a clear agreement on what can and cannot be included in the green box and hence be free of reduction constraints. However, it may be better to think of this issue as one for the medium term agenda, say the next four years.

Biofuels and price volatility

The DDA agenda for agriculture has been criticised for not addressing other pressing current issues. One of these is that of subsidies for biofuels. Certainly there needs to be an agreement on whether such subsidies come under the constraints of the Agriculture Agreement; at present there is no agreement on whether all the variable biofuel products themselves are 'agricultural'. But it might be as well to treat this issue along with other energy subsidies, a topic that the WTO may need to visit in the context of the interaction between climate change policies and trade.

A stronger case can be made for including in a post-Bali agenda the issue of price volatility. One aspect of this is the development of rules governing export restrictions and taxes. As indicated above, this could be a useful complement to further market opening. But it may be best to treat this as one component of the reaction of the trade system to uncertainties from climate events, financial disruptions and economic fluctuations. The first responsibility for addressing such issues is with sovereign governments, but the existence of avenues in Geneva to discuss, coordinate and alleviate the impact of such events on trade flows may be useful. In the case of agriculture, a work programme on food security could be a suitable framework for this activity. The work programme would be responsible for bringing forward suggestions for action by the 11th Ministerial Conference . The aim would be to increase the confidence of all countries in the ability of the trade system to assist governments in achieving growth and stability.

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The WTO Negotiations on Agriculture: What Next After Bali?

Melaku Geboye Desta

Introduction

The 9th WTO Ministerial Conference held in Bali, Indonesia, in December 2013 showed that the WTO is still relevant and can take decisions. This is as important as the substantive policy and legal content of its decisions. Next to the highly promising and 'long-sought' *Agreement on Trade Facilitation*, the few major breakthroughs concern agriculture: (1) an interim but open-ended peace clause to protect from legal challenge otherwise trade-distorting domestic support already in place for "traditional staple food crops in pursuance of public stockholding programmes for food security purposes"; (2) a decision to expand the list of green box domestic support measures to include development and land-use programmes as "general services" falling under paragraph 2 of Annex 2 to the Agreement on Agriculture (AoA); and (3) a decision to apply a slightly tightened version of the *Agreement on Import Licensing Procedures* to the administration of tariff rate quotas (TRQs) together with additional mechanisms to trigger "unencumbered access" obligations in the event of consistent and significant quota under-fill. The remaining two agriculture-related decisions, in the areas of export subsidies and cotton, are as much an expression of remorse for broken promises in the past as political commitments to do better in the future.

What is striking about the Bali agriculture package is that, from a strictly trade liberalisation point of view, its major achievements in the area of agricultural domestic support represent a reversal in the sense that both the new peace clause for some amber box measures and the expansion of the general services category of the green box legitimise, rather than discourage, further trade distortions. From this perspective, only

the commitment on TRQ administration can pass the trade liberalisation test. However, if these new decisions are considered from the perspective of formal or relative fairness of the rules, i.e. if they are assessed by the extent to which they level the playing field particularly between developed and developing Members of the WTO, they are likely to be seen more favourably. This is so because, until now, while all developed and a few developing countries had the legal right to provide amber box support, albeit within Member-specific limits, a substantial majority of developing countries, including China and India, were not allowed to provide such support beyond *de minimis* levels.

What next? Forge consensus around an essential minimum

Going forward, WTO Members do not have a shortage of ideas for their post-Bali work on agriculture; on the contrary, they have detailed technical proposals contained in draft modalities formulated and reformulated by a series of negotiation chairmen from Stuart Harbinson in 2003[1] to Crawford Falconer in 2008[2], General Council decisions[3] and ministerial declarations,[4] representing almost a decade's worth of work. Their challenge, far from easy, is to forge a political consensus around the essential minimum so as to take the process of agricultural reform to the next level. The body of proposals contained in the December 2008 draft of the Modalities text is still a good place to start. To this extent, my job here is easy: the post-Bali agenda for the agriculture negotiations is already in place. In this contribution, I only try to highlight what in my view should be at core of this post-Bali WTO work programme on agriculture. To do that, my starting point and guiding principle is the AoA's own long-term objective: "to establish a fair and market-oriented agricultural trading system". As the opening observations above may show and as will be further highlighted below, these two objectives – fairness and market orientation – do not always coincide.

1 TN/AG/W/1, 17 February 2003 and TN/AG/W/1/Rev.1, 18 March 2003.
2 See TN/AG/W/3 (12 July 2006); TN/AG/W/4 (1 August 2007), later revised four times: TN/AG/W/4/Rev.1 (8 February 2008), TN/AG/W/4/Rev.2 (19 May 2008), TN/AG/W/4/Rev.3 (10 July 2008) and TN/AG/W/4/Rev.4 (6 December 2008).
3 E.g. WT/L/579 (2 August 2004), often known as the July 2004 Package.
4 E.g. the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC) of 18 December 2005.

The search for a fair and market-oriented system: Regressive v progressive routes

Under the WTO rulebook, if there is a distinction between developed and developing countries in terms of their obligations, it is often one where the latter are given more policy flexibility in terms of the level of binding commitments they have to undertake, the period over which those commitments have to be implemented, possible technical and other assistance to be made available to them, and a more development-sensitive approach in dispute settlement. We find many of these privileges in agriculture as well. However, a unique feature of the AoA is that, in all the three substantive areas of market access (e.g. the special agricultural safeguard or SSG), domestic support (e.g. amber and blue box measures) and export competition (e.g. right to give scheduled subsidies on scheduled agricultural products), developed and a few high-income developing countries enjoy special and more favourable treatment over the poorest majority of the WTO membership. In trade negotiation terms, what this means is that the WTO has the option to push the fairness agenda in these areas in either of two ways: by extending a right to distort the market to all its Members (the regressive route), or by banning or at least mitigating existing market distortion rights altogether (the progressive route). The latter route is, of course, superior to the former; but as we saw earlier, at Bali, the WTO followed a mix of these two routes.

Export competition: Where fairness is to be found only in enhanced market orientation

This is one area where the solution can only be the progressive one of a complete ban and phase out. Traditionally, export subsidies have been the most contentious policy area for the trading system to handle, in the process causing enormous trade friction among the major players and tarnishing the image of the GATT/WTO system itself as one that rewards the strong and punishes the weak, because:

1. export subsidies always have only one objective: to distort the patterns of trade in favour of their recipients, which is why they were outlawed as early as 1955 for non-agricultural products; the same measures were tolerated in agriculture until 1995;
2. the new rules in 1995 explicitly allowed the richer Members to continue to subsidise their exports, albeit within certain limits, while explicitly prohibiting the poorest Members from providing such subsidies, even if money were to fall like rain for them from the heavens;
3. in any case, even if the rules had allowed them, the poorest Members of the WTO, whose export capacity is likely to be concentrated in the production of primary agricultural products, would be financially unable to subsidise their exports and compete with similar products originating in rich countries; and
4. the cumulative effect was that while the market share of some of the poorest countries with acknowledged comparative advantage in agriculture fell over time, the share of subsidising powers continued to grow.

Fortunately, over the past decade or so falling stocks of agricultural supplies and rising world market prices appear to be obviating the need for export subsidies. Reflecting this encouraging development, the Doha commitment to "comprehensive negotiations aimed at ... reductions of, with a view to phasing out, all forms of export subsidies" was translated by the July 2004 package into a firm decision to achieve "the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date"; the Hong Kong Ministerial in 2005 then put that "credible date" to be 31 December 2013. On the specific issue of cotton, this Ministerial promised that developed countries' export subsidies on cotton would be eliminated by 2006. That these deadlines have been missed by such a wide and uncertain margin is indeed to be regretted, but the prospect is less bleak than it might look at first sight, for the same reasons as above: the commercial need for export subsidies is diminishing and the WTO has come to realise that it can ill-afford to keep such a damaging anomaly in its rulebook.

As a result, I believe this has now become an area where the WTO can plausibly aim to achieve a concrete and lasting outcome by the 10th Ministerial conference along the lines contemplated in the 2008 Modalities text, which were accepted by the entire membership at the time. Accordingly, it should be within the reach of WTO Members to:

1. agree, by the end of 2015, to eliminate all export subsidies and other similar practices over a period of two years;
2. reduce their budgetary outlay commitments by 50% as envisaged in the 2008 Modalities text as a down payment by the beginning of 2016; and
3. bring those budgetary commitments down to zero by the end of 2017.

The same should apply to the other related policy instruments of export credits, export credit guarantees, insurance programmes, exporting state trading enterprises, and international food aid deliveries with elements of export subsidisation.

In sum, export competition should be the least-contentious pillar of the AoA right now because the rules are simply out of date. If WTO Members deliver on this, the result will be a fairer, more modern and more market-oriented trading system with a much enhanced legitimacy.

Domestic support: Where fairness and enhanced market orientation might not always coincide

Trade negotiators are like travellers; they start from where they are, not from where they wish to have been. In agriculture, perhaps more than in any other sector, the national domestic support policies of a country effectively dictate its foreign trade policy. In countries with the requisite resources and technical and institutional capacity, successful agricultural domestic support policies often lead to surplus production domestically, making most imports redundant and, in some cases, even necessitating resort to export subsidies in order to dispose of surplus production on the world market. The tri-colour framework of the AoA to discipline domestic support shares several features in common

with that on export subsidies, the most important being the explicit authorisation to the richer Members to use trade-distortive (amber box) measures of support while a large majority are explicitly prohibited from the use of such measures (outside *de minimis* levels). However, unlike export subsidies, there is little consensus as to whether or not they should be eliminated altogether. Indeed, unlike export subsidies, trade-distortive measures of support outside agriculture are only actionable, rather than prohibited, subsidies under the SCM Agreement. As a result, the pursuit of formal fairness can be approached not just through a complete ban of trade-distortive measures of support, a political impossibility for now, but also through the extension of the right-to-distort to those that have been denied it by the AoA. The peace clause agreed in Bali for domestic support measures intended for food security programmes in developing countries is close to, though not the same as, an authorisation to distort. The same can be said about the expanded list of general services that are now considered as totally exempt green box measures.

Until Bali, the Doha negotiations had followed an ambitious programme to reduce trade-distortive domestic support measures both in aggregate as well as at policy- and product-specific levels. However, the Bali decision to protect from legal challenge possible breaches of AoA obligations on amber box measures in pursuit of national food security objectives, or the decision to expand the list of green box measures, is unlikely to be a one-off. We have seen from experience that as countries grow richer, they also increase their budgetary expenditure for agricultural domestic support. Until amber box measures are completely prohibited for all countries, which is unlikely for a long time to come, emerging economic powers such as India are likely to continue to demand equality of treatment in this area. If it is unlikely for those Members of the WTO that have the privilege to use amber box measures today to agree to their elimination, and if more and more developing countries continue to intensify their demands for policy space in this area, the WTO may need to moderate its ambition on this issue and prepare the ground to avoid unnecessary shocks later. Indeed, we must not be surprised if the success of these two otherwise regressive initiatives inspires others to start looking to

the SCM Agreement as a model and propose the abolition of the domestic support pillar of the AoA altogether in favour of a general rule that makes all non-green agricultural domestic support measures actionable regardless of the amount of support provided to individual products or the agriculture sector at large. Domestic support might have become a fertile ground for innovation yet again, and the approach of selective and careful expansion of the green box that was followed for general services at Bali has some potential to serve as a model for the future.

In terms of a post-Bali work programme, therefore, it will be desirable and feasible if WTO Members aim, by the end of 2015, to:

1. take final decision on proposed modifications to the green box (Annex 2) measures, of which there are many as can be seen in the December 2008 draft modalities, so as to accommodate particularly developing countries' concerns;
2. clarify the fate of the blue box (currently intended to remain as a separate box but subject to tighter conditions on the amount that can be spent on it);
3. convert members' aggregate AMS commitments into product-specific ones; and
4. set firm figures by which all trade-distorting domestic support – amber, blue as well as *de minimis* – will be reduced (using the tiered formula that was first agreed in the July 2004 agriculture package) and the implementation period within which those reductions will be applied.

Finally, it is notable that while the same factors noted earlier in the context of export subsidies – falling stocks of supplies and rising prices that would reduce the need for subsidies – also apply here, the multi-purpose nature of national domestic support policies precludes a simple solution here. As a result, the twin goals of fairness and market-orientation can be pursued in a complementary fashion, but there will also be times when considerations of the former may have to override the latter.

Market access: Where enhanced market orientation is likely to lead to enhanced fairness

Agricultural market access issues have been central to Doha since its early days. Just as in other areas, the agriculture negotiations had to grapple with such traditional matters as how and by how much to reduce tariffs, whether or not to adopt some principle of tariff harmonisation, the form final tariff commitments should take (in ad valorem terms or also in others?) and the level of flexibility to be allowed developing countries. However, agriculture also presented its own unique challenges in this area: only agriculture has a special agricultural safeguard (SSG) that is available to just a few Members; tariff rate quotas (TRQs) and their administration present a particular difficulty in agriculture because only in agriculture do we have minimum and current access commitments for the implementation of which TRQs were created; the concept of special treatment of selected products (such as the rice clause contained in AoA Annex 5), which appears to have inspired new demands for special products (SP) and sensitive products in the Doha negotiations, is little known outside agriculture; and the agricultural sector suffers from an acute form of tariff escalation.

The Doha process needs to address all these and many more complex matters of agricultural market access. The proposed solution for many of these is almost predictably messy, containing both progressive and regressive elements. The ambitious proposal to apply a tiered and harmonising formula to reduce tariffs, to convert all specific and compound tariffs into their *ad valorem* equivalents, to reduce the in-quota tariffs within TRQs and to enhance their use through more effective methods of administration, and the effort to simplify tariffs can be cited as examples of a progressive agenda. On the other hand, the proposal to introduce new categories of products for special treatment (special products and sensitive products) and a new special safeguard mechanism (SSM) represent a degree of backsliding in the liberalisation process. The high tariff waters available in many poor countries means that the proposed SSM and SP mechanisms are unlikely to be of much practical use to a vast majority of them. To the extent that these developing countries are unable to make use of the built-in flexibility of their tariff

waters because of loan conditionalities from the World Bank or the IMF, closer policy coordination between the WTO and these financial institutions should be the way forward. By insisting on SSM and SP, and by agreeing as *quid pro quo* to the creation of a sensitive products category that would apply to up to 4% of tariff lines in developed countries, developing countries once again might be paying an excessive price for little actual gain, in the process contributing to a further erosion of the AoA's already weak disciplining power on every member. That the 2008 negotiations collapsed apparently because of disagreements over the SSM shows how the entire system can be taken hostage in the pursuit of such marginal issues.

In terms of a post-Bali work programme, I believe it will be desirable and feasible for WTO to aim, by the end of 2015, to:

1. remove all those eye-wateringly high, three-digit tariffs from the national schedules of some of its members, for which a decision to apply the proposed tiered formula is essential;
2. simplify the system of bound tariffs by agreeing to a comprehensive conversion of all specific and compound tariffs into *ad valorem* equivalents;
3. address the one-sided and unfair system of tariff escalation directly;
4. substantially reduce or eliminate in-quota tariffs within TRQs, expand the volume of products that can be imported within TRQs and enhance their fill-rate and if this is not achievable, consider removing TRQs altogether and pursue enhanced market access through the more traditional and transparent route of lower standard tariffs; and
5. eliminate the SSG and other forms of special treatment, which should make it easier to stop the de-liberalisation creep that it has inspired, including the proposed rules for SSM, SP and sensitive products.

Conclusion

In this chapter, I have highlighted what I believe to be some of the essential items that should be on the WTO's post-Bali agenda in its agriculture negotiations. The proposal does not aim to be exhaustive, nor even systematic; it only contains an academic observer's reaction to the Bali package on agriculture. The result of these negotiations might not always serve the Agreement on Agriculture's objective to establish a fair and market-oriented trading system in agriculture, but the effort must stay alive and must continue.

About the author

Melaku Desta joined the Leicester De Montfort Law School in September 2013 as Professor of International Economic Law. Prior to that, Melaku worked at the Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP), University of Dundee, Scotland, for over 12 years. At CEPMLP, he worked as Teaching/Research Fellow (July 2001 to June 2002), Lecturer (June 2002 to September 2004), Senior Lecturer (October 2004 to September 2007), and Reader in International Economic Law (October 2007 to August 2013). During his time in Dundee, Melaku served as programme leader for the LL.M. degrees in International Business Law and Transactions (July 2001 to August 2013) and in International Dispute Resolution and Management (September 2006 to August 2013), as Director of the overall LL.M. Programme (September 2006 to September 2008), and as Director of the PhD Programme (September 2008 to August 2013). Melaku's teaching responsibilities during this period included Fundamentals of Public International Law (induction), International Trade Law, International Arbitration, and International Dispute Settlement.

The Quest for an Efficient Instrument in Services Negotiations

Patrick Messerlin

Negotiating in services boils down to negotiating on regulations. This raises two – not one – challenges for multilateral (WTO) and preferential trade agreements (PTAs). The first is well known and occurs during the negotiation phase: it is hard to assess the level of protection (that is, the level of unjustified restrictions to business generated by a regulation) of the services at stake which exists before the negotiations. The second challenge occurs after the conclusion of an agreement, hence it is rarely mentioned though probably the more important: it is even more difficult to monitor the fulfilment of the liberalisation commitments of the trading partner. After such a conclusion, a country can change a services regulation with the best intentions, and inadvertently erodes the market access negotiated in the agreement. This situation (unknown in the case of tariffs where each country can easily monitor whether its trading partners keep their commitments) creates strong disincentives to negotiate on services when the negotiating partners are not trusted.

Both challenges raise the question of the efficiency of the instruments of negotiations on regulations. During the last 150 years, tariff negotiations have amply shown that inefficient negotiating instruments (requests and offers on tariff cuts on a product basis, tariff-rate quotas, etc.) do not necessarily bring the expected benefits from market opening and even can deliver costly – because distorted – liberalisations.

What then would be the most efficient instrument to negotiate on services regulations? Trade negotiators are amazingly vague. They often refer almost indifferently to ‘harmonisation’, ‘mutual recognition’, ‘equivalence’ or ‘regulatory convergence’. Clarification is thus needed, and it should help to spot the most efficient instrument of negotiations.

Harmonisation and mutual recognition: bad records

Most negotiators have a deep bias in favour of harmonisation. Regulatory convergence echoes this feeling: if harmonisation is not possible now, then one should hope that convergence will occur over time. However, the history of the EU Internal Market leaves little doubt that harmonisation is a non-starter. In modern economies characterised by a huge variety of services and regulations, a regulation can be better in one environment, and not in another. Comparing the regulations of various countries in a well defined service suggests often that few regulatory features have an unambiguously detrimental impact on the efficient provision of the service. This lesson casts heavy doubts on regulatory convergence. If regulations accompany the creative process of varieties, then there are no strong forces leading to regulatory convergence; regulations could converge at some periods of time, and diverge at others.

Mutual recognition (MR) means that each party accepts the regulations of its partner for the services at stake *conditionally* upon the adoption of a 'core' of common provisions ('essential requirements' in the legal jargon of the EU Internal Market). MR is thus a hybrid instrument: the 'core' is harmonised through negotiations, and only the rest of the provisions are subject to mutual recognition. As the 'core' is harmonised, the whole MR approach suffers from the limits faced by harmonisation – pressures from the firms and the negotiators for limiting the pro-competition impact of MR by negotiating constraining 'core' provisions. As a result, MR has progressively drifted to harmonisation, and faced the same limits. This evolution explains the very unsatisfactory situation of the EU Internal Market, still characterised by severe fragmentation in most services.

'Mutual equivalence': the way to go

Mutual equivalence (ME) means that each party recognises the regulations of its partner in a given service as fully equivalent to its own. To be politically acceptable, ME requires a systematic preliminary step: a joint process of 'mutual evaluation' of the

regulations at stake by the two partners. This process allows the two parties to decide whether the regulations examined will be covered by ME or not.

At a first glance, ME seems a bold move in the unknown. But it has actually been implemented by the EU 2006 Services Directive – the only EU Directive to cover such a very wide range of services, from logistics, to hotels, to retail, and so on.

The mutual evaluation first step has a crucial feature. It requires the involvement of the partner's regulating bodies in the negotiating process, suggesting some interesting division of labour between trade negotiators and services regulators. Trade negotiators agree on broad areas of goods and services they consider as promising candidates for the MR approach in the agreement under negotiation. Regulators in charge of these services then undertake the mutual evaluation process. They examine the partner's regulations, ask for clarifications and possibly changes as pre-requisites for granting the ME status, define exceptions (if any) for some sub-sectors of the services examined and, lastly, request reviews to be done for eliminating the exceptions in future negotiations.

Such a process offers a unique opportunity to build, restore or improve trust among the signatories. In this respect, it offers the appropriate answer to the strong disincentives, evoked in the introduction, generated by the absence of trust among negotiating partners.

Mutual equivalence and world welfare

ME is not only the best instrument for the negotiating partners, it is also the most promising instrument for the third countries which will not be part of the emerging mega-PTAs for the following reason. The large signatories (the US, the EU, Japan, China) of such mega-PTAs will be induced to make their regulations appealing to third-country providers. In order to get better access to these mega-PTAs, third countries will be induced to adopt the regulations of the large signatory capable of designing the least costly regulations while keeping the equivalence status with its mega-PTA partner(s).

In other words, ME gives the best definition of what should be 'norm-setters', a term often used in the context of the Transatlantic Trade and Investment Agreement (TTIP). Far from mirroring a duopoly of shrinking (in relative terms) economies trying to impose their regulations on the rest of the world (as often seems the case in the current TTIP context), ME creates competition among large economies to achieve the best regulations while not endangering the regulatory equivalence agreed among them.

By the same token, ME blurs the frontier between multilateral and bilateral negotiations by creating permanent incentives among PTA members (particularly the large members of the mega-PTAs) to give a 'multilateral' dimension to their domestic regulations. ME thus creates positive interactions between PTAs (which benefit from the higher trust among their members, but could generate costly trade diversion) and the WTO (which generates low trade diversion, but is constrained by a lower level of initial trust among all its Members).

A work programme for the WTO

The WTO could develop a work programme drawn from the few experiences of implementing mutual equivalence in services in order to better understand how this instrument could work at the multilateral level. A working WTO group could start by examining two key Articles of the EU Services Directive in order to adjust them to the multilateral or plurilateral services negotiations in the WTO forum.

- Article 14 of the EU Directive lists provisions that represent indisputable barriers to market access (nationality clause, obligation to have an establishment in more than one location, etc.). The WTO would probably endorse this list with few changes, and simply add barriers still existing in developing countries but no longer present in the EU countries when the Directive was drafted.
- Article 15 draws the list of the provisions that should be mutually evaluated (quantitative or territorial restrictions, requirements on shareholding, etc.) because they have the potential to restrict market access and therefore need to be clarified or

amended before concluding the targeted mutual equivalence agreement. Most of the debates in the WTO will focus on this list.

WTO discussions on Article 15 have a 'systemic' merit. They will give the right perspective on liberalisation and its dynamics by underlining that it is not so much liberalisation that counts (an exchange of concessions in a narrow mercantilist approach) but the dynamics of 'better regulations' that should go with it. In short, Article 15 takes a trade agreement – be it multilateral or preferential – for what it should be: an opportunity for each signatory to improve its domestic regulations.

A last crucial point: all that has been said on mutual equivalence in services is valid when negotiating on technical norms in goods, since norms are defined by regulations. In goods, as in services, harmonisation is very rarely an efficient solution, and mutual recognition an unstable and disappointing hybrid. Showing how mutual equivalence is the most promising instrument could be the task of the WTO working group on technical barriers to trade.

About the author

Patrick A. Messerlin is Professor of Economics at the Institut d' Etudes Politiques de Paris, known as Sciences Po and the director of the Groupe d'Economie Mondiale de Sciences Po (GEM) since its creation in 1997.

He has specialised in international trade and trade policy. His current research deals with (i) WTO issues; (ii) liberalisation in services (with a special interest for the audiovisual and distribution sectors) and the associated regulatory reforms; and (iii) EC commercial policy.

In 2001, he was appointed special advisor to Mike Moore, then WTO Director General. He also serves as a member of the Preparatory Conference to the G7-G8 Summits (a group of independent persons gathered by the Institute for International Economics and the Tokyo Foundation), of the Advisory Committees on competition issues and on

services (both at the French Ministry of Economics) and of the Steering Committee of the European Trade Study Group (an academic group). After having been a visiting professor at the University of Houston (Texas) and at Simon Fraser University (British Columbia), he has been, from 1986 to 1990, a Senior Economist at the Research Department of the World Bank, and since then, a consultant to various international organisations, governments and firms.

Unleashing Recognition in International Trade

Joel P. Trachtman

The tariff reduction enterprise that has driven the GATT/WTO system since 1947 has run out of steam. Most of the low hanging fruit has been harvested, and tariffs among developed countries on manufactured products are generally quite low. During the tariff reduction period, multilateral disciplines on non-tariff barriers were largely intended to limit defection from tariff-reduction commitments. Therefore, discriminatory measures, and measures that failed tests of necessity or a requirement to be founded on a scientific basis, are prohibited. These prohibitions have generally not imposed extensive discipline on national measures that have a plausible non-protectionist rationale, although there are some arguable exceptions. In the field of services, there are no tariff barriers. Therefore, the greatest share of future gains from liberalisation in manufactured goods and services trade are likely to come from reduction in barriers resulting from measures that have a plausible non-protectionist rationale.

In addition, since 1947, much has changed in international trade. Changes in technology, including transportation technology, and the globalisation that itself was promoted by the GATT/WTO system have resulted in greater specialisation and more complex supply chains, as well as greater homogenisation of consumer demand. These longer supply chains and homogenisation of demand make it more attractive to have homogeneous products across markets, and not to differentiate production due to different regulatory requirements.

The most ambitious regional integration projects today recognise these changes, and seek to provide for greater regulatory integration. This can be seen most vividly in the proposals for the Trans-Atlantic Trade and Investment Partnership (TTIP), where the lion's share of welfare gains will come from reducing non-tariff barriers. In order

to realise these gains, the US and EU will have to engage in increased adjudicative determination of equivalence, or legislative or administrative rules for recognition or harmonisation of regulatory standards for goods and services.

To the extent that the US and EU are successful in harmonisation, the standards they set will establish a focal point that many producers will wish to achieve, and many other countries will find it convenient to adopt these standards. This would be a powerful 'California effect', causing manufacturers to seek to homogenise their production according to the US-EU standard. Because of the attraction of any US-EU harmonised standard, foreign producers and even foreign governments and consumers will wish to have some input on the content of these standards. They may seek arrangements by which they can have formal representation in the establishment of these standards.

Of course, since 1957, the relatively economically and culturally homogenous states of the EU have shown that it is possible, through a gradual process, to establish judicial and legislative mechanisms that can reduce the costs of non-protectionist barriers to trade. This process included rules against discrimination, judicial application of proportionality requirements to domestic regulation, and judicial determinations of equivalence of exporting state regulation to address the regulatory concerns of importing states. On the other hand, it included positive integration in the form of rules of harmonisation and recognition, combined under the formula of essential harmonisation and mutual recognition. This process has gone a long way towards reducing regulatory barriers to trade in goods and services, even while the EU has engaged in substantial expansion to include more heterogeneous states.

Can this type of process be initiated on a multilateral level at the WTO? Of course any initiative will begin with modesty, and there are even better reasons for regulatory diversity in the multilateral context than in the EU context. However, the TTIP proposal, along with the Trans-Pacific Partnership and other preferential trade agreements that are proposed to include significant reduction of regulatory barriers, show that there are significant potential welfare gains that may result from this type of process. There

will indeed be costs of doing so as well, including costs of transition to new regulatory standards and costs of compromise from the regulatory standard that would otherwise be optimal under autarky. The benefits and costs can only be evaluated by each state acting in its own interests in connection with a process of negotiation.

But at times, states decide to accept legislative and adjudicative tools to make decisions in this type of area – rather than negotiating each context separately, they agree on majority voting rules or empower adjudicators according to specified standards – in order to facilitate equivalence, recognition, or harmonisation.

Building blocks like the TTIP might be a somewhat easier path towards reducing regulatory barriers. However, the most-favoured nation (MFN) rule in existing WTO law does not seem to permit rules of recognition that would benefit only parties to preferential trade agreements, and it is not clear that these measures would be exempted under the regional exception contained in Article XXIV of GATT. (Yes, there is a plausible argument that this component of the EU Single Market project are illegal under WTO law.) So, for preferential trade agreements to serve as building blocks in this area, some revisions, or definitive interpretations, of existing WTO law would be necessary.

But even more importantly, it may be suitable in some areas to move directly to deeper multilateral integration of regulatory standards relating to goods and services, and the WTO today lacks an appropriate institutional structure to facilitate such integration. What would it take to do so?

First, it would be possible for Member States to encourage WTO panels and the Appellate Body to apply the necessity requirements in the Agreement on Technical Barriers to Trade and in the Agreement on Sanitary and Phytosanitary Measures, so as to include a rule of equivalence. That is, it should be understood that a national measure is more trade restrictive than necessary if it requires a change in a foreign product or service where the foreign regulation already achieves the desired regulatory goal satisfactorily. No formal change in WTO law would be required in these areas.

However, the General Agreement on Trade in Services lacks a broadly applicable necessity discipline, so in that area, action by the Council for Trade in Services under Article VI(4) of GATS may establish appropriate rules to form a basis for equivalence. Alternatively, a treaty amendment could institute a rule of equivalence.

Second, in the field of trade in goods, multilateral rules of recognition in the area of goods regulation could be established either by consensus among Member States, or by sub-multilateral groups of Member States. These would probably not violate the MFN obligation, so long as goods that fail to meet the recognised standards are not considered for that reason to be treated less favourably (in the words of Article I of GATT, denied an advantage) compared to goods that meet those standards. The distinction cannot be origin-based, but must be based on substantive regulatory concerns. The Appellate Body has recently found in the context of the TBT Agreement that a national measure does not treat imported products less favourably if the detrimental impact on imports 'stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products'. In the field of trade in services, there is already a specific facility for recognition provided in Article VII of GATS. In the case of both goods and services, recognition arrangements may be permitted, even on a sub-multilateral basis, so long as they do not artificially exclude any WTO Member States.

Third, there is nothing in WTO law that restricts the ability of groups of Member States to harmonise their goods or services regulation. So a project to reduce regulatory barriers to trade may proceed at once. However, Member States in fear of being left out of the process of harmonisation that could create a standard they would *de facto* be required to follow may wish to establish a multilateral majority voting, or weighted majority voting, arrangement within the WTO in order to attract leading states to take account of their concerns in establishing a harmonised standard. Poor states may especially seek to have their views taken into account in establishing harmonised standards. Indeed, once harmonised standards are established, poor states would wish to have a facility by

which to provide them with technical assistance in meeting these newly harmonised goods and services standards.

The next frontier of trade barrier reduction involves greater attention to regulatory barriers. While regional integration agreements will increasingly seek to address regulatory barriers, more can be done in the multilateral system to address these barriers with greater efficiency and greater participation of affected states. A multilateral rule of equivalence can be applied under existing WTO law in connection with goods, but a formal WTO decision would be required to do so in connection with services. The experience of the EU shows that judicial enforcement of a rule of equivalence can provide incentives for states to agree on a standard of harmonisation pursuant to which exporting state regulation would be recognised as satisfactory by the importing state. Multilateral agreement on harmonised regulatory standards for goods and services could be accelerated through a majority voting system, perhaps applied first on a sectoral basis, and perhaps including special opt-outs for areas of special national concern. Special facilities may be appropriate to provide technical assistance to developing countries in participating in harmonisation, and in achieving equivalence or satisfying the requirements for recognition.

Thus, over a two-year horizon until the 10th Ministerial Conference, Member States could agree on a broad decision, pursuant to Article VI(4) of GATS, to apply disciplines to national services regulation to ensure that they are not more burdensome than is necessary to achieve the relevant regulatory goal. This necessity discipline would include equivalence. It would then be for individual Member States to identify and bring dispute settlement cases, both under the TBT and SPS Agreements related to trade in goods, and under this proposed GATS decision, seeking to ensure that goods and services that are regulated adequately by the exporting state (equivalently in terms of meeting importing state regulatory goals) are not subject to unnecessary importing state regulation.

Over a four-year horizon, that is in the run up to 11th Ministerial Conference, Member States could agree on specific sectors in which they would engage in majority voting with respect to harmonisation of regulation for goods and services. This agreement would include provisions for opt-outs where important national concerns are implicated, as well as technical assistance to ensure full participation of developing countries. Perhaps as a complementary arrangement, Member States could also agree to interpret Article I:1 of GATT and the MFN provisions of the TBT Agreement and SPS Agreement to clarify authorisation for 'open' recognition agreements relating to goods, similar to the permission contained in Article VII of GATS, in sectors not covered by their agreement for majority voting on harmonisation.

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A Plurilateral Agreement on Local Content Requirements

Gary Hufbauer, Jeffrey Schott and **Cathleen Cimino**[1]

Introduction

The proliferation of non-tariff barriers (NTBs) remains a significant challenge to the multilateral trading system. 'Micro-protection' reached new heights compared to just five years ago, as countries turned towards politically expedient measures to counter their sluggish economies and high unemployment. The latest Global Trade Alert report estimates that since the Great Recession nearly 2,500 discriminatory measures have been implemented worldwide; the majority of them behind-the-border NTBs (Evenett 2013, p. 61).

Among such policies, local content requirements (LCRs) and kindred performance requirements, while not new, have grown in popularity. Job creation and the infant industry argument rank as the top rationales for imposing LCRs. By their design, LCRs ensure preferences for domestic suppliers of goods and services. These preferences come with economic efficiency costs in the form of higher prices, poorer quality, and project delays. But the protective effects are uncertain, especially when LCRs take the form of quantitative restrictions or discretionary guidelines imposed on foreign firms.[2] Forced localisation can disrupt global supply chains and deter foreign direct investment. Empirical studies are mixed as to whether LCRs sometimes fulfill the tenets of the infant industry argument by creating industries that can compete in world markets.[3]

1 Views expressed are the authors' own.
2 For an overview, see Chapter 1 "Introduction: The LCR Phenomenon," in Hufbauer et al. (2013).
3 For example, see Moran (1998); WTO and UNCTAD (2002).

According to our broad survey (Hufbauer et al. 2013), 117 LCR measures have been proposed or implemented since 2008 by about 30 countries. Both developed and developing economies have imposed LCRs and across nearly all industries, with direct impacts on trade flows, services, investment and procurement. Based on our estimates, these practices in aggregate may have reduced global trade by about $93 billion annually.[4]

This LCR phenomenon has garnered attention. The Asia-Pacific Economic Cooperation forum (APEC) and the United Nations Conference on Trade and Development (UNCTAD), among others, are seeking new solutions to the proliferation of LCRs. Mega-regional pacts, like the Transatlantic Trade and Investment Partnership (TTIP), are considering the inclusion of localisation disciplines within their negotiations.

An initiative by the WTO to address LCRs would offer the highest payoff. While many LCRs are inconsistent with the multilateral rules inscribed in several WTO agreements, important gaps in the current rulebook, along with weak surveillance and enforcement mechanisms, have allowed LCR practices to flourish. We first summarise several policy alternatives to LCRs, as outlined in Hufbauer et al. (2013). We then propose strengthened LCR disciplines that could take shape as a plurilateral agreement inside the WTO framework. Such an effort would set a precedent for enhanced obligations on NTBs, a longstanding objective of the WTO.

Policy alternatives to LCRs

Several policies are available to governments that can stimulate economic growth and create jobs, without the distortive impact of LCRs. Alternatives include:

- Promoting a business-friendly climate, such as lowered tax rates and anti-corruption measures, to stimulate investment over the long term.

4 For detail on methodology, see Chapter 3 "Survey and Case Studies," in Hufbauer et al. (2013).

- Developing corporate social responsibility guidelines that encourage multinational firms to do business with local suppliers, without crossing into 'forced localisation'.
- Expanding training programmes to build on the demonstrated linkage between training and higher labour force participation rates.
- Improving logistics, such as border administration and transportation infrastructure, to cut trade transaction costs and boost competitiveness.
- Expanding investment opportunities for the private sector in infrastructure projects, potentially financed by user fees.

If countries pursued these alternatives, they would, in and of themselves, provide a self-enforcing norm against LCRs. But in practice, governments often find that 'beggar-thy-neighbour' policies are easier to implement. In that event, we recommend 'second-best' protectionist policies, rather than Nth best. Second-best policies have the virtue of greater transparency and calculable costs, compared to the more opaque LCRs, and generally adhere to WTO obligations. First, if governments are determined to use LCRs, they should apply classic price preferences on designated projects or products (e.g. a 25% bid preference) rather than impose quantitative restrictions or discretionary guidelines. Second, governments determined to support infant industries should use domestic subsidies on a temporary basis rather than LCRs. Domestic subsidies violate WTO obligations only when they cause 'adverse effects' to another WTO Member, and in practice, this threshold is seldom reached. Lastly, governments that choose to protect preferred industries for an indefinite time should impose higher tariffs rather than LCRs. Many developing countries maintain ample space between their applied tariff and bound tariff levels and thus can raise tariff rates without violating WTO obligations. Those that do not have room to raise their applied tariffs should simply choose to breach their bound tariff rates and pay compensation to their trading partners, in the form of lower tariffs on other products.

New disciplines on LCRs

Various WTO rules limit the use of LCRs, but have gaps in their coverage. A few of the important gaps are summarised here.

WTO rules have proven most effective when LCRs violate the GATT obligation of national treatment (Article III). However, government procurement is excluded from coverage under Article III, and many LCRs are linked to procurement. Some 42 WTO Members have acceded to the Government Procurement Agreement (GPA) which, by design, extends the national treatment principle to covered agencies. However, numerous exceptions are attached to national GPA schedules, and the coverage of sub-federal agencies is limited, leaving ample space for the continued use of LCRs in public procurement. Given the widespread practice of conditioning public procurement on LCRs, WTO Members should continue their efforts to enlarge the GPA in order to expand entity coverage and country participation, thereby reducing the scope for LCRs.[5]

The Agreement on Trade-Related Investment Measures (TRIMs) prohibits certain types of LCRs in the form of performance requirements, but only when coupled with investment incentives attached to manufacturing sectors, leaving service sectors as targets for discretionary LCRs. Among other gaps, new forms of LCRs related to technology and data currently do not fall under TRIMs disciplines.

Last, the Agreement on Subsidies and Countervailing Measures (ASCM) prohibits subsidies that are contingent on the use of domestic goods over imports. But a financial contribution coupled with an LCR must be proven to provide a benefit to qualify as a subsidy within the meaning of the agreement. The benefit test, as the Canada wind turbine case illustrated, can be clouded by confusing factual circumstances. In that

5 The WTO estimates that the revised GPA, currently under negotiation, could expand market access coverage to as much as $100 billion dollars of procurement annually. See "Historic deal reached on government procurement," 2011 WTO news items, December 15, 2011. http://www.wto.org/english/news_e/news11_e/gpro_15dec11_e.htm (accessed on November 12, 2013).

case, the confusion arose because it was not proven that the gain arising from the wind turbine subsidy was any greater than the gain that the wind turbine firms might have received from an alternative scheme.

Of equal importance is the weak enforcement of current rules. The cumulative number of LCR cases, by our count, significantly outnumber the cases subject to the resolution procedures of the WTO Dispute Settlement Body (DSB), by 117 to 3. One reason is that it can be both politically and financially costly to pursue a case in the WTO. Another reason relates to the 'glass house' syndrome: countries hesitate to draw attention to foreign abuses in order to shield their own domestic policies from scrutiny. Finally, many governments do not publish their performance requirements and other LCR measures, in disregard of WTO transparency obligations, which makes it more difficult to launch a complaint.

New disciplines on LCRs should be crafted to address these deficiencies. A plurilateral agreement within the WTO framework would ensure that obligations of a new LCR code apply only to signatories and that disputes would be subject to resolution procedures of the DSB. Such disciplines could feasibly be applied to new LCR practices, while allowing for 'non-conforming measures' to be scheduled on a positive list subject to periodic review. New disciplines could foremost narrow important gaps within the language of the GPA, TRIMs, and the ASCM.[6] Specific provisions could include the following:

- Projects administered by sub-federal governments and materially financed by the federal government should be subject to GPA obligations.
- Obligations under the TRIMs Agreement not to impose performance requirements as a condition of investment should also apply to services.

6 For more detail on proposed new disciplines, see Cimino et al. (forthcoming).

- Financial contributions, as defined in the ASCM, if attached to LCRs, should be considered 'actionable' when they inflict adverse effects on another member, regardless of whether they confer a benefit on domestic firms.

New rules should also be supplemented by surveillance and enforcement mechanisms that promote enhanced transparency obligations and real-time monitoring of LCR practices. Specific provisions could include:

- Timely, semi-annual reports of all new and existing LCRs imposed by all federal and sub-federal government agencies of member countries.
- A new body created to monitor national LCR practices.
- Notification requirements for new LCRs, with recourse to reverse notification procedures and penalties for non-compliance.
- Expedited consultation period for dispute resolution.

Concluding remarks

Moving forward, the future WTO agenda will likely centre on the successful conclusion of plurilateral negotiations. This pathway should encompass new LCR disciplines. WTO inaction very likely ensures the continued proliferation of LCRs. Absent a WTO initiative, enhanced LCR obligations will become the province of bilateral FTAs and mega-regional trade agreements, leaving many countries on the sidelines. A new LCR code would not only limit the proliferation of LCRs, but would also set an important precedent for enhanced obligations on NTBs, a longstanding objective of the WTO.

Over the next few years, the WTO programme will likely focus on implementing the Bali package and on sealing major plurilateral deals, exemplified by the expanded International Technology Agreement (ITA) and Trade in Services Agreement (TISA). Like TISA, the LCR agreement should build on the conditional MFN principle. Talks can start in 2014 among interested parties, and the accession procedures should enable a widening circle of WTO Members to join the negotiations.

The new code would, of course, complement the enlarged GPA which is expected to enter into force in 2014. But the LCR code would reach practices that are not covered by the GPA, in particular the gaps we have noted in the ASCM and TRIMs. Ideally the WTO agreement should be launched by 2016, reinforcing whatever LCR disciplines are declared by the mega-regional agreements – TPP, TTIP, and RCEP.

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Exchange Rates: Alien to the WTO?

Hector Rogelio Torres[1]

Since 2008 the US Federal Reserve (Fed) has printed approximately 3 trillion US dollars and it is still pumping in $85 billion every month. It uses them to purchase long-term US government bonds and mortgages so as to keep long-term interest rates down, as part of so-called 'quantitative easing' (QE). The Fed is not alone in this. Japan's central bank is acting similarly and other reserve-issuing countries have also indulged in QE. The Fed is not trying to weaken the US dollar (though I cannot be as sure in Japan's case), but rather is trying to boost domestic growth and job-creation. Nevertheless, this extraordinary liquidity may compound financial volatility.

Earlier this year we saw a hint of what this could mean for exchange rates. In late May the Fed gave some 'forward guidance' to markets by announcing that, if certain conditions were met, it could start slowing-down ('tapering') and eventually ceasing the creation of new money. The subsequent reverberations in emerging market economies (EMEs) were strong and many experienced steep currency devaluations. The expected 'tapering' was then delayed and in September markets went into reverse, appreciating EMEs' currencies to the dollar. When tapering actually happens, exchange rates could experience severe volatility. Whereas the industry is normally happy with a weak currency, sharp swings in exchange rates are less welcome. Financial traders may make good money but those producing tradable goods or services will feel that the ground is shaking. Some EMEs have been preparing themselves by building up additional reserves (hence using resources to buy dollars, rather than importing goods and services). But, given the unprecedented amount of liquidity created, reserves

1 I wish to thank Professor Richard Baldwin and Michele Ruta for their comments. Any errors are my exclusive responsibility. Opinions are strictly personal and should not be interpreted as reflecting the views of neither the IMF nor the WTO.

may not be enough to contain volatility and governments could experience calls for 'protection' and accusations of 'currency manipulation' (by trading partners).

Exchange rate volatility and trade could be quite a hot topic in the coming years and the rather legalistic discussion of whether WTO rules are prepared or not to deal with exchange rates could be overtaken by events. Should trade ministers bring the subject to the WTO, or should they rather wait for their colleagues at finance ministries to do 'something' at the IMF? In my view the question is moot. The problems raised by compounded exchange rate volatility could be too big to ignore and trade ministers will somehow feel (and rightly so) that the WTO should play a bigger role in promoting policy coherence and concerted action. So the real question is: Who should do what?

Exchange rates are the Fund's bread and butter. Yet the IMF has never found a country 'manipulating' its currency 'to gain an unfair competitive advantage over other members', which represents a breach of a IMF member's statutory obligations. So trade ministers should not expect the IMF to enforce disciplines on exchange rates.

The IMF is, nevertheless, concerned with the negative spillover effects of QE and it has recently accepted that imposing capital restrictions may be necessary to contain financial volatility (exchange rates included). Legally speaking, IMF members were always free to restrict financial capital movements. The Fund only bans one kind of capital restrictions – those imposed on capital transfers that are for the purpose of settling current transactions (as those resulting from trade in goods and services).

However, until very recently capital flow management measures (CFMs) were stigmatised. The massive liquidity creation (and the consequent serious risk of financial volatility) moved the Fund to acknowledge that capital restrictions were 'respectable' policy tools, albeit of a 'temporary' and 'last resort' nature. The IMF is still keen to over-emphasise the benefits of financial flows and recommends flexible exchange rates as the best protection from the negative spillover effects of ultra-loose monetary policies (in the US and elsewhere). Still, the severity of the challenge is undeniable and the Fund is closely monitoring its potential consequences on trade. An 'external sector unit' has

recently been created (in its mighty Strategy, Policy and Review department) to unify the analysis, review, and policy development of the 'external sector', encompassing exchange rates, capital flows, and trade. This is in sharp contrast with the WTO that, just before the crisis (2008), decided to dismantle its Trade and Finance Department.

In Geneva many believe that the WTO should keep exchange rates at bay. I, for one, think that WTO rules are unprepared to discipline the subtle ways in which governments can intervene to repress appreciation or to devalue a currency. It would be very difficult to prove that a trading partner, by loosening its monetary policies or building up its foreign reserves, is 'frustrating' the 'intent' of WTO provisions (Article XV.4 of GATT1994) or providing a subsidy that is prohibited or actionable in the terms of the Agreement on Subsidies and Countervailing Measures. However, this does not mean that the WTO should just brush-off the problem on the assumption that the IMF is better prepared for it.

Conventional wisdom indicates that weakening a currency (or repressing appreciation) is tantamount to cutting wages and making domestic products more competitive. However, the effects of devaluations are less clear for 'task-exporting' countries, where the value added to exports is a fraction of the cost of imported inputs. In such cases, devaluing the domestic currency would cheapen the fraction of domestic production costs, but raise prices of intermediate inputs processed and integrated in exports.

The IMF has recently published a seminal study[2] finding that the increased influence of global value (added) chains (GVCs) on international trade warrants changing the way it calculates national competitiveness (in technical terms, their real effective exchange rates). Currently trade flows (one of the components for the calculation) are measured in gross terms, on the assumption that countries mostly trade final products produced on the basis of domestic inputs. This assumption is not valid in countries whose exports are part of global chains of production.

2 *Trade Interconnectedness:-The World with Global Value Chains*, August 28, 2013.

However the importance of GVCs should not be exaggerated. According to IMF estimates and projections,[3] international trade is not growing faster than world output (in 2013 both are at the snail's pace of 2.9%) and in 2012 world output growth outpaced trade growth by a significant margin (3.2% vs. 2.7%). This is suggesting that the importance of GVCs may not be so large and that governments may still gain a competitive advantage by weakening their currencies.

Some reasons could tentatively explain why trade growth is not outpacing output growth and, therefore, why the 'benefit' of devaluing a currency (or repressing its appreciation) may still outweigh the damage it could cause to producers integrated into GVCs. Wage differentials between advanced and emerging economies are narrowing and, on top, many advanced economies are actively fighting production outsourcing; both of which could be at the very least holding back the growth of GVCs.

It is difficult to pinpoint a cause explaining why, despite GVCs, trade is not growing faster than output. Moreover, trade in some manufactured products may still be growing faster than the share of manufacturing in GDP, but this could be happening only in countries really involved in GVCs, where informal protectionism and red tape is at bay. In any event it is quite apparent that governments continue to assume that an artificially weakened currency provides an unfair competitive advantage to the 'manipulator'.

Is the WTO the place to monitor exchange rates? The answer is both yes and no.

As noted above, WTO rules were not designed to detect purported exchange rate 'manipulation'. However, the recent global economic crisis has underscored the need to match economic interdependence with enhanced coherence in global economic policy-making. The WTO offers a unique forum for multilateral policy dialogue and information sharing. As such, the WTO could facilitate concerted action and international cooperation to limit the trade consequences of exchange rate volatility.

3 *World Economic Outlook*, October 2013.

This is well within the WTO's remit,[4] and the periodic multilateral monitoring of trade measures (initiated in October 2008) has been a positive contribution.

However, the WTO's radar mostly misses monetary policies with potentially important trade implications. The time between the Bali Ministerial and the next should be used to rethink and re-launch the WTO's cooperation with the IMF. For instance, the WTO could team up with the Fund to prepare an external sector report (covering trade, financial, monetary and exchange rate policies). Such a report could feed into the WTO's multilateral TPR monitoring.

The WTO could also help integrate trade into the G20's Mutual Assessment Process (MAP). The G20 leaders pledged to work together in a MAP; they periodically identify economic objectives and the policies they will be implementing to reach those objectives. This makes governments mutually more accountable. However, the MAP does *not* include trade policies. G20 members could be invited to lay down the trade policies that they will be using to achieve the economic objectives identified in the MAP. The WTO (as the IMF does) could assist G20 members to periodically assess progress in meeting the aforementioned objectives.[5] Mainstreaming trade into the MAP would expose potential inconsistencies between economic objectives and trade policies, therefore deterring G20 countries from slippage into protectionism. Adding a trade chapter to the aforementioned MAP would also enrich the understanding of the causes and consequences of exchange rate movements, including policy-related determinants, and taking such a step would reinforce multilateral monitoring by the WTO.

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4 Article III.5 of the Marrakesh Agreement Establishing the WTO.

5 At the request of the G20, the IMF provides technical analysis to evaluate key imbalances and how members' policies fit together—and whether, collectively, they can achieve the G20's goals. The WTO could do the same.

Trade and Climate Change – Establishing Coherence

Laura Nielsen

Coherent policy choices

Climate change and trade is not a new topic on the policy agenda, but it may be time to add the missing component – *coherence.*

It seems contradictory to support and perhaps even advocate green trade liberalisation whilst at the same time refraining from unilaterally liberalising trade on a chosen group of products – if this is thought to be so desirable, why should it not be accomplished free from any mercantilist considerations? It seems equally contradictory to seek liberalising green trade whilst at the same time reserving the right to impose antidumping or countervailing duties, and perhaps even imposing such or seeking to impose such on, for example, solar panels.

If one accepts the idea that green trade liberalisation is desirable, this must be based on the premise that lowering prices on these goods can assist the world in scaling up renewable energy technologies. If one accepts that premise, it seems even more desirable if a government is so 'generous' as to subsidise and hence further lower prices on products. Accepting that premise also means refraining from engaging in mercantilist considerations of ensuring that one's own country obtains the economic rewards from the green industry that particular country excels in or wishes to excel in. It is precisely those types of arguments that can explain why unilateral trade liberalisation is *not* occurring and why it seems so pressing to impose antidumping and/or countervailing duties on green goods.

However, to give a more balanced and more politically digestible view for governments, the realistic coherent policy goal is probably this: there should be an agreement on a list of green products on which governments liberalise trade simultaneously, whilst at the same time allowing some government intervention in promoting green industries – in a type of green light subsidy with clearly defined limits that should not be actionable or subject to countervailing duties. Antidumping may be more difficult to tackle due to the involvement of private actors, but it would certainly be beneficial if governments refrained from imposing antidumping duties on the scale of which it is presently occurring.

Green trade liberalisation

After the advent of the APEC list of green products, it seems realistic that an agreement on green, climate friendly or sustainable energy generating products would be possible to reach at the WTO. Whether this negotiation should begin with the already politically agreed-upon APEC list and seek to expand the list and aim at further lowering tariffs, *or* follow the SETA/SETI format, *or* even resurrect the failed efforts of the green trade liberalisation from the Doha Round, albeit with a new and different mandate, is a political decision only the WTO Members can make. However, with the APEC list as a starting point, the pragmatic point of view is probably that many WTO Members at present live up to the 5% target and this starting point would make it relatively easy for those to accede to such an agreement. From this starting point, the negotiations could aim at broadening the list and further lowering the tariffs. What matters is that a list of products which the WTO Members can agree upon is embedded into a full-fledged WTO Agreement or alternatively a plurilateral WTO Agreement allowing some Members to proceed while others choose not to. The different manners in which this can be designed in and outside the WTO system have already been succinctly described in ICTSD publications.[1]

1 See ICTSD list of publications concerning SETA/SETI at http://ictsd.org/programmes/climate-change/a-sustainable-energy-trade-initiative/research-analysis/

Subsidies on green technologies

The so-called 'green light' subsidy in the SCM Agreement could be reinstated and amended so it covers only subsidies granted to support renewable energy generating equipment or green technologies – or perhaps covering the identical list on which WTO Members have decided to liberalise trade. It would naturally have to include a limit on the magnitude of the subsidy so that the prices would not get overly distorted, but some minimal subsidisation could be allowed. The subsidies should of course not be linked to WTO-inconsistent local content measures or import substituting measures – so the subsidies to, for example, feed-in tariffs would *not* be actionable provided they were granted equally to green technologies irrespectively of where they are produced.

While this type of negotiation at the outset seems more politically sensitive and perhaps even an impediment to establishing a green trade liberalisation plurilateral in the WTO, it nevertheless seems important that the policymakers consider it a necessity in the long run. It could, for example, function so that it becomes active upon the ratification of the green trade liberalisation plurilateral from 50 WTO Members – recalling that plurilateral rules on subsidies are not realistically going to function, although a 'gentlemen's agreement' on *not* pursuing CVD actions to subsidies of a low magnitude may be the interim solution preventing the worst types of problems. This 'gentlemen's agreement' may even be extended to ADD.

Fossil fuels

In the ideal world, a comprehensive agreement such as the SETA should be reached. This agreement would also address the issue of fossil fuel subsidies, which contribute greatly to blocking the scaling up of renewable energy technologies. Currently, the Global Subsidies Initiative by IISD estimates that around US$600 billion a year are granted as subsidies to fossil fuels.[2] This is estimated to be three times the amount

2 See The Global Subsidies Initiative at http://www.iisd.org/gsi/fossil-fuel-subsidies/fossil-fuels-what-cost

granted to green technologies.[3] The removal of subsidies is estimated by OECD to result in a 10% lowering of greenhouse gasses by 2050.[4]

While the issue was discussed at a side event at COP19, it is not necessarily a topic best suited to the UNFCCC process.[5] It could perhaps more optimally fit the WTO-agenda where the experience with enhancing transparency of and 'locking in' the agricultural subsidies at a certain level, with a gradual reduction plan, proved very successful in the Agreement on Agriculture. Using either the export subsidies or domestic subsidies model of 'locking in' and gradually reducing the subsidies would be a strong starting point for such negotiations. This would not remove such negotiations from the UNFCCC, but it could be strong starting point for any further reform at the UNFCCC process.

Suggested Work Programme for the WTO

During 2014-15 commence negotiations on green trade liberalisation, including:

- Decide on the starting point – the APEC list and 5% tariffs? Moving on to goals of 2% and duty free treatment by 2018? 2020?
- Design a plurilateral agreement in the WTO and start discussing embedding a green light subsidy to become active in the SCM Agreement upon, for example, 50 ratifications. If it proves impossible, then adjust the amount governments are allowed to subsidise to a minimum, with perhaps a built-in re-negotiation deadline two years after it enters into force to take stock of the associated effects.

3 See The World Economic Forum at http://www3.weforum.org/docs/GAC/2013/WEF_GAC_GovernanceSustainability_GreenLight_October_Report_2013.pdf
4 See The OECD at http://www.oecd.org/env/45575666.pdf
5 See The Global Subsidies Initiative at http://www.iisd.org/gsi/news/cop19-side-event-fossil-fuel-subsidies-and-climate-change

- Discuss the opportunities for a 'gentlemen's agreement' on exercising self-restraint in imposing new CVDs and ADDs – perhaps agreeing on consultations with the aim of finding political solutions for the cases actively pending or potentially pending in the near future.

During 2015-16 continue negotiations on green trade liberalisation, including:

- Have a draft list ready with a set timeline for when new products can be accepted on the list – for example revision of the list every three years.
- Have a draft plurilateral ready for the adoption at the Ministerial in December 2015.
- Start preparing negotiations on fossil fuel subsidies – perhaps getting a negotiation timeline ready for the Ministerial in December 2015.

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Can the WTO Adapt to a World Where Everyone Is Empowered to Engage in Global Trade?

Usman Ahmed, Andreas Lendle, Hanne Melin and Simon Schropp

"*The fast pace of innovation is at odds with the outdated trade disciplines that still govern us*."

WTO Director-General Roberto Azevêdo (October 2013)

In 1995, the WTO was created 'to develop an integrated, more viable and durable multilateral trading system'.[1] At the time, the majority of global trade involved large multinationals trading physical products across borders to large local businesses that would then work through a network of smaller businesses and intermediaries to eventually reach local consumers. The multilateral trading system has played an important role in bolstering this global supply chain model by reducing tariffs and providing rules of the road for large, sophisticated businesses engaging in goods and services trade.

Notably, the mid-1990s also marked the time when the commercial internet began to take shape. In less than 20 years, the commercial internet evolved from a global user base of less than 20 million to a user base of over 2.7 billion.[2] This rapid expansion has revolutionised the way people live, work, communicate, find information, consume, and trade.

1 See chapeau of the Marrakech Agreement.
2 Internet World Stats.

The internet is enabling a novel parallel model for trade. A business of any size can now utilise the internet – and the services built on top of it – to connect directly with a customer in another country. The internet greatly reduces the search, information, marketing, and transaction costs that have traditionally limited the ability of smaller businesses to participate in global trade. At the same time, it has developed mechanisms and processes that establish trust between market participants. Internet voice and video services improve long distance communication, social platforms help to build brand, marketplace platforms provide powerful reach, and payment services facilitate trusted transactions. We refer to this parallel model for global trade as the 'global empowerment network'.[3]

A growing evidential base on internet-based international commerce

eBay Inc. has spent the past two years researching the scale, scope, and effect of the global empowerment network. Their findings shed light on the relevant of this recent global commercial phenomenon:

- More than 95% of commercial businesses on the eBay platform export.[4] This is true for eBay businesses based in developed[5] and developing countries.[6] In contrast, evidence for traditional firms suggests that typically less than 20% of brick-and-mortar firms export.
- When exporting, commercial eBay sellers reach a very large number of countries. They are what one may call 'micro-multinationals'. The average commercial eBay seller ships to consumers in 20 to 40 different countries within just one year.

3 The National Board of Trade describes the characteristics of e-traders as (1) selling into a large number of markets simultaneously, (2) seldom established in the markets they sell into, (3) small, and (4) often shipping a large number of small consignments rather than single big ones. (see Report 2012:4, E-Commerce: New Opportunities, New Barriers).

4 We define "commercial eBay businesses" as those with annual sales of at least $10'000 USD.

5 For evidence on the US, see Lendle et al. (2013); see also eBay's report *Enabling Traders to Enter and Grow on the Global Stage*.

6 See Lendle and Vézina (2013). For more evidence on developing countries, see *Commerce 3.0 for Development: The promise of the Global Empowerment Network*.

Again, this is in complete contrast to traditional offline exporters. Evidence from a comprehensive dataset provided by the World Bank suggests that the average number of markets reached by traditional exporters is around three (World Bank 2012).

- Finally, geographic distance (a commonly used proxy for trade costs) matters 65% less for technology-enabled trade than for traditional trade (Lendle et al. 2012).

The technology-enabled marketplace truly is flat and the opportunity for businesses of all sizes will only continue to grow. Findings from market research firm Nielsen demonstrates that cross-border retail trade among six key markets alone (the US, the UK, Germany, Australia, China and Brazil) will triple to over $300 billion by 2018.[7]

There are significant benefits to the global trading system from the rise of the global empowerment network:

- Small-scale and artisanal producers or retailers of niche products can reach a global market, something that was practically impossible before the emergence of the internet. These small entities can thus benefit from economies of scale and improve their growth prospects.
- The founding WTO document, the Marrakech Agreement, recognised the need for 'positive efforts designed to ensure that developing countries secure a share in the growth in international trade commensurate with the needs of their economic development'.[8] Research demonstrates that the global empowerment network has similar effects in the developing world as it does in the developed world. Developing-country businesses that were traditionally isolated from global markets stand to reap tremendous gains as a result of the internet.
- Consumers and small-scale producers benefit from gains in variety that are provided by technology-enabled trade, especially those in small and remote countries with struggling domestic retail sectors. International selection increases competition all

7 See eBay's report *Modern Spice Routes: The Cultural Impact and Economic Opportunity of Cross-Border Shopping*.
8 See chapeau of the Marrakech Agreement.

the way down to the retail level. It ensures that gains from trade directly benefit final consumers, whereas an increase in traditional trade does not always lead to falling consumer prices.

Moving beyond an 'offline' trade policy mindset

The multilateral trade rules have unsurprisingly been drafted with traditional – offline – exporters in mind. However, if the WTO framework is to remain relevant in the 21st century, the global trading order must start taking into account the expectations, needs, and concerns of technology-enabled traders. WTO Members should therefore modernise and amend their trade agenda to create policies that will be relevant for the billions of internet users all over the world.

The traditional policy issues tackled by the WTO (tariffs, subsidies, quotas and such) have limited effect on the global empowerment network. For small transactions of, say, US$50 a 5% import duty is relatively minor in absolute terms and will affect trade less than high shipping fees or a $10 customs processing fee. Therefore, future tariff reductions through WTO negotiation rounds are unlikely to significantly affect technology-enabled trade, unless policymakers complement the trade agenda with topics relevant for 21st century internet-based commerce.

A revitalised work programme on electronic commerce

There are several concrete steps that WTO Members can take over the next four years 'to develop an integrated, more viable and durable multilateral trading system' for the modern internet age:

- **Improve and harmonise customs procedures by raising de minimis levels.** The recent agreement on Trade Facilitation represents an important first step in addressing the difficulties that modern businesses have with customs. Inefficient customs procedures affect all types of trade, but technology-enabled trade can be

particularly impacted not only because small businesses shipping low-value items have less capacity to deal with customs, but also because final consumers now have to deal with customs formalities. Frequent traders with bulk shipments often receive preferential treatment through expedited procedures, to which most technology-enabled businesses will not have access. Notably, the costs from collecting customs on these low value shipments can exceed the revenues governments receive from them (see Hufbauer and Wong 2011). Raising and harmonising *de minimis* levels (the level below which imports are exempted from duties and paperwork requirements) will facilitate technology-enabled trade, reduce confusion for final consumers, and enable customs agencies to save money and focus their energies on security.

- **Optimise and harmonise the postal system.** In many countries, there is a large gap between cheap, slow and untracked postal service providers on the one hand, and expensive, fast and tracked services on the other. Filling the middle – providing efficient, reasonably priced and reliable postal services for international shipments – is a key ingredient for the successful growth of technology-enable trade. Moreover, postal systems rarely use harmonised systems or standards, thus once a package leaves national borders it is difficult to track. The WTO could work closely with the United Postal Union to create binding rules for international postal communication and cooperation.
- **Structure a global consumer rights system.** The emerging trade landscape is one where businesses serve consumers directly and worldwide. Therefore, the full potential of technology-enabled trade depends on ensuring that both businesses and consumers are confident transacting across borders. Consumer concern about engaging in a transaction with traders in foreign markets is an important trade barrier. Heterogeneous consumer protection rights between countries may effectively exclude consumers from engaging in international transactions. Indeed, former Director General of the WTO Pascal Lamy was quoted in a recent article suggesting that the WTO should act on consumer regulation and harmonisation efforts (*Financial Times* 2013). The WTO could take practical steps towards

'leveling up' consumer legislation worldwide through a system of transparency mechanisms (e.g. an 'exchange platform' for consumer legislation) and globally standardised dispute resolution.[9]

- **Maintain the principles of interconnection and openness that form the core of the internet**. The beauty and power of the internet is that it is an open global interconnected network. National governments around the world are exploring policies that would de facto create localised versions of the internet in response to very legitimate concerns about surveillance, privacy, and consumer protection. Moreover, the openness of the internet is regularly threatened by powerful actors (governmental and non-governmental) that seek to drive users to particular services. The WTO should discourage actions that seek to disconnect portions of the Internet or that give preference to certain services over others.

There is a tremendous opportunity for WTO Members to create new rules that will enable the growth of the global empowerment network. The dormant WTO Work Programme on Electronic Commerce can take a central role in driving the work outlined in this chapter. If the WTO fails to remove some of the barriers to technology-enabled trade, the beneficiaries of the global empowerment network may be limited to a handful of larger players – those able to internalise the costs of policy hurdles. By acting now to put the right global policy framework in place for the internet, WTO Members can ensure that the internet continues to operate as a powerful force for economic development in the future.

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Cross-border Data Flows in the Post-Bali Agenda

Hosuk Lee-Makiyama

The progress between Doha and Bali

One of my least controversial remarks about the WTO concerns one of its biggest controversies – the digital economy. Brian Hindley and I noted that 'the versatility of internet technology was understood by few observers, and trade negotiators were not typically among those few' (Hindley and Lee-Makiyama 2009). There are many contrarieties between the digital economy and international trade law, and the stasis of multilateralism has not contributed to solving them; the draft declaration of the Bali Ministerial Conference does not change this fact.[1] As usual, the e-commerce moratorium was merely extended until the next ministerial conference, binding the membership to 'continue their current practice of not imposing customs duties on electronic transmission'.[2]

However, the practicality of the moratorium is questionable. It is technically difficult for most governments to introduce discriminating duties on 'foreign' data flows as they are in most cases indistinguishable from domestic ones.[3] The moratorium remains the only WTO text to directly address the question of trade-related aspects of data flows. Moreover, the WTO Members have done little to remedy the situation as no proposal on cross-border data flows ever fell within the modalities of the Doha round.

1 WT/MIN(13)/W/3.
2 WT/MIN(01)/DEC/1.
3 There are occasions where it is technically feasible to such duties. See Lee-Makiyama, Samarajiva, Whither Global Rules for the Internet? The implications of the World Conference on International Telecommunication (WCIT) for international trade, ECIPE Policy Brief No. 12/2012.

As a result, a new breed of digital trade barriers has flourished where the trading system has failed – legal bans, physical blocking, selective filtering and slowing down of foreign websites still occur. Some economies have moved towards a 'licence to operate' regime where a 'content licence' is necessary to keep a website accessible in the country (Hindley and Lee-Makiyama 2009). In the wake of the electronic surveillance revelations, data localisation requirements and privacy laws have also been enacted to intentionally limit commercial data-processing overseas.

Inherent incompatibility with GATS

Despite this, no comprehensive catalogue of trade disciplines has ever emerged in any geometry of trade to date. Both the multilateral and bilateral trade agreements are still structured according to GATS and its four modes of delivery that predates the creation of the internet. As neither the internet nor data flows are always a 'sector' or a mode of delivery, current GATS architecture represents a systemic problem. Effective data access requires liberalisation along at least two dimensions: first, as cross-border delivery (mode 1 and 2) of the sector of the data subject (e.g. banking, retailing); second, for the underlying business processes (such as data storage, online processing), which are typically computer and related services (CRS).[4]

Furthermore, the existing regulatory disciplines are originally designed for liberalising voice communication rather than data. Both the GATS Annex on Telecommunications and the Reference Paper on Basic Telecommunications were drafted to 'lock in' telecom deregulations during the 1990s. Only the GATS Annex have some internet relevance, providing MFN terms and non-discrimination for the use of public networks for interconnection and movement of information,[5] but by and large, it is ineffective in addressing the existing barriers. To fill this void, the legal dynamism of disputes has provided a stop-gap jurisprudence – to date, all disputes concerning GATS to date

4 Understanding on the scope of coverage of CPC 84, S/CSC/W/51, TN/S/W/60.
5 GATS Annex on Telecommunication, Article 5b and 5c.

deal with online services in some form.[6] The important interpretations on technological neutrality and GATS general exceptions, such as the necessity criteria or the rule of least trade restrictive measure, have been derived from these disputes.[7]

Establishing a new discipline on data flows

The services industry no longer trades in 'modes' but instead through the movement of competences (e.g. consultants), intellectual property (often transmitted via goods such as devices and servers), investments, and cross-border supply by data flows. Whereas the first three feature in clearly defined sections of WTO agreements, the trade aspects of data remain a blind spot of the multilateral system.

Moreover, trade negotiators often make the erroneous assumption that data flows ought to be dealt with under GATS. Meanwhile, an increasing number of goods like smartphones, medical devices or cars transmit and process information. It is self-evident that a car should not need to be classified as a telecom operator or an online processing service to be granted market access. In extension, online barriers on goods would have to be addressed with the TBT agreement or as a non-violation complaint (NVCs), a role they were ultimately not designed for.

The multilateral system is in need of a horizontal discipline to deal with all trade-related aspects of data, for goods and services alike, in the same way that TRIPS established a basis for IP-related aspects of all trade. Drawing on the GATS Annex and recent preferential agreements, the horizontal discipline would grant open access to public or proprietary information between WTO Members for commercial entities. Despite recent attempts to advance e-commerce regulations, such horizontal disciplines on data flows are few even amongst the most recent preferential agreements, which tend to simply incorporate existing WTO texts. One notable exception is the Korea-US FTA,

6 United States – Measures affecting the cross-border supply of gambling and betting services, DS285; China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products, DS363.
7 For further analysis of these cases, see Hindley and Lee-Makiyama (2009).

which made an overhaul of GATS Annex terminology by extending the coverage to online services, digital products, applications and devices.[8]

Licensing and localisation requirements would be inconsistent with the horizontal discipline unless they are justified under existing GATT and GATS general exceptions – including data privacy – and these exceptions are unlikely to be renegotiated. However, these exceptions are still subject to necessity and least trade restrictive measure rules – and contrary to common misconceptions, both the EU and the US have negotiated free movement of personal data in their FTAs, but limited to the financial sector within the 'ordinary course of business'.[9]

In short, market access for the data subject (the commercial entity) will continue to be governed by the Members' GATT and GATS schedules. WTO exceptions primarily deal with data objects (the traded item) for their characteristics, e.g. an audio-visual product or service may infringe on copyrighted work, data privacy regulation, security interests or public order. The new horizontal discipline would simply govern the principles for cross-border data flow when both data subjects and objects are deemed WTO consistent.

A future work programme for the WTO

The future roadmap to address digital trade barriers starts with the question of what the current rules can and cannot do. The existing rules provide sufficient basis to address some of the current disproportionate restrictions on data flows using the necessity and least trade restrictiveness rule. The relative few disputes to date (at least in proportion to the volume of trade lost) reveal a reluctance to launch disputes. Indeed, many of these cases may set the precedent for a case against a Member's own practices while exporter interests are either relatively weak or diffuse. However, such caution grossly

8 Korea-US Free Trade Agreement (KORUS), article 15.7.
9 Korea-US FTA, Annex 13B; EU-Korea FTA, Article 7.43 where it also adds the proviso of 'adequate safeguards' for privacy.

depreciates the merits of legal certainty and an arbitration on internet openness on strictly commercial terms that authoritarian governments understand and ultimately respect. In the end, the alternative – non-action – is far worse.

As discussed, the majority of trade barriers and regulatory divergences cannot be addressed under the current set of rules. A new data flow discipline would rectify antiquated concepts of data and e-commerce that linger from the early days of the internet and the WTO. To this end, an increasing number of physical goods have become data- or services-dependent, or have been entirely digitalised into services – in effect, previously achieved market access on both goods and services are reversed unless data flows are reopened. This rollback is fundamentally a question of institutional relevance for the post-Bali WTO. One approach is to consider a path into cross-border data flows through the ITA – indeed, the early ITA talks of 2012 seems to have involved ideas of augmenting its scope to at least encompass computer and related services.[10]

Multilateralism is obviously subject to institutional competition from the ongoing negotiations on the Trade in Services Agreement (TISA), the Trans-Pacific Pacific Partnership (TPP) and other major FTAs. However, preferential agreements alone cannot hope to establish a functioning framework that keeps digital trade open given the inherent fragmented and multilateral nature of the internet. For the economies that impose online trade barriers, no single preferential agreement would provide sufficient critical mass to be an incentive against the strong commercial and political vested interests in favour of data barriers.

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Strengthening The Rules On State Enterprises

Przemyslaw Kowalski

State enterprises and international commerce

The key concern with state enterprises is that governments may provide them with certain financial or regulatory advantages to improve their competitive position in international markets, or influence them to provide such advantages to other firms. In either case, goods and services may end up being produced not by those who can do it most efficiently, but by those that receive the greatest advantage. The rationale for – and the benefits of – international trade may be seriously undermined.

As testified by the recent commotion on the subject of state-owned enterprises (SOEs)[1] in the ongoing Trans-Pacific Partnership (TTP) negotiations and its inclusion as a negotiating issue in another potential mega trade deal – the Transatlantic Trade and Investment Partnership (TTIP) – these concerns have not receded. Indeed, the 2000s saw dynamic growth and trade expansion of some emerging market economies with important enterprise-state links extending well beyond traditional state sectors such as energy or telecommunications. In industrialised countries, the extent of government intervention in the economy is deemed less significant in general, but there are considerable exceptions in a few economies and in a number of selected economic sectors (see, for example, Christiansen 2011). Governments and enterprises have also certainly got closer to each other on the wave of bailouts and state interventions in the aftermath of the 2008-2009 crisis.

1 Note that ownership is neither necessary for governments to influence enterprises' operations, nor does it inevitably entail such influence. But it implies certain interests, rights and obligations characteristic to an owner, and is directly observable.

The WTO rules discipline some forms of discriminatory government behaviour related to state enterprises. Yet, they were developed when the state firms were oriented primarily towards domestic markets, or were concentrated in declining or special sectors and may be inadequate when large, internationally active state firms compete with their private peers for resources, ideas, intermediate inputs and consumer markets. Indeed, recent empirical research has revealed for example that SOEs account for as much as 10 to 30% of the world's largest firms' sales, employment or value of international mergers and acquisitions, and that the extent of their international activity may have tripled or quadrupled over the last decade (Gestrin and Shima 2013, Kowalski et al. 2013, UNCTAD 2011).

The more extensive rules on state enterprises that have been emerging in regional trade agreements (RTAs), bilateral investment treaties (BITs) and national investment regimes respond to some of these new realities. In many cases they build on and fill the gaps in the existing WTO rules by providing clearer definitions and interpretations. They suggest a number of initiatives the WTO could take to make its rules more adapted to competition in today's global markets. Some would require not much more than a methodical reconsideration of interpretations of current rules and could be readily pursued within the regular work of the WTO. This is the case, for example, with an extension of the application of the GATT Article XVII on state trading enterprises (STEs) in order to improve transparency and to cover a wider range of discriminatory or anti-competitive behaviours, or with a clarification of the 'public body' concept in the Subsidies and Countervailing Measures Agreement (SCMA). Other relevant initiatives, such as an agreement on subsidy disciplines in services or a resurrection of negotiations on competition and investment, while perhaps even more pressing, are more ambitious.

Elements of a future WTO agenda on state enterprises

The current rules of the SCMA prohibit or discipline various forms of trade-distorting financial preferences, irrespective of whether they are granted to state or independent

firms. Yet, they do not cover services or investment. The exclusion of services from the WTO subsidy disciplines is a significant omission in the context of strong vertical links between goods and services sectors, the significant presence of state enterprises in services sectors[2] and the extent of government aid that went to the sector in the aftermath of the 2008-2009 crisis. The General Agreement on Trade in Services mandates the negotiations of disciplines on subsidies, and significant progress is reported to have been achieved but there was not enough momentum and political will to complete the negotiation (Horlick and Clarke 2010). Investment and competition issues, originally expected to be added to the Doha Round agenda, were dropped at the 2003 WTO Ministerial at the request of the LDCs and with support of other developing countries, including China and India.

A significant problem with existing WTO rules on subsidies is that it can be difficult to detect a subsidy if, for example, the finances of state enterprises are not separated from the finances of the state itself, or if operations of such enterprises are not transparent. The WTO transparency provisions on state enterprises are limited to an obligation of notification of so-called STEs (GATT Article XVII). Yet, with the current interpretation of the Article, only a narrow subset of today's state enterprises are considered STEs. While the original text of Article XVII defines an STE to be a 'state enterprise' *or* 'any enterprise which is granted exclusive or special rights or privileges', the current 'working definition'[3] of STEs puts emphasis on the latter.[4] Thus, otherwise state-linked enterprises, which cannot be proven to have been granted exclusive or special rights or privileges, are not considered STEs even though their actions may be trade-distorting.

The precedence of the exclusive rights and privileges criterion is often interpreted as a consequence of the traditionally ownership-neutral approach of the WTO law. Yet, this tradition has already been sacrificed in the WTO Accession Protocols of China and

2 See, for example, Kowalski et al. (2013) for evidence on state ownership in different economic sectors.
3 See the WTO Understanding on the Interpretation of Article XVII.
4 It defines STEs as "governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports".

Russia, which explicitly refer to state ownership and similar concepts. This could be taken advantage of to simplify the interpretation of the Article XVII and return to the original letter by making either of the two elements – 'exclusive rights and privileges' or 'state enterprise' – a sufficient criterion when combined with a trade distortion.[5] This would certainly require an effort by the WTO membership to agree on a definition of 'state enterprise' and an appropriate trade distortion test. The RTA negotiations, which considered similar provisions, could be a useful point of reference (see, for example, Kowalski et al. 2013).

In next steps, to further improve transparency with respect to internationally active state enterprises and to strengthen the enforcement of the SCMA and other agreements, in the run-up to the 10th Ministerial Conference the WTO membership could consider adopting more extensive rules on transparency and disclosure. There the work would hardly have to start from scratch. The OECD Guidelines on Corporate Governance of State-Owned Enterprises (OECD 2005) which list and elaborate guiding principles in a number of areas, including transparency and disclosure of the corporate accounting system of SOEs, could be a useful starting reference point for this exercise (see also Nakagawa 2012). The issue will, however, be to make any notification or other transparency exercise meaningful by making countries comply, which has not always been the case in the WTO so far.

Another initiative would be to reconsider the current interpretation of the relationship between Article XVII(a) and Article XVII:1(b),[6] which implies that there is no separate obligation applied to STEs to operate in accordance with commercial considerations. As a result, STEs can act in an anti-competitive manner insofar as they do not violate the obligation of non-discrimination (e.g. Nakagawa 2012). Re-establishing such a commercial considerations obligation would be tantamount to having a competition-

5 It is important to note here that keeping the exclusive rights and privileges criterion is important as it can be usefully interpreted as covering the above-mentioned government-granted advantages in the form of preferential regulatory treatment.

6 This interpretation is currently determined by the Appellate Body Report on the Canada – Wheat case.

law-type obligation on state enterprises. This is exactly the approach that has been taken in the 2004 US-Singapore FTA and, reportedly, in the ongoing TPP negotiations.

Finally, while state enterprises involved in goods trade are covered by the current WTO subsidy disciplines when they are subsidy *recipients,* their status as *grantors of subsidies* is less clear. The SCMA specifies that subsidies granted by 'public bodies' are subject to WTO disciplines in the same way as subsidies granted by government authorities. Whether or not a state enterprise is subject to these disciplines thus depends on whether it can be considered a 'public body'. While existing rulings provide some indications in this respect (e.g. DS379 *United States –Definitive Anti Dumping and Countervailing Duties on Certain Products from China*) and while more rulings in the future will eventually flesh out an interpretation, the WTO could usefully undertake a more systematic debate in the course of its regular work on what the right answer might be.

Addressing some of the above issues would go a long way towards making the WTO rules more adapted to the realities of competition in today's global markets. Yet, even the most comprehensive rules may be worth little if they are difficult to enforce. WTO dispute settlement procedures can have diplomatic and commercial costs and might represent an uncomfortable forum for enforcement when the ultimate owners or supporters of state firms are closely affiliated to other government bodies which act, for example, as regulators or principals of government procurement biddings (e.g. Potter 2001). This suggests that more effective enforcement might only materialise through sounder incentives for states and state firms to abide by market and transparency principles in the first place. Interesting examples to follow here are be some of the existing national investment policies and BITs, which on the one hand specify requirements with respect to behaviour of state investors, and on the other hand, offer access to investment markets and protection of investors' rights (see, for example, Gestrin and Shima 2013, Kowalski 2013). Thus, ultimately, a real strengthening of WTO rules on state firms in the future may require a resurrection of multilateral negotiations on trade, competition and investment. Some may be anxious to see if that phoenix would indeed fly.

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The Return of Industrial Policy: A Constructive Role for the WTO

Vinod K. Aggarwal and Simon J. Evenett

One prominent feature of crisis-era policymaking is the resurgence of industrial policy. Until recently, industrial policy had been taboo in Anglo-Saxon countries such as the US and UK. Yet even in these economies, since the crisis began some senior policymakers have made the case for state intervention to promote economic activity in specific sectors. Rather than debate the pros and cons of industrial policy, the primary goal of this chapter is to examine the implications of its return for the future work programme of the WTO.

Evidence on the resort to industrial policy during the crisis era is beginning to pile up. Aggarwal and Evenett (2012) demonstrate how pervasive sectoral – as opposed to across-the-board – intervention has been in seven large trading powers. Furthermore, they show that there is considerable variation across those powers in the degree to which sectoral interventions discriminate against foreign commercial interests *and* between domestic firms. 'Propping up losers' as well as 'picking winners' are prominent features of crisis-era policy choice. In addition, in 2013, Aggarwal and Evenett commissioned a series of sectoral studies to better understand intervention across the globe in the same area of economic activity.[1] Finally, the OECD, World Bank, and UNCTAD have taken an interest in examining industrial policy choice, and in some cases, promoted selective intervention.

1 The sectors examined include automobiles, banking, steel, biofuels, petroleum, wide-bodied aircraft and wind power. These papers are currently being revised and are available from the authors upon request.

The momentum behind industrial policy

Broadly speaking, four explanations have been advanced for the industrial policy measures taken during the crisis era when, at the very minimum, national economic growth rates fell below trend. First, intervention has been rationalised on defensive grounds – that is, limiting or slowing down adjustment or mitigating associated costs. Second, some measures have been explained in terms of improving the long-term growth prospects by promoting certain sectors, of which so-called green growth is perhaps the highest profile example.

A third rationale is similar to the second. Here the goal appears to be to restore nationwide economic growth by promoting an activity – innovation is a leading example – that is said to benefit many sectors. Finally, fixing market failures is sometimes used as a rationale for industrial policy intervention.

While these purported rationales for industrial policy existed long before the recent global economic crisis, for many WTO Members their salience and relevance grew once the crisis began. Advocates of industrial policy – long on the defensive – believe that the tide had turned in their favour. Moreover, the imperative of restoring economic growth has been used by some to brush aside objections to industrial policy. What could possibly go wrong?

Why the return of industrial policy matters for the WTO

Given the many ways in which firms seek to supply customers located abroad, any wave of government intervention that affects commercial opportunities should be of interest to WTO Members. The principal concern is not government intervention *per se*, given that such intervention is to be expected during systemic economic crises. Rather, the concern is that such intervention violates the WTO's principle of non-discrimination, including in ways that go beyond what is necessary to attain the policy objectives at hand.

Even where discrimination against foreign commercial interests is necessary to attain an industrial policy goal, it is of interest whether governments have put in place deliberative processes that identify the correct government intervention and that withdraw that intervention when its job is done. Just because a discriminatory industrial policy measure is thought to have worked in one context does not provide *carte blanche* for its uncritical application elsewhere.

These are not hypothetical concerns. Resort to industrial policy in previous eras has involved substantial discrimination against foreign commercial interests, most notably when governments sought to promote so-called national champions, infant industries, and the like. These matters require particular attention because so many discussions of industrial policy are ideological, rather than evidence-based. Can the renewed emphasis on industrial policy be conducted in a manner that does the least violence to the principle of non-discrimination?

Fortunately, the WTO has experience in dealing with forms of government intervention that are pervasive and that are said to be motivated by concerns other than favouritism towards domestic commercial interests. The science-based WTO rules on sanitary and phytosanitary (SPS) regulations come to mind. While the SPS agreement may not be perfect, certain elements of its underlying approach to evaluating policy might be usefully employed in assessing industrial policy initiatives. Likewise, the approach that the competition law community typically uses to assess state interventions that compromise short-run market efficiency could serve as a model as well.

A work programme for the WTO on industrial policy

Over the next two years, the WTO Membership could adopt a constructive work programme that sought to inform state decision-making on industrial policy by examining in depth crisis-era measures taken in key sectors of the global economy. This work programme could draw upon the evidence collected by other international organisations and by independent analysts and researchers. The goal would not be to

negotiate new WTO rules – although the fact-finding and deliberative phase may well identify matters where existing rules need amendment or where new rules might be desirable.

A Working Group open to all WTO Members and supported by the WTO Secretariat could examine crisis-era policy interventions in leading sectors of the global economy. The sectors considered could be chosen so as to be of interest to the broadest range of WTO Members, bearing in mind their different stages of development and sectoral specialisations. For example, given that car assembly is undertaken in many WTO Members and the billions of US dollars of trade in cars, a better understanding of intervention in that sector might of interest. WTO Members could propose sectors for analysis.

For a given sector, the first stage would involve establishing the factual record concerning several decisions by governments to intervene, bearing in mind that some governments may have contemplated intervention and decided against it. The fact-finding phase would do the following:

- Describe the factors that triggered consideration of government intervention, including possibly intervention by foreign governments in the same sector.
- Identify the purported rationale for government intervention.
- Identify the options a government considered when intervening.
- Identify the metrics used by a government in assessing those interventions.
- Describe the process used by the government in assessing options for intervention, including use of objective evidence, consultation with trading partners, and expertise employed during this process.
- State the decision(s) taken, the form and scope of intervention chosen (where relevant), the financial resources employed, and the duration of the intervention.
- Where a measure was imposed, identify whether the intervention *de facto* or *de jure* discriminates between rival domestic and foreign commercial interests. Here

it would be important to establish whether the discrimination violates the national treatment principle, the most-favoured nation principle, or both.

- Where a measure taken was discriminatory, describe whether the design of the measure deliberately sought to limit the harm done to foreign commercial interests.
- Describe any mechanism used to review the intervention after implementation, the terms of that review, and whether the review was actually undertaken. When a review was undertaken, its findings and any steps taken in the light of the review would be described.
- Describe any evaluation of the effectiveness of the policy intervention undertaken by the implementing government or by a third party.
- Describe whether and when the policy intervention was unwound and the rationale given for unwinding the measure.

Separately, the Working Group should examine the factors responsible for the speed with which government interventions were unwound in those major sectors of the world economy where many measures were imposed during the turbulent decade of the 1970s or the sharp global economic downturn of the early 1980s. During that era, the OECD took the leading role in promoting the unwinding of government intervention in certain sectors and that experience could be drawn upon.

With this evidence, the Working Group could do the following:

- Identify, for each broad motivation for industrial policy, the types of government intervention that do not raise concerns from the perspective of non-discrimination. 'Safe harbours' for industrial policy interventions could then be established, which if followed by a WTO member might provide reassurance to trading partners.
- Identify under what circumstances effective industrial policy intervention does not involve violating the most-favoured nation principle.
- Identify and articulate better practices for the processes that WTO Members should follow when considering industrial policy interventions, in particular those interventions that might harm foreign commercial interests.

- Establish principles for the periodic review of industrial policy interventions, including the potential for the removal or amendment of the intervention being reviewed.
- Consider ways to encourage the phasing out of discriminatory industrial policy interventions taken in recent years or, where possible, the substitution of more discriminatory policy instruments with less discriminatory alternatives.

Execution of this work programme would be part of the deliberative function of the WTO. Execution would encourage evidence-informed policymaking by WTO Members as well as the careful consideration of the necessity and form of any discrimination against foreign commercial interests. In so doing, this would reassure trading partners, potentially reduce the number of disputes between WTO Members, and provide government officials with good arguments when resisting self-serving attempts to jump on the industrial policy bandwagon.

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Export Restrictions

Marcelo Olarreaga

Export restrictions, like import restrictions, can hurt trading partners who see their 'access' shrink as the price of the goods they purchase in international markets increase and quantities traded decline. There is, however, a strong asymmetry in the regulation of import and export restrictions in the WTO. While rules on import restrictions are numerous and well-known, those on export restrictions are essentially limited to Articles XI and XX of GATT, and some soft language in Article 12 of the Uruguay Round Agreement on Agriculture. There are also some 'WTO+' requirements imposed on a few recent members (China, Mongolia, Saudi Arabia, Ukraine) which raise more questions than answers (Karapinar 2012). The post-Bali agenda should aim at a more comprehensive agreement on export restrictions and bring part of the '+' into the WTO.

Why so little progress in the past?

The apparent lack of interest in the regulation of export restrictions by GATT and WTO Members can be partly explained by the fact that WTO law has been generally driven by the interest of exporters. It is also true that the use of export restrictions is less common than the use of import restrictions. However, a recent compilation of the WTO's Trade Policy Reviews by the OECD suggests that half of WTO Members used export duties in the 2005-09 period; this was up from 40% in the early 2000s (Kim 2010). The 2007-09 food crisis was partly responsible for the increase, as dozens of countries facing food shortages imposed export restrictions to try to 'export' their food shortage to other countries. The use of export restrictions is also frequent in the mineral and metal sectors, as illustrated by the recent disputes over China's raw materials and rare earth export restrictions. The rationale behind restrictions in these sectors is often based on government revenue considerations (in the case of taxes, and auctioning of

quantitative restrictions), environmental concerns, and the promotion of downstream sectors, which are intensive users of these mineral and metals.[1]

The current disciplines on export restrictions impose no constraints on the use of export taxes, except for those new Members that committed not to impose (new) export taxes at the moment of their accession as part of their WTO+ commitments.[2] Quantitative restrictions are allowed by Article XI of GATT, but only if 'temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party'. The definitions of 'temporary', 'critical', or 'shortage' are not given by Article XI, but some recent decisions by the WTO's Appellate Body provide some guidance. Article XX also provides, in several of its paragraphs, exceptions for the use of export restrictions if they are taken within an intergovernmental commodity agreement (paragraph h), or the restricted product is used for domestic processing (paragraph i). Article 12 of the Uruguay Round Agreement on Agriculture requires Members to consider the impact of export restrictions on other Member's food security, and to give notice in advance and consult with other members having a substantial interest as an importer. But the above disciplines have not been followed by the dozens of countries that imposed export restrictions for food security purposes during the food crisis, suggesting that these rules do not have much of a bite. The use of export restrictions during food shortages can make things worse. While there is not a strong consensus in the literature, some observers consider than up to 40% of the increase in prices during the 2007-09 food crisis was due to policy measures adopted by countries trying to reduce prices at home.

There have been several proposals to improve disciplines on export restrictions during the Doha Round. Japan, a net food importer, proposes an approach similar to that applied during the Uruguay Round for agricultural import restrictions. First, transform

1 Political reasons may also play a role, and there is evidence of countries using them to squeeze rents out of opposition supporters.

2 Some preferential trade agreements also forbid the use of export duties (Article 314 of NAFTA). Depending on the degree of integration of national markets, commitments taken at the bilateral level could de facto apply at the multilateral level through market arbitrage.

all quantitative restrictions into export taxes, and then bind all export taxes, with a quota allowed to be exported duty free. The Swiss proposal goes one step further and requires the elimination of all export restrictions on agricultural products, with some differential treatment provided to LDCs. Exporters of agricultural products usually do not go as far. The Cairns Group agrees with the need for improved disciplines, but interestingly links these improved disciplines to tariff escalation. The US proposal also aims at a strengthening of the rules targeting a more reliable food supply, but also puts forward a prohibition of their use for competitive advantage or supply management, aimed at restrictions on industrial raw materials.

Where to go after Bali? Towards a work programme on export restrictions

There is a need to bring rules on export restrictions within the WTO umbrella. WTO Members could start down this road in a work programme that builds up to the next one or two Ministerial Conferences. Further consideration – which might in turn stimulate further proposals – should be given to the suggestions made hitherto. The Japanese proposal provides a clear symmetry between import and export restrictions that should appeal to students of Abba Lerner. Its weakness lies in the fact that most of the countries imposing export restrictions today are developing countries, which are likely to require differential treatment. Giving in to demands for differential treatment leads to a two-speed WTO system, which is probably dangerous for the institutional stability in the long run and also takes away the gains from solving time-inconsistency problems for WTO Members that face credibility problems at home.

An interesting idea that could help bring some developing countries to the negotiating table is to link tighter rules on export restriction to reductions in import tariff escalation, as suggested in the Cairns Group proposal. Indeed, tariff escalation by importers leads to relatively lower international prices on raw materials, whereas export restrictions on raw materials have the opposite effect. An agreement limiting tariff escalation would be embraced by resource-rich developing countries, which often feel trapped in the

export of food and raw materials due to tariff escalation in the rest of the world. An agreement limiting export restrictions would be embraced by importers of food and raw materials. Linking the two provides an opportunity to generate gains for both importers and exporters, while reducing policy-driven uncertainty in international markets.

Beyond the economic and political gains that an agreement would bring for importers and exporters of food and raw materials, the image of the WTO as an institution with fair and balanced rules is at stake. The WTO+ disciplines on export taxes that some WTO Members had to take in order to accede seem utterly unfair when existing WTO Members can impose prohibitive export taxes without constraints. An agreement would correct these imbalances.

Because food security is often linked to export restrictions, it is crucial than any agreement allows for exceptions in the presence of food shortages. This would require a clear definition of what represents a food shortage. This can be undertaken within the WTO or could be delegated to other UN agencies that are specialised in food shortages (Howse and Josling 2012). This would obviously require looking not at the situation of a country in isolation, but also at food shortages in trading partners which may be affected by the measure as requested by Article 12 of the Uruguay Round Agreement on Agriculture.

Looking further, there is probably a second important exception that rules on export restrictions should consider. It is clear that the WTO cannot keep avoiding global environmental questions. The issue of border adjustment and carbon taxes is too important to be settled by decisions by the dispute settlement body. WTO Members have to tackle these questions head on, and border adjustments can in principle be applied in the importing or exporting country. Border adjustments by exporters may help reconcile opposing views on border adjustment measures. More importantly, it is crucial in all areas to find the right exchange of concessions to encourage developing countries to sit at the negotiating table rather than hide behind requests for special and differential treatment.

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Technology Transfer for Sustainable Development

Keith E. Maskus

The point of departure

In recent years, policy issues surrounding the international transfer of technology (ITT) to developing countries has taken on increasing importance on the global stage. One reason is the evident failure of TRIPS Article 66.2, which sets out an obligation for governments in developed countries to provide mechanisms supporting ITT to the least developed countries, to generate such flows. This failure can be attributed to many factors, most readily the simple fact that governments cannot mandate or effectively subsidise private investments in places where firms do not want to invest. Nevertheless, the weak response of private technology flows to poor countries in the wake of TRIPS, which implicitly should support them in ways far beyond Article 66.2, is a source of considerable disappointment in the agreement to authorities in the developing world.

A second reason is the widespread perception that access to technology, and its effective adaptation and implementation into local production, are critical processes supporting economic transformation and growth. This perception is growing in response to the emergence of global innovation and research networks, which are important channels of cross-border information. Governments in many countries wish to see their firms and research workers become more connected with these processes.

Finally, access to technology is among the best means available for poor countries to address key areas of public concern, such as agricultural security, energy conservation and mitigation of climate change. Such issues are so important on a global scale that the United Nations, along with other international organisations, is currently deliberating

whether to make improved access to science and technology, and the promotion of local innovation, a fully articulated Sustainable Development Goal for 2015.

As an institution, the WTO is properly focused on liberalising border measures and improving clearly trade-related regulations such as intellectual property rights in order to enhance the efficiency of trade and foreign direct investment (FDI). In this context, it is already deeply involved in policy issues that directly and indirectly affect ITT. Trade liberalisation importantly channels technology flows. A clear example is the International Technology Agreement (ITA), which has successfully cut import restraints on a range of products in the information and communication sector. Within the WTO agreements, elements of ITT clearly are envisioned and protected by TRIPS, TBT, SPS, TRIMS, and the GATS, along with the ITA. Also relevant are the subsidies agreement (SCM) and the plurilateral agreement on procurement, since both address policies that could affect investments in new or adapted technologies.

Thus, there is certainly scope for the WTO to revisit some of its rules and consider extending certain agreements in a way that can expand effective ITT to facilitate both economic benefits and solutions for public needs in developing economies. Doing so would permit the institution to engage collaboratively with other international organisations and elements of civil society that are increasingly focused on this area as a solution to public-goods problems. The balance of this chapter sets out some areas in which fruitful study and negotiations could take place within the WTO.

What could be accomplished within a two-year time horizon?

Between now and the 2015 ministerial there are at least two areas in which further WTO deliberations could deliver real benefits in ITT.

Complete the expanded International Technology Agreement

Negotiations to increase the scope of the ITA, in terms of both country membership and, crucially, product coverage, are tantalisingly close to completion. A unique agreement, the original ITA cut tariffs to zero on an important range of earlier-generation information technology products and attracted growing membership over time. Empirical analysis suggests it had a substantial trade-creating effect, with relatively more gains in developing countries because of the larger tariff cuts they implemented (Mann and Liu 2009).

Access to the newest ICT products on reasonable terms is one of the most effective means of linking individuals and enterprises to key global technologies. These products enable internet connections, cheaper communication and better educational opportunities. In this context, the original ITA should be counted a success for facilitating technology transfer.

It remains anomalous that the product list in the 1996 agreement has yet to be expanded to cover many of the wide range of digital consumer products, equipment and inputs that have evolved since that time. Cutting tariffs on these newer goods should generate similar gains, while helping to facilitate connections of enterprises and research organisations in developing countries to information sources elsewhere. Thus, a renewed push to move the new ITA past its finish line is both sensible and well within range of short-term possibility.

Trade in research services

One of the most important trends in ITT is the emergence of global innovation and research networks. These involve cross-border horizontal or vertical sharing of research tasks, whether within multinational firms or, increasingly, across multiple institutions including universities, foundations and private enterprises (Maskus and Saggi 2013).

These networks offer considerable promise for increasing the international circulation of technological information.

The GATS does not meaningfully address service and research regulations that could inefficiently restrict trade and international investments in research networks. Yet its approach could be applied to liberalise disparate R&D processes, subject to appropriate safety and security needs. For example, research grants often restrict associated management services or purchases of equipment to domestic suppliers. On the output side, governments may have requirements that universities or similar institutions license their inventions to domestic firms on a favourable or even exclusive basis (Barton and Maskus 2006). Similarly, rules regarding the location of clinical trials can diminish prospects for efficient investments in locations where such trials may be cheaper or better focused on local needs.

Thus, it could be beneficial to bring research services into GATS negotiations for those countries willing to liberalise the sector in particular ways. R&D services, ranging from equipment purchases and testing protocols to grant management and accounting and beyond, are often heavily regulated in favour of domestic providers. Similarly, grants may raise barriers to using research workers and students in other countries. Commitments to open such services to competition, whether through GATS or perhaps the emerging Trade in Services Agreement (TISA), could offer efficiency gains and improve global network linkages.

What could be accomplished within a four-year time horizon?

While the steps just mentioned would deliver real gains in ITT, ultimately the largest net gains could come from considerably expanding the scope of temporary migration of technically and entrepreneurially skilled workers through the GATS.

Expanding GATS to encourage temporary mobility of skilled workers

The essential idea is to increase 'brain circulation', in part to avoid perceived drawbacks of 'brain drain' in depriving developing countries of talent. Evidence shows that a significant channel of ITT is the temporary – though not brief – relocation of skilled personnel from countries where production technologies and R&D are lagging to where those skills can be fully utilised. The reverse flows contribute to technology transfer as well. The development of global research and innovation networks has been facilitated by the unimpeded flow of such personnel among R&D and production facilities for temporary stays. Similar comments would apply to research professionals, faculty, and graduate students moving between universities and public research labs and also migrating to spend time in private R&D facilities.

Compared to the current world of tightly limited visas and short stays, a more efficient system would link skilled workers together in an 'innovation zone' in which countries would agree to permit longer-term work visas, perhaps for ten years, that could be valid in all participant countries. The concept would be to facilitate free circulation of technical and entrepreneurial talent among the member nations, permitting them to be deployed freely within the associated innovation networks.

Thus, WTO Members could move towards (at least) a plurilateral agreement for significantly liberalised skilled-labour flows under the framework of an innovation zone work visa. The agreement would need to consider how the certification of skills acquired in different professions and in different countries would be recognised by the members, though a basic preference for mutual recognition would seem most efficient. Consistent with GATS principles, countries could reserve certain sensitive professions or perhaps enact safeguards, for example to ensure that security-sensitive positions in public agencies or research labs are ineligible.

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Mode 4: The Temporary Movement of Workers to Provide Services

L Alan Winters

Mode 4 was the great hope of many developing countries for the Uruguay Round: developing countries are abundant in labour and developed countries have high wage levels, and so the former hoped to be able to provide services to the latter much more cheaply than could the locals. These hopes have come basically to nothing, with little agreed in the Uruguay Round and nothing since. Indeed, even the offers in the Doha Round have been slight and conditional.

But this does not mean that temporary mobility has failed – far from it, in fact. For example, qualified medical personnel are highly mobile internationally and regional trading arrangements frequently have clauses guaranteeing the mobility of key personnel. At the opposite end of the scale, the US responded to the Haitian earthquake in 2010, not only with aid, but by adding Haiti to the list of countries that could receive H-2 temporary migration visas[1]. And previously New Zealand had pioneered its Recognised Seasonal Employers Scheme (RSE), which welcomes workers from poor Pacific Islands for the agricultural season. Fully operational since 2008, it allows recognised agricultural employers to recruit workers from 11 Pacific Islands for a season's work subject to the workers meeting certain (mild) criteria and the employers providing reasonable working and living conditions. Successful workers can return in subsequent seasons. A formal evaluation of the RSE in Tonga and Vanuatu found that 'per capita incomes of households participating in the RSE had increased by over 30% relative to the comparison groups in both countries… Subjective economic welfare is estimated to have increased by almost half a standard deviation in both countries…

1 See http://www.cgdev.org/blog/haitian-officials-welcome-h-2-visa-program---michael-clemens

School attendance rates increased by 20 percentage points for 16 to 18 year olds in Tonga… Overall these results show that the seasonal worker programme has been a powerful development intervention for the participating households' (Gibson and McKenzie 2011). In Vanuatu over 1% of the entire population travel under the RSE each year.

The point about these schemes is that, for a series of reasons, they proceed without any input from the WTO's GATS. First, the GATS seeks binding agreements and lacks a safeguards clause. Given that labour demand fluctuates and that governments often see overseas labour as the margin of adjustment, the politics of 'foreigners taking our jobs' are poisonous, and few governments are willing to contemplate tying their hands in this way.[2] Second, the MFN clause presents major challenges. The movement of people is far more sensitive than that of goods: governments see the ability to control who is present within their borders as a defining aspect of sovereignty. Thus even when, for example, governments recognise the need for temporary inflows of labour, they are unwilling to extend invitations worldwide; all of the examples noted above are constrained geographically.

Relatedly, the movement of people is complex, for example, in terms of recognising qualifications, managing social security, ensuring the absence of criminal intent and obtaining assurances that workers can return home without hindrance once they have served their contracts abroad. Bilaterally, host and home countries can cooperate on these details, often with significant burdens being placed on the latter. An MFN clause, on the other hand, vitiates them because it, *prima facie*, prevents access from being conditional on such agreements and offers developing country exporters of labour no scope to make commitments to such cooperation.

2 Even the EU is starting to feel stresses in this direction as the UK, formerly the chief champion of enlargement of the EU, is now proposing limits on the free movement of labour within the EU, see for example, http://www.independent.co.uk/news/uk/politics/david-cameron-to-lobby-for-support-on-migration-restrictions-at-eu-summit-in-lithuania-8967018.html.

Finally, a major difficulty throughout the GATS is that services trade liberalisation is not just about trade. In many sectors, liberalisation concerns the relaxation or re-figuring of domestic regulations, and domestic regulators have a completely different perspective from trade negotiators. Getting the two groups into the same room, let alone onto the same page, is a major challenge. Mode 4 contends with possibly the most entrenched of all regulators – those managing access to the country via the visa system. Supported by other interests such as labour, policing and national security, the visa authorities see themselves as central to sovereignty and do not readily surrender their influence to mere trade negotiators. Neither do they generally like sector-specific visa regulations, although as developed countries become keener on quality-selective immigration policies and on restricting immigration to 'shortage-trades', this barrier is being eroded.

This analysis leads me to conclude that within the Doha Round, the chances of MFN Mode 4 concessions for less-skilled mobility of the sort that would be of most use to developing countries are vanishingly small. However, there may be scope for agreements or concessions on 'key' workers' mobility. Multinational companies are strong advocates for such mobility (for good reason), which will be sufficient for most developed country negotiators to support it, and the elites in developing countries are often keen, not least because they and their families are potentially direct beneficiaries.

If there is to be any progress on less-skilled workers it will have to be bilateral, but even then I would not expect to see it brought under the GATS. Regional trading arrangements may include some such mobility and thus insert it into the WTO's ambit via Article 24 deliberations, but it is much more likely that they will sign completely separate migration agreements. The narrative that Mode 4 concerned only international trade and was quite separate from migration (of which I was guilty with others) was a fiction, and it seems to me that we now need to accept this. Mode 4 will never advance unless we see it as part of the migration policy domain. That means that the migration authorities will have to have at least equal status to the trade authorities before we will get progress.

So what can be done in the WTO over the next two and four years? The truth is not very much. One plausible possibility is to try to negotiate an agreement in which Mode 4 concessions are requested and offered but which all parties accept can be overruled by any party by reference to its visa policy. That is, the GATS defines the structure and scope of an agreement but essentially allows countries to move any bilateral flow in and out of it with no reference to the GATS and with no WTO-based sanction. The trade-off between key workers and less-skilled access might allow sufficient countries to coalesce around such an agreement. This would preserve multilateralism in principle and impose a degree of discipline on agreements in terms of structure and terms (e.g. over the treatment of workers or definitions of temporary work), and thus it might make the resultant noodle bowl a little easier to comprehend and negotiate. However, the inability to guarantee that such an agreement would be operative for any given bilateral flow would obviously be a disincentive to invest heavily in negotiating it or offering concessions against it.

A feasible and useful precursor to this agenda would be for the Secretariat to collect data on the migration agreements that have been signed in the last decade to identify their scope and definitions and the extent of their discrimination between source countries. This would provide a step towards developing a common vocabulary with which to negotiate and an inventory from which to start.

A much more ambitious agenda would be to develop the agreement in principle as above, but to attempt to negotiate the terms on which countries could use visa policy to override a Mode 4 agreement. One could, for example, allow a system whereby specific flows could be bound under the GATS – i.e. voluntarily remove their vulnerability to override. To go further, however, seems very difficult; it would essentially open visa policy up to international scrutiny, which is difficult at any time but seems basically impossible currently, given how difficult any international negotiation is at present.

An alternative one sometimes hears would be to try to negotiate a framework agreement which governed bilateral arrangements in Mode 4, recognising their lack of MFN (i.e.

their discriminatory nature) but nonetheless offering to make them enforceable through WTO processes. This would appear to some to be a useful and, at a stretch, feasible contribution that the WTO could make. It would, however, bring bilateralism right into the heart of the WTO, and once the principle had been conceded for Mode 4 how long could it be resisted for other trade? Thus while it may preserve the WTO's credibility as an organisation, it would undermine its credibility as an institution of multilateralism. At least for some of us, this would be a poor bargain. I would rather preserve the WTO's weak, but not yet deceased, commitment to multilateralism than undermine it for the sake of a little more activity and supposed 'relevance'.

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About the author

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The successful conclusion of the Bali Ministerial Conference and its terrific reception in the international press and from government leaders means that the WTO now has the opportunity to restore its fortunes. The purpose of this VoxEU eBook is to identify a pragmatic, feasible, and comprehensive work programme for the WTO over the next four years.

Twenty-seven contributions were commissioned from leading international trade experts and practitioners. These analyses cover both the strategic considerations that will likely shape near-term deliberations on the WTO's priorities and the steps that should be taken by the WTO membership in the coming years on a wide range of important topics, ranging from long-standing staples like agriculture to new big-ticket items, such as electronic commerce.

This volume provides decision-makers, analysts, and commentators with up-to-date assessments of the options before the membership of this critical international organisation.

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